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Recent Cases

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RECENT CASES

Administrative Law—Federal Trade Commission Act—Restitution Held Improper in Section Five Cease and Desist Order

I. FACTS AND HOLDING

Petitioner, the controlling force of several corporations engaged in defrauding franchisees and retail merchants of franchise and service fees,[1] appealed[2] a cease and desist order issued by the Federal Trade Commission[3] because it required him to make restitution to those defrauded. The corporations operated a credit card clearing house and collection service and franchised the right to sell the service to retail merchants. Petitioner intentionally misrepresented the nature and profitability of the franchises and services; consequently the majority of franchisees and retailers suffered substan-

1. John Clifford Heater was sole stockholder and president of Universal Credit Acceptance Corp. The stock of another corporation involved was dormant during the 1967-71 period covered by the complaint, and the ownership of two others did not appear in the record. In an administrative proceeding before the FTC, Heater was found to be the alter ego of all these corporations, the sole creator of the confidence game in which they were engaged, and the individual primarily responsible for establishing, supervising, and controlling all of their acts and practices. Universal Credit Acceptance Corp., [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,240 (FTC 1973).

2. 15 U.S.C. §45(c) (1970) provides in part: "Any person . . . required by an order of the [Federal Trade] Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States . . . ."

3. The Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1970) provides in part:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
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> . . . .
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> (b) Whenever the Commission shall have reason to believe that any . . . person . . . has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person . . . a complaint stating its charges . . . . The person . . . so complained of shall have the right to appear . . . and show cause why an order should not be entered by the Commission requiring such person . . . to cease and desist from the violation of the law so charged in said complaint . . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by section [45] . . . of this title, it . . . shall issue . . . an order requiring such person . . . to cease and desist from using such method of competition or such act or practice . . . .

The FTC final order is reported at [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,240 (FTC 1973).

The Federal Trade Commission will hereinafter be referred to as "the FTC" or "the Commission."

tial financial losses.[4] Finding that petitioner's misrepresentations constituted unfair business practices and that the retention of funds obtained by these practices was in itself both an unfair business practice[5] and an unfair method of competition,[6] the FTC issued an order pursuant to section five of the Federal Trade Commission Act.[7] The order required petitioner to cease and desist from retention of the funds by making restitution to those defrauded. Appealing the order, petitioner argued that section five granted the FTC only the power to prohibit future illegal practices and therefore excluded the power to punish past conduct by awarding damages to private parties. Petitioner contended that the restitutionary order constituted an attempt to penalize him and award private damages because the order was unnecessary to prevent future misconduct.[8]

4. The FTC final order reported the following findings of fact by the Administrative Law Judge:

> The Administrative Law Judge found that [petitioner's corporations] represented they would honor all credit cards used by the customers of their retail merchant program members "on a guaranteed non-recourse basis" and that members would he paid within thirty days whether or not the customers paid [the corporations]. In fact, [petitioner's] program was fully recoursable and . . . [the] retail members were not paid unless their customers paid the [corporations]. . . . Additionally, the Law Judge found that [petitioner's corporation] guaranteed their members a 10 percent increase in business within 12 months of becoming a member . . . . In fact, the average member remained active in the program for only 7-8 months despite the fact that [it] had paid a two-year membership fee.
>
> [The corporations] also represented that their program was operated by substantial businessmen who could rely on corporate assets in excess of three million dollars, that it was backed by an efficient and intensive collection agency and that it was nationally accepted. The Administrative Law Judge found, however, that . . . collection procedures were at best haphazard, . . . and that [the corporations'] bank accounts never exceeded $99,000 between January, 1965 and November, 1971. The Law Judge further found that there was no national acceptance for the program, that the members failed to remain active in the program for the period covered by their contracts and that the bulk of [the corporations'] substantiating data purporting to prove the worth of the program was in fact written by [the corporations] and merely repeated their advertising claims.
>
> Franchisees were further led to believe that the program was easy to sell, that they could earn as much as $80,000 a year, and that each would receive either an exclusive and wholly unworked territory or one that had been profitable for a prior franchisee. In fact, corporate records established that no franchisee earned the amounts indicated on the earning projection sheets shown to prospective franchisees and that the same franchise territories were often resold to as many as eight franchisees. [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,240 (FTC 1973).

5. The FTC found the retention to be an unfair business practice because practices under which the funds were obtained were themselves unfair and because the defrauded persons, thinking they had no legal recourse, continued to be deceived.

6. The FTC found the retention to be an unfair method of competition because it improved petitioner's competitive position and resulted in distortion of the credit market.

7. 15 U.S.C. § 45 (1970).

8. Petitioner's corporations had been adjudicated bankrupt and proceedings in California had been initiated as a consequence of petitioner's activities. Universal Credit Acceptance Corp. [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,240, at 22, 247-48 (FTC 1973).

Respondent FTC contended that it had validly exercised its power in defining the retention of funds as an unfair business practice and that the restitutionary order was therefore an ordinary and proper cease and desist order. Moreover, the FTC argued that the order operated prospectively to prohibit the continuing failure to refund and was neither a punitive sanction nor the payment of reliance or expectancy damages. The Commission asserted further that the order was necessary to end the illegal conduct of petitioner and therefore came within the legislative grant of broad remedial discretion[9] to the FTC. Finally, the Commission argued that the order protected a specific and substantial public interest and was not a prohibited grant of private relief. The United States Court of Appeals for the Ninth Circuit, *held,* reversed. The Federal Trade Commission has no power under section five of the Federal Trade Commission Act to order a refund of moneys obtained by unfair and deceptive business practices. *Heater v. FTC,* 503 F.2d 321 (9th Cir. 1974).

II. LEGAL BACKGROUND

Congress enacted section five[10] of the Federal Trade Commission Act in 1914 to supplement[11] the antitrust provisions of the Sherman Act.[12] The section declared unfair methods of competition illegal and placed the power to define and prohibit unfair methods in the hands of an independent regulatory commission, the FTC.[13] In conferring this power, Congress intended this body of experts to educate and guide the business community toward the goal of securing higher standards of business conduct.[14] The Commission was granted no power to punish those engaging in the prohibited prac-

9. *See* notes 30-39 *infra* and accompanying text.

10. Ch. 311, § 5, 38 Stat. 719, *as amended,* 15 U.S.C. § 45 (1970).

11. G. HENDERSON, THE FEDERAL TRADE COMMISSION 27 (1924). For studies of the Act's legislative history see Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition,* 7 VILL. L. REV. 517 (1962); Kauper, *Cease and Desist: The History, Effect, and Scope of Clayton Act Orders of the Federal Trade Commission,* 66 MICH. L. REV. 1095, 1100-06 (1968); Lang, *The Legislative History of the Federal Trade Commission Act,* 13 WASHBURN L.J. 6 (1974); Rublee, *The Original Plan and Early History of the Federal Trade Commission,* 11 ACAD. POL. SCI. PROC. 666 (1926).

12. 15 U.S.C. §§ 1-7 (1970). A second act was passed in 1914 to supplement the Sherman Act with criminal penalties. *See* Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12-27 (1970)).

13. 15 U.S.C. § 45(b) (1970).

14. 51 CONG. REC. 13,116 (1914) (remarks of Senator Newlands). *See generally* FTC v. Ruberoid Co., 343 U.S. 470, 480 (1952) (Jackson, J., dissenting); H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1136 (tent. ed. 1958).

tices. Rather, Congress limited the permissible sanctions to the issuance of cease and desist orders.[15] Although Congress considered defining several specific methods of competition as unfair, it ultimately delegated broad authority to the Commission to do this on a case-by-case basis.[16] Only minimal consideration was given to the permissible scope of the Commission's cease and desist orders.[17]

Despite the expressed congressional intent to give the FTC broad discretion in defining unfair methods of competition,[18] early cases narrowly construed the Commission's statutory grant of power. In *FTC v. Gratz,*[19] a 1920 case, the Supreme Court held that the Court and not the Commission ultimately must define methods of competition as unfair.[20] The Court excluded practices never before regarded as offensive to good morals or contrary to public policy,[21] in effect limiting the Commission to an interstitial role. In *FTC v. Klesner,*[22] the Court held that a cease and desist order must protect a specific and substantial public interest and vacated an FTC order because it constituted a grant of private relief only.[23] In *FTC v. Raladam Co.,*[24] the Court narrowly construed "methods of competition," holding that the FTC had no power to issue an order when an unfair practice injured only consumers and not competitors.[25]

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15. 15 U.S.C. § 45(b) (1970).

16. *See, e.g.,* 51 CONG. REC. 12,145; 12,652; 14,932 (1914).

17. *See* Kauper, *supra* note 11, at 1102; Sebert, *Obtaining Monetary Redress for Consumers Through Action by the Federal Trade Commission,* 57 MINN. L. REV. 225, 229-30 (1972). Legislators did note that the Commission had no power to punish violations through the issuance of cease and desist orders. *Id.*

18. *See, e.g.,* H.R. REP. No. 1142, 63d Cong., 2d Sess. 19 (1914).

19. 253 U.S. 421 (1920). Respondents, who were in the business of selling steel ties and bagging for use in bailing cotton, refused to sell ties unless the prospective purchaser also bought a specified amount of bagging. The FTC found this to be an unfair method of competition and ordered them to cease and desist. The Supreme Court reversed.

20. *Id.* at 427.

21. *Id. See* FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922).

22. 280 U.S. 19 (1929). Respondent, a window shade maker, opened his business under tbe same name as a competitor. His action was motivated by spite and was intended to and did in fact deceive his customers into tbinking they were doing business with the competitor.

23. *Id.* at 28. *See* Burton-Dixie Corp. v. FTC, 240 F.2d 166 (7th Cir. 1957); Flynn & Emrich Co. v. FTC, 52 F.2d 836 (4th Cir. 1931). *But see* Exposition Press, Inc. v. FTC, 295 F.2d 869 (2d Cir. 1961), *cert. denied,* 370 U.S. 917 (1962) (deference should be given FTC determination that public interest is involved); Posner, *The Federal Trade Commission,* 37 U. CHI. L. REV. 47, 71-77 (1969).

24. 283 U.S. 643 (1931). A purported obesity cure marketed by respondent was dangerous to consumers and deceptively advertised. The FTC ordered respondent to cease and desist from representing the cure as a scientific method of treating obesity and from representing that it could safely be used without a prescription. The Supreme Court reversed because the Commission failed to establish the deceptive advertising had any adverse effect on competitors.

25. *Id.* at 652-54.

Subsequent to these early decisions,[26] however, the Court has more broadly construed the FTC's power. In the 1934 decision of *FTC v. R.F. Keppel & Brother*,[27] a maker of penny candy employed gambling incentives to increase his sales. Rejecting the reasoning of the *Raladam* decision, the Court upheld a cease and desist order on the ground that unfair methods of competition included the exploitation of consumers, even though the practice tended neither to hinder competition nor to create a monopoly.[28] The Court specifically limited the *Gratz* decision and noted that while the courts do have the ultimate responsibility of determining whether a particular practice is unfair, the FTC is a body specially competent in this area and its findings are entitled to great weight.[29] The scope of the Commission's discretion to frame remedies and define unfair practices received further attention in *Jacob Seigel Co. v. FTC*.[30] In that 1946 case, a manufacturer of coats used the trade name "Alpacuna" even though the fabric so named included no vicuna fiber. Following a Commission order to cease use of the name, the manufacturer appealed, seeking permission to employ the name in conjunction with an enumeration of the fibers comprising the fabric. The Supreme Court recognized the Commission's broad discretion but reversed, ordering the FTC to consider on remand whether the preferred less restrictive alternative would be adequate. The Court stated:

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.[31]

The *Siegel* reasonableness test still governs court review of FTC orders. Under that test the reasonableness of an order rests generally

26. Despite the Court's early narrow construction of the Commission's power under section five, it did recognize during this period that the Commission's findings of fact, if supported by substantial evidence, were binding. *E.g.*, FTC v. Algoma Lumber Co., 291 U.S. 67 (1934); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922).

27. 291 U.S. 304 (1934).

28. *Id.* at 309, 312-14. *See* FTC v. Algoma Lumber Co., 291 U.S. 67 (1934); FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922).

29. 291 U.S. at 314. Congress approved the result of the *Keppel* case in 1938 by broadening § 5 to include unfair business practices as well as unfair methods of competition. Wheeler-Lea Act, ch. 49, 52 Stat. 111 (1938).

30. 327 U.S. 608 (1946).

31. *Id.* at 612-13. On remand, the FTC modified its order to permit use of "Alpacuna" when accompanied by an enumeration of fibers. Jacob Siegel Co., 43 F.T.C. 256 (1946). *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

on its relation to the statutory powers and purposes of the FTC;[32] specifically, the courts have identified three major limitations as growing out of the statutory expression of congressional intent. First, as indicated by the specific language of section five,[33] the unfair practice must be found to affect adversely the public interest.[34] Secondly, the Commission may not assess damages or penalties.[35] Thus the Commission may not issue an order imposing a more onerous remedy than is necessary to cure the deceptive practice.[36] Some courts and commentators read this limitation as requiring that an order have prospective and not retrospective effect.[37] Finally, although consumers may gain incidental relief from a Commission order,[38] the Commission has no power to grant specific consumer redress.[39] The relationship of these limitations to restitutionary orders will be considered next.

Though one might consider the ordering of affirmative acts retrospective in nature and therefore unreasonable, the Commission does have the power to order divestiture of a subsidiary[40] and corrective advertising[41] when necessary to terminate an unfair practice or its effects. Whether the Commission's authority to order affirmative acts includes the power to order restitution remained unanswered until the instant case; however, other agencies operating under other statutes have occasionally sought or ordered restitution, and a consideration of these analogous situations provides insight in determining the limits of the FTC's power. In *Virginia Electric & Power Co. v. NLRB,*[42] the Supreme Court upheld an NLRB order

32. 15 U.S.C. § 45 (1970).

33. *Id.*

34. *See* notes 22-23 *supra* and accompanying text.

35. *See* notes 6-10 *supra* and accompanying text; *cf.* FTC v. Ruberoid Co., 343 U.S. 470, 480 (1952) (Jackson J., dissenting); FTC v. Cement Institute, 333 U.S. 683 (1948).

36. *See* Magnaflo v. FTC, 343 F.2d 318 (D.C. Cir. 1965); Elliot Knitwear, Inc. v. FTC, 266 F.2d 787 (2d Cir. 1959); FTC v. Royal Milling Co., 288 U.S. 212 (1933).

37. *See* Curtis Publisbing Co., [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,719, at 21,753; 21,757-58 (FTC 1971); Sebert, note 17 *supra*, at 237-45.

38. U.S. v. Klesner, 280 U.S. 19, 27 (1929).

39. *Id.*; *see* notes 15-16 *supra* and accompanying text. The latter 2 limitations appear to grow out of a literal construction of the words "cease and desist."

40. *See* L.G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971); FTC v. Dean Foods Co., 384 U.S. 597, 606 n.4 (1966); *cf.* Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963).

41. *See* J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir.), *order modified,* 72 F.T.C. 865 (1967) (the *Geritol* case); Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960); Ward Laboratories, Inc. v. FTC, 276 F.2d 952 (2d Cir. 1960); ITT Continental Baking Co., 36 Fed. Rog. 18,522 (FTC 1971); Note, *"Corrective Advertising" Orders of the Federal Trade Commission,* 85 HARV. L. REV. 477 (1971); *cf.* American Cyanamid v. FTC, 363 F.2d 757 (6th Cir. 1966).

42. 319 U.S. 533 (1943).

requiring reimbursement of dues paid to an employer-controlled union. The Court found the order restitutionary in essence and did not require the agency to inquire into the amount of damages actually sustained by employees. The Court reasoned that this would unduly fetter agency proceedings and that whether and to what extent such matters should be considered constituted a question for the agency to consider in light of its special administrative experience and knowledge.[43] Unlike the Federal Trade Commission Act, the statute under which relief was granted specifically provided that the board could require persons engaging in unfair practices to take affirmative actions.[44] In *Porter v. Warner Holding Co.*,[45] a proceeding under the Emergency Price Control Act of 1942,[46] the Price Administrator sought restitution of rents collected in excess of the government ceiling. The Court granted restitution under a section of the statute[47] giving it jurisdiction to issue a restraining "or other" order. The Court stated that the power to grant restitution was an equitable adjunct to the power to give injunctive relief[48] and concluded that the order was appropriate and necessary to enforce the Act since restoring illegal gains would more definitely assure future compliance.[49] Because the Administrator sought only a restoration of the status quo through the return of rents paid that rightfully belonged to the tenants, the Court rejected defendant's claim that the order constituted an assessment of damages and a penalty.[50] In the 1956 case of *United States v. Parkinson*,[51] the Ninth Circuit distinguished the prior cases and denied a Food and Drug Administration request for restitution. In *Parkinson*, defendant marketed a

43. *Id.* at 543-44.

44. National Labor Relations Act § 10, 29 U.S.C. § 160 (c) (1970):

> [T]he Board shall state its findings of fact and sball issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate tbe policies of this subchapter . . . .

45. 328 U.S. 395 (1946); *accord*, Bowles v. Skaggs, 151 F.2d 817 (6th Cir. 1945).

46. Ch. 56, 56 Stat. 23.

47. § 205(a), 56 Stat. 33 provides:

> [U]pon a showing by the Administrator that such person has engaged or is about to engage in any such [probibited] acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

48. 328 U.S. at 399.

49. *Id.* at 400.

50. "Restitution, wbich lies within [the Court's] equitable jurisdiction, is consistent with and differs greatly from . . . damages and penalties . . . . When the Administrator seeks restitution under § 205 (a) he does not request the court to award statutory damages to the purchaser or tenant or to pay to sucb person [a] . . . penalt[y] . . . . Rather, he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant." *Id.* at 402.

51. 240 F.2d 918 (9th Cir. 1956), *aff'g* 135 F. Supp. 208 (S.D. Cal. 1955).

drug in violation of the Federal Food, Drug and Cosmetic Act.[52] Under a section of the statute giving the district courts jurisdiction to restrain violations,[53] the FDA sought restitution to customers in an amount equal to the cost of the drug. Noting the practical difficulty of identifying those customers who should receive restitution, the court distinguished *Warner Holding Co.* as a special case in which wartime stress required an extraordinary remedy[54] and asserted further that Congress had rebuked the holding of *Virginia Electric & Power Co.*[55] The Court stated that the power to grant restitution would require specific statutory authority and that such relief possessed the characteristics of a penalty.[56] In 1960, however, the Supreme Court rejected the reasoning of the *Parkinson* decision in *Mitchell v. Robert DeMario Jewelry, Inc.*,[57] a proceeding under the Fair Labor Standards Act of 1938.[58] In that case, the Secretary of Labor sought restitution of back wages on behalf of former employees of the defendant corporation. In granting restitution, the Court cited with approval the analysis of its decision in *Porter v. Warner Holding Co.*[59] It agreed that a statute giving a court the power to restrain confers a broad equitable jurisdiction that includes the power to order restitution unless specific evidence of contrary congressional intent appears. Further, the Court found that restitution did not constitute a punitive sanction.[60]

In its 1971 *Curtis Publishing Co.* decision,[61] the FTC asserted that it possessed the power under section five to require restitution of moneys acquired through unfair practices. The Commission stated in a dictum that restitution would be appropriate when consistent with the commonly cited limitations on the FTC's remedial power. The Commission argued that a restitutionary order would not operate retrospectively if the retention of money obtained by an unfair practice either adversely affected competition or in itself constituted an unfair practice. Further, when necessary to terminate an

52. 21 U.S.C. § 331 (1970).

53. 21 U.S.C. § 332(a) (1970) provides: The district courts of the United States . . . shall have jurisdiction . . . to restrain violations of section 331 of this title . . . ."

54. 240 F.2d at 919-20.

55. *Id.; see* Act of Oct. 26, 1949, ch. 736, § 15, 63 Stat. 919, *amending* 29 U.S.C. § 216(c) (1970). *But see* notes 57-59 *infra* and accompanying text.

56. 240 F.2d at 921-22.

57. 361 U.S. 288 (1960).

58. 29 U.S.C. § 216(c) (1970).

59. *See* notes 45-50 *supra* and accompanying text.

60. For a discussion of *DeMario* and its effect on the *Parkinson* and *Warner Holding Co.* cases see Kamenshine & Wade, *Restitution for Defrauded Consumers: Making the Remedy Effective Through Suit by Governmental Agency*, 37 GEO. WASH. L. REV. 1031, 1050-57 (1969).

61. [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,719 (FTC 1971).

illegal practice, a restitutionary order would not function as a penalty or an award of damages, the Commission argued, since the order would operate only to restore the status quo. Finally, the Commission asserted that the order's incidental effect of giving relief to private citizens was permissible provided that a substantial public interest existed. Because the FTC decided the *Curtis* case on other grounds,[62] however, the instant case provides the first determination of whether section five of the Act gives the Commission power to order restitution.[63]

III. The Instant Opinion

The instant court noted initially that Congress, in passing section five of the Federal Trade Commission Act, granted the FTC wide latitude to define unfair business practices.[64] The court next set forth three factors that the Commission properly may consider in defining a practice as unfair; first, whether the practice offends public policy; secondly, whether it is immoral, unethical, oppressive, or unscrupulous; and thirdly, whether it causes substantial injury to consumers, competitors, or other businessmen.[65] Based on these criteria, the court found plausible the FTC's position that petitioner's retention of funds unfairly obtained was in itself unfair. The court added, however, that the retention actually constituted only a "secondary effect" of an unfair practice and that some departure from the ordinary meaning of "cease and desist" would be required to uphold the Commission's order because ending the retention required an affirmative remedial act by petitioner. The court next considered whether the legislative history of the Act and the applicable case law supported the FTC's contention that section five conferred the power to order such acts. The court stated that Congress intended to limit the remedial power of the FTC by denying it the authority to give private relief and by requiring that violators receive notice before sanctions are imposed. Citing statements of the bill's principal sponsor in the Senate,[66] the court asserted that the FTC existed for the educational and quasi-legislative purpose of developing a body of administrative law that defines unfair acts and unfair competition in the context of particular factual situa-

62. *Id.* at 21,753-54; 21,756-59.

63. *But cf.* Credit Card Service Corp., [1970-1973 Transfer Binder] Trade Reg. Rep. ¶ 19,967 (FTC 1972), *aff'd*, 495 F.2d 1004 (D.C. Cir. 1974); Universal Electronics Corp., [1970-1973 Transfer Binder] Trade Reg. Rep. ¶ 19,575 (FTC 1971); Cookware Associates, 40 F.T.C. 654 (1945).

64. *See* notes 27-39 *supra* and accompanying text.

65. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972).

66. 51 Cong. Reg. 11,084 (1914) (remarks of Senator Newlands).

tions. The court then found that the powers to attach consequences to prior conduct and to grant private relief were inconsistent with this legislative purpose. The court recognized that divestiture and corrective advertising orders were retrospective in effect and admitted that no economic difference existed between the impact of those affirmative orders and that of a restitutionary order. Nevertheless, the court distinguished the restitutionary situation on the ground that Congress, "out of reasonable fair notice considerations," had chosen not to give the Commission power to cure private injuries through retrospective remedies. Finally, noting that the record did not show that petitioner had actually received the proceeds of the corporations' unfair practices, the court questioned the fairness of requiring him to make restitution out of personal assets and stated that administrative procedures became suspect when used, as in the instant case, to adjudicate private rights. Finding that neither the legislative history nor the case law had construed section five to include the power to give restitution or adjudicate private rights and concluding that the order's retrospective effect prevented satisfaction of the Act's notice requirement, the court held that the FTC had acted outside the scope of its statutory authority in issuing the order.

IV. COMMENT

In immediate terms, the holding of the instant court probably will continue the difficulty the FTC currently experiences in dealing effectively with unfair business practices.[67] Nevertheless, under a narrow construction of section five, the court's holding appears correct. Although the statutory meaning of "cease and desist" clearly includes the power to order affirmative acts such as divestiture and corrective advertising,[68] whether it encompasses the power to order a refund previously was uncertain. Some commentators suggest that this affirmative power exceeds the scope of a proper order;[69] by seeking passage of legislation enabling it to grant private relief to consumers, the Commission itself had displayed similar doubts.[70] Further, an application of the *Warner Holding Co.*[71] and *DeMario*

67. *See* ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, ABA REPORT 62-64 (1969); Kamenshine & Wade, note 60 *supra,* at 1048-50, 1057-59; E. COX, R. FELLMETH, & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969); Sebert, note 17 *supra,* at 225-29.

68. *See* cases cited notes 40-41 *supra.*

69. Kamenshine & Wade, note 60 *supra,* at 1065-66; Note, note 41 *supra,* at 490-93.

70. For a review of the Commission's efforts see Sebert, note 17 *supra,* at 256-61.

71. 328 U.S. 395 (1946); *see* notes 45-50 *supra* and accompanying text.

Jewelry cases[72] to expand the Commission's section five power seems questionable. In those cases, the proceedings originated in the federal courts, whose broad equity jurisdiction to grant restitution may be invoked by narrow statutory language.[73] The instant adjudication, however, originated in an administrative proceeding before the FTC; and that agency, having no broad equity powers, must depend exclusively for jurisdiction on the explicit grant of section five. The instant court identifies two major reasons for reading section five to exclude a restitutionary order: first, the order would constitute an unauthorized grant of private relief; and secondly, the order would have a prohibited retrospective effect and would constitute an assessment of damages in the nature of a penalty. Although an order of restitution may clearly run contrary to both these provisos, it does not follow, despite the instant decision's implications, that a restitutionary order necessarily violates either of them. As to the former, judicial decisions[74] establish that incidental private relief is a permissible consequence of a Commission order provided the order is reasonably related to the Commission's purpose of protecting the public interest by preventing unfair practices. Thus, as *Curtis Publishing Co.*[75] suggests, an order of restitution, when reasonably necessary to protect a sufficiently specific and substantial public interest, would not violate the private relief limitation.[76] Regarding the latter, the court discusses the penalty limitation in prospective-retrospective terms. This concern likewise seems misplaced, for recent divestiture and corrective advertising cases have upheld orders having retrospective effects. Moreover, a prospective-retrospective analysis appears improper on its face because every order can be viewed as retrospective in some sense. The distinction appears meaningful only when an order may be said to have no prospective effect whatsoever.[77] In such a case, the order clearly would constitute a penalty because it would have no reasonable relationship to the FTC's goal of securing a higher standard of business conduct. The court attempts to distinguish the retrospective effects of a restitutionary order, stating that in situations requiring

72. 361 U.S. 288 (1960); *see* notes 57-60 *supra* and accompanying text.

73. *See* Sebert, note 17 *supra*, at 242-43.

74. FTC v. Klesner, 280 U.S. 19 (1929); *see* cases cited note 23 *supra*.

75. [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,719 (FTC 1971).

76. *Id.* at 21,759.

77. "Every Commission order is 'retrospective,' in the sense that it looks to and is based upon the causes and results of the acts found to violate the statute, and at the same time it is 'prospective' in the sense that its design, purpose, and effect is to dissipate any lingering effects of the past violations and to prevent their recurrence in the future." Curtis Publishing Co., [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,719, at 21, 757.

monetary redress Congress intended out of "reasonable fair notice considerations" to leave such remedies to the common law; but this position has no clearly supportable basis on the legislative history of section five's cease and desist language.[78] Both the "retrospective" and "damages" language used by the court identifies the generally recognized absence from the Commission's jurisdiction of any power to assess penalties. Recognizing the semantic difficulties inherent in applying the prospective-retrospective analysis and the *DeMario Jewelry* statement[79] that restitution is not tantamount to an assessment of damages, the preferable analysis is to inquire whether a restitutionary order necessarily constitutes a penalty. In resolving this issue, the term "penalty" must of course be defined, and the *Siegel* case[80] suggests an appropriate definition: that portion of an order which bears no reasonable relation to terminating an unfair practice. If, as the FTC has suggested in its *Curtis Publishing Co.* opinion, a retention of funds unfairly obtained may be classified as an unfair practice,[81] a reasonable relation between the retention and a restitutionary order clearly would exist. Because the Commission is admittedly prohibited from assessing damages or fines, restitution would serve as the only means to end the practice. Thus, the reasoning of the instant court appears erroneous. To say that the FTC should be permitted under some circumstances to require restitution of funds unfairly obtained is not, however, to render the result of the instant case incorrect. A better approach might have been to conclude that the order in the instant case was actually an assessment of damages that the Commission had mislabelled as restitution. Since restitution is based on a theory of unjust enrichment, the court could have adopted an approach under which restitution would be permitted but only when petitioner is found to have obtained the use of the moneys ordered to be refunded. Noting that, so far as the record showed, petitioner had received only a salary and loans from his corporations, the instant court appears tacitly to reject the Commission's characterization of petitioner as the corporations' alter ego and to reason that restitution is inappropriate because petitioner had not in fact received the funds. If petitioner

78. In any event, when unfair practices are founded on intentional misrepresentation, the violator surely has constructive notice of the illegality of his conduct and a further notice requirement would be supernumerary.

79. 361 U.S. at 293.

80. *See* notes 30-39 *supra* and accompanying text.

81. The instant court agrees that "as an abstract proposition" such a characterization by the Commission is "undoubtedly permissible," but the court rejects this characterization because it views restitutionary remedies as outside the Commission's powers. 503 F.2d at 323; text accompanying notes 65-66 *supra*.

never received funds, arguably he could not be retaining them, and thus no substantial evidence existed in support of the unfair practice found by the Commission. This reasoning seems adequate to justify vacating the order and would have been preferable to that actually used, since it would leave open the possibility of future orders of restitution in appropriate cases. A study of current criticisms of the FTC indicates that its failure to control effectively unfair practices stems in part from well-founded doubts about the scope of its remedial power and from the admitted absence of a power to assess damages. A holding recognizing the Commission's power to order restitution and based on the alternative analysis suggested would have increased the Commission's effectiveness in accomplishing the goal of securing higher standards of business conduct.[82]

RICHARD C. STARK

Constitutional Law—Due Process—Permitting Nonattorney Judges to Preside Over Criminal Trials in Which the Offense is Punishable by a Jail Sentence Violates Defendants' Fundamental Right to a Fair Trial

I. FACTS AND HOLDING

Defendants, charged with misdemeanors involving a potential jail sentence,[1] contended that trial before a nonattorney judge[2] vio-

82. Subsequent to the writing of this comment, President Ford signed into law the Magnuson-Moss Warranty—FTC Improvement Act, 15 U.S.C.A. §§ 45-57c and 2301-12 (Pamphlet No. 1, Feb. 1975). This amendment to the FTC Act gives federal district and state courts jurisdiction to award restitution in a civil suit brought by the FTC, provided that a final cease and desist order has been issued and a reasonable man would have known the practice subject to the order was dishonest or fraudulent. 15 U.S.C.A. § 57 (a)-(b) (Pamphlet No. 1, Feb. 1975).

1. Defendant Gordon was charged with disturbing the peace and failing to disperse; defendant Arguijo was charged with driving under the influence of alcohol.

2. Both defendants were brought before nonattorney judges in the California Justice Court system.

Presently in California each county is divided into municipal court and justice court districts with districts of more than 40,000 residents having a municipal court and districts of 40,000 or less having a justice court. CAL. CONST. art. VI, §5. Justice courts have jurisdiction over misdemeanors punishable by a fine of $1,000 or less or a maximum term of one year in jail or both. CAL. PEN. CODE § 1425 (West 1970). Moreover, a judge of a justice court may act as a magistrate. CAL. PEN. CODE § 808 (West 1970). Thus, he also has the power to conduct preliminary hearings in felony cases and to order the defendant to stand trial for the offense. CAL. PEN. CODE § 858-83 (West 1970). Despite the broad range of legal functions performed by justice court judges, eligibility is not restricted to attorneys. A justice court judge may

lated due process[3] by denying the fundamental right to a fair trial. The superior court, Sacramento County, sustained a demurrer to defendants' petition for extraordinary pretrial relief. On appeal[4] to the California Supreme Court, *held,* reversed. Permitting nonattorney judges to preside over any criminal trial in which the offense is punishable by a jail sentence violates the due process clause of the fourteenth amendment by denying the fundamental right to a fair trial. *Gordon v. Justice Court,* ___ Cal. 3d ___, 525 P.2d 72, 115 Cal. Rptr. 632 (1974).

II. BACKGROUND

A basic requirement of due process is the right to a fair trial in a fair tribunal,[5] a right that extends to *all* criminal trials.[6] Whether a particular procedural right is included in the concept of due process depends upon whether the procedure is fundamental to the Anglo-American scheme of ordered liberty.[7] Further, in ascertaining whether a particular procedure conforms with the requirements of due process, the test is not whether the defendant was actually prejudiced during his trial. Rather, the test is whether a reasonable likelihood or probability exists that the procedure will result in prejudice, denying the defendant a fair trial.[8]

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qualify by meeting any one of the following three criteria: he must be a member of the state bar; or he must pass a qualifying exam; or he must have been a judge of tbe justice court, or a predecessor court, at the time the Reorganization Act of 1950 became operative. CAL. GOV. CODE § 71601 (West 1970). As of March 1974, 127 of the 215 authorized judgeships in the justice courts were held by nonattorney judges. 115 Cal. Rptr. at 634 n.3. Moreover, a study shows that in 1972, at least 13 of the nonattorney judges who had qualified by passing the Judicial Council examination had not completed high school and 37% of the examinee justice court judges had no education beyond high school. Hennessy, *Qualification of California Justice Court Judges: A Dual System,* 3 PAC. L.J. 439, 445-46 (1972).

3. Defendants also objected to the nonattorney judge system on the grounds that it violated equal protection. Because the court agreed with the due process argument, it did not discuss this contention.

4. After the appeal to the California Supreme Court was filed, but before it was heard, defendants pleaded guilty to lesser charges. The court held, however, that these events did not render the case moot.

5. *In re* Murchison, 349 U.S. 133 (1955).

6. Argersinger v. Hamlin, 407 U.S. 25 (1972).

7. *See* B. SCHWARTZ, CONSTITUTIONAL LAW 215 (1972).

8. Under California law, the traditional test to determine whether a particular procedure comports with the demands of due process is whether in the absence of relief a reasonable likelihood or probability exists that a fair trial cannot be had. Frazier v. Superior Court, 5 Cal. 3d 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971); Maine v. Superior Court, 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968). The same standard is applied in federal cases. *See* Ward v. Village of Monroeville, 409 U.S. 57 (1972) (traffic offender tried before the mayor of town which was heavily dependent on traffic fines for revenue); Sheppard v. Maxwell, 384 U.S. 333 (1966) (pretrial publicity); Estes v. Texas, 381 U.S. 532 (1965)(televised trials); *In re* Murchison, 349 U.S. 133 (1955) (contempt trial before same judge who presided at the

Occasionally the argument has been made that the right to a fair trial includes the right to have an attorney judge.[9] Generally, in the absence of a constitutional or statutory provision to the contrary, states have not required that judges be lawyers.[10] Compelling historical reasons justified the use of lay judges. In colonial days, communities were sparsely settled, few lawyers were available, and transportation difficulties made it arduous, if not impossible, for an attorney judge from a populous area to preside over proceedings in rural areas.[11] These factors, particularly the paucity of attorneys,

grand jury hearing during which alleged contempt occurred); Tumey v. Ohio, 273 U.S. 510 (1927) (judge compensated from fines he imposed). Moreover, the California Supreme Court has said that "[d]ue course of law under the state constitution and due process of law under the federal Constitution mean the same thing." Gray v. Hall, 203 Cal. 306, 318, 265 P. 246, 252 (1928); *accord,* Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 366-67, 521 P.2d 441, 449-50, 113 Cal. Rptr. 449, 457-58 (1974). Therefore, this article will develop the concept of due process without a state-federal dichotomy.

9. The question most frequently arises in nonfelony cases in which the incidence of nonattorney judges is highest. *See, e.g.,* Ditty v. Hampton, 490 S.W.2d 772 (Ky.), *appeal dismissed,* 414 U.S. 885 (1973); City of Decatur v. Kushmer, 43 Ill. 2d 334, 253 N.E.2d 425 (1969); State *ex rel.* Swann v. Freshour, 219 Tenn. 482, 410 S.W.2d 885 (1967).

In Argersinger v. Hamlin, 407 U.S. 25 (1972), the United States Supreme Court appeared to abandon the classical characterization of crimes as felonies, misdemeanors, or traffic offenses. Rather, the distinguishing characteristic of an offense in right to counsel cases is whether or not it will result in the defendant's imprisonment. *Id.* at 37-39. Similarly, whether a defendant has a right to an attorney judge should depend on whether incarceration is involved, and not on a classification of the offense as a felony, misdemeanor, or traffic offense. *See* notes 37-38 *infra* and accompanying text.

10. *See, e.g.,* Mississippi County v. Green, 200 Ark. 204, 138 S.W.2d 377 (1940); State v. Peck, 88 Conn. 447, 91 A. 274 (1914); State *ex rel.* Sellars v.Parker, 87 Fla. 181, 100 So. 260 (1924); City of Decatur v. Kushmer, 43 Ill. 2d 334, 253 N.E.2d 425 (1969); Ditty v. Hampton, 490 S.W.2d 772 (Ky.), *appeal dismissed,* 414 U.S. 885 (1973); Attorney General *ex rel.* Cook v. O'Neill, 280 Mich. 649, 274 N.W. 445 (1937); Spruill v. Bateman, 162 N.C. 588, 77 S.E. 768 (1913); *In re* Hudson County,106 N.J. 62, 144 A. 169 (1928); State *ex rel.* Swann v. Freshour, 219 Tenn. 482, 410 S.W.2d 885 (1967).

It should be noted that many states do have constitutional or statutory provisions requiring judges to be attorneys. The constitutions of 26 states require judges of the general trial courts to be lawyers. LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS 231 (2d ed. 1959, Supp. 1971). Nine other states have a constitutional requirement that judges he "learned in the law." *Id.* at 232. Some states interpret this phrase to mean that a judge must be an attoruey. *See In re* Daly, 294 Minn. 351, 200 N.W.2d 913 (1972) *cert. denied,* 409 U.S. 1041 (1973); Jamieson v. Wiggin, 12 S.D. 16, 80 N.W. 137 (1899). *Contra, Ex parte* Craig, 150 Tex. Crim. 598, 193 S.W.2d 178 (1946), *rev'd. on other grounds sub nom.,* Craig v. Harney, 331 U.S. 367 (1947). Fifteen states require judges to be attorneys at every court level, while other states only exclude lay judges in certain classes of courts. Gordon v. Justice Court, 108 Cal. Rptr. 912, at 916 (1973) (superior court opinion).

When no constitutional provision requires judges to he attorneys, some jurisdictions refuse to allow the legislature to impose such a requirement. Spruill v. Bateman, 162 N.C. 588, 77 S.E. 768 (1913). *Contra,* LaFever v. Ware, 211 Tenn. 393, 365 S.W.2d 44 (1963). Similarly, the courts have refused to increase constitutional qualifications to be a judge. State *ex rel.* Boedigheimer v. Welter, 208 Minn. 338, 293 N.W. 914 (1940).

11. *See generally* Smith, *The Justice of the Peace System in the United States,* 15 CAL. L. REV. 118 (1927).

influenced the Arkansas Supreme Court in *Mississippi County v. Green*.[12] In *Green*, the Arkansas constitution fixed the qualifications for county judges and under the applicable provisions laymen were eligible for judicial office. A statute attempting to add to the constitutional qualifications by requiring lawyer judges was held invalid by the court because the various counties lacked sufficient attorneys.[13]

Courts also have been influenced by the argument that lay judges were sufficiently capable to administer criminal justice because few legal principles and little legislation existed.[14] Thus the Illinois Supreme Court, in *City of Decatur v. Kushmer*,[15] found that laymen could preside over certain proceedings specified by the legislature. Apparently the court reasoned that due process was not denied because the character of the proceeding was not sufficiently complex to require an attorney judge.

At least one court[16] has been confronted with the argument that recent advances[17] in the area of the right to counsel, which is an essential element in the right to a fair trial,[18] give rise to the right to have an attorney judge. The right to counsel was first recoguized in capital cases[19] and later was guaranteed to all felony defendants.[20] Recently, in *Argersinger v. Hamlin*,[21] the Supreme Court extended the right to counsel to misdemeanor cases in which the accused may be deprived of his liberty. In extending the right to alleged misdemeanants, the Court reasoned that the average layman is incapable of defending himself because he lacks the skill and knowledge necessary to comprehend the increasing complexity of criminal trials. Moreover, the *Argersinger* Court found that the nation's legal resources were sufficient to provide counsel for alleged misdemean-

12. 200 Ark. 204, 138 S.W.2d 377 (1940).

13. The court said that "the makers of the constitution well knew that the electorate would have a better opportunity to select a man of good business education from all the citizens than if restricted to the selection of a person of good business education from among the lawyers in the county only." *Id.* at 207, 138 S.W.2d at 379.

14. *See generally* Smith, *The Justice of the Peace System in the United States*, 15 CAL. L. REV. 118 (1927).

15. 43 Ill. 2d 334, 253 N.E.2d 425 (1969).

16. *See* note 23 *infra* and accompanying text.

17. The United States Supreme Court has indicated that due process is an advancing standard that may be expanded at any given time to include new rights determined to be fundamental. Wolf v. Colorado, 338 U.S. 25 (1949). The right to counsel illustrates the distending nature of due process. *See* notes 19-21 *infra* and accompanying text.

18. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932); B. SCHWARTZ, CONSTITUTIONAL LAW 211-15 (1972).

19. Powell v. Alabama, 287 U.S. 45 (1932).

20. Gideon v. Wainwright, 372 U.S. 335 (1963).

21. 407 U.S. 25 (1972).

ants, even in remote rural areas.[22] Later, in *Ditty v. Hampton*[23] an alleged misdemeanant argued that the right to counsel spawned the right to have an attorney judge preside, because a lay judge was not qualified to comprehend and utilize counsel's legal arguments. Nevertheless, the Kentucky Court of Appeals rejected defendant's due process and equal protection arguments and refused to recognize the right to have a lawyer preside over the trial. The court was influenced by the serious practical problems that could arise in undertaking to impose the requirements of an attorney judge—the lack of attorneys, especially in rural areas, and the prospect of putting the lower court system out of business.[24] Moreover, the court repudiated the defendant's contention that the increased complexity of criminal cases, found to exist in *Argersinger,* made it necessary to have an attorney preside. Thus, *Ditty* followed the old line of cases that denied the right to an attorney judge even though *Argersinger* recognized an abundance of attorneys throughout the nation and an increasing complexity in criminal cases.

Although the United States Supreme Court has never specifically decided whether a defendant has the right to an attorney judge in a criminal proceeding, it has dealt tangentially with the question.[25] Further, the Court granted certiorari in *Ditty v. Hampton,*

22. Justice Powell's concurring opinion argues that hundreds of rural communities have no or very few lawyers. *Id.* at 60-61. The majority rejected J. Powell's contention. *Id.* at 37 n.7.

23. 490 S.W.2d 772 (Ky.), *appeal dismissed,* 414 U.S. 885 (1973).

24. The court noted that:

> We reserve decision on the matter of whether if this court should agree that there is a denial of equal protection, any appropriate remedy could be granted in this action, but we note the problem that exists in that regard. It is doubtful that this court simply could establish by order the qualification for all police judges that they be lawyers . . . . This leaves as the only possible remedy an order putting the police court system out of business . . . .

490 S.W.2d at 776.

Later in its opinion, the court admitted that it envisioned serious problems that might result from an attorney judge requirement. *Id.* at 777.

25. In Craig v. Harney, 331 U.S. 367 (1947), *rev'g on other grounds, Ex parte* Craig, 150 Tex. Crim. 598, 193 S.W.2d 178 (1946), the Court noted that the use of lay judges had been criticized, but refused to attach any legal significance to the lack of legal training. In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court said that a parole-revocation proceeding need not be presided over by an attorney. Further, in Shadwick v. City of Tampa, 407 U.S. 345 (1972), it was determined that a court clerk who was neither a judge nor an attorney could make a determination of prohable cause for the issuance of arrest warrants provided he was impartial, independent and capable. The Court found that the issuance of arrest warrants was not an overly complex job. *See* 407 U.S. 345, 351-52. It did not determine, however, whether an attorney judge is required in complex misdemeanor cases. In fact, *Shadwick* can be interpreted as favoring attorney judges in complex areas because it contained a requirement that the issuing clerks be capable. 407 U.S. at 354.

indicating a willingness to address the issue, but the defendant died before the appeal could be heard and the case was dismissed.[26]

III. THE INSTANT OPINION

Recognizing that due process is an evolving standard, the instant court stated that even well-established practices are subject to close constitutional scrutiny. Thus the court found that the long-standing practice of allowing laymen to preside over criminal trials[27] must be reevaluated because both society and due process had made significant advances. The court pointed out an increase in the number of attorneys throughout the state and substantial improvements in travel and communication and concluded that the provision of attorney judges in all criminal cases was no longer impractical, even in remote rural areas.[28]

The court next found that due process also had made significant advances, extending the fundamental right to a fair trial in a fair tribunal and the right to counsel to *all* criminal trials. Relying on the *Argersinger* rationale, the court recognized that misdemeanor cases had become increasingly complex,[29] but did not hold that a

26. Ditty v. Hampton, 490 S.W.2d 772 (Ky.), *appeal dismissed,* 414 U.S. 885 (1973).

27. For a full development of the historical justifications for lay judges see Smith, *The Justice of the Peace System in the United States,* 15 CAL. L. REV. 118 (1927).

28. The court, however, did note that some practical prohlems would remain because, even with the increase in the number of attorneys throughout the state, some rural areas may still find that no attorney judges are available. The court suggested that in situations in which no attorney judges were available, the case could be transferred to another judicial district or the state Judicial Council could assign an attorney judge from another area to hear the matter. Further, the court recognized that the right could be waived, and that it did not apply in civil cases or in criminal cases not involving potential jail sentences.

29. The court argued that this increased complexity may be demonstrated by reference to the facts in the instant cases. Defendant Gordon was charged with failure to disperse, a crime that may involve first amendment issues. Defendant Arguijo was charged with driving under the influence of alcohol. The admissibility of the blood tests administered to Arguijo could have been challenged. The court felt that it was unlikely that a lay judge would have been able to rule properly on such an objection. The court also noted that justice court judges must be capable of performing the following functions: presiding over jury trials, giving proper jury instructions and making sophisticated determinations regarding *voir dire* of jurors; accepting guilty pleas, which requires that the judge he able to determine whether there exists a basis in fact for the plea and that it was freely and voluntarily made, and whether the accused understands the nature of the charge, the elements of the offense, and the consequences of his guilty plea; making proper sentencing decisions. The instant court doubted that a nonattorney judge could perform these duties satisfactorily.

The court's conclusion is buttressed by a study commissioned by the state Judicial Council which stated that "Many Justice Courts are still staffed by lay judges who often are unfamiliar with or inexperienced in the complexities of modern court procedure and adjudication activities." BOOZ, ALLEN & HAMILTON, INC., FINAL REPORTS ON THE UNIFIED TRIAL COURT FEASIBILITY STUDY A-20 (Dec. 3, 1971). The report went on to say "The use of lay judges to handle cases requiring legal background and training, insights and attitudes . . . can create problems in the adjudication of cases. The need for legal training for judges has become

fair trial would be impossible when the judge was not an attorney. Rather, the court applied the traditional test[30] and held that because criminal trials had become increasingly complex, and because nonattorneys lacked the requisite expertise, the likelihood of a fair trial would be substantially diminished if a lay judge presided. Further, the court reasoned that a logical extension of the right to counsel is the right to have a judge who is qualified and able to understand and employ counsel's legal arguments.[31] Finding that the use of lay judges denied the effective use of counsel and therefore, the right to a fair trial,[32] the court held that permitting nonattorney judges to preside over criminal trials when a potential jail sentence is involved violates due process.[33]

IV. COMMENT

The instant opinion expands the concept of due process because it marks the first time a court[34] has upheld the right to an attorney judge absent an express state constitutional or statutory provision. Although this expansion of due process appears desirable, some practical problems remain as a result of the court's decision. The court noted a significant increase in the number of attorneys throughout the state, but failed to cite any statistics to support this contention.[35] Even with such an increase, however, the court was aware that attorneys are scarce in rural areas and that its holding would result in difficulty because many of these rural areas would have insufficient attorneys to serve as judges.[36] If no attorney judges were available in an area, a case would have to be transferred to

increasingly important in view of the complexities brought about by recent court decisions regarding the constitutional rights of criminal defendants. The technicalities of the law play a prominent role today in the legal process." BOOZ, ALLEN & HAMILTON, INC., FINAL REPORT ON THE CALIFORNIA LOWER COURT STUDY 27-28 (Sept. 15, 1971). The report recommended that a full-time attorney judge be made available for each judicial district. BOOZ, ALLEN & HAMILTON, INC., FINAL REPORTS ON THE UNIFIED TRIAL COURT FEASIBILITY STUDY A-25 (Dec. 3, 1971).

30. *See* notes 7 & 8 *supra* and accompanying text.

31. Again, the court's finding was supported by the Judicial Council's commissioned report, which stated that "It is incongruous today for prosecutors and defense attorneys, who must be licensed attorneys, to perform advocacy roles before a judge who does not have a similar background." BOOZ, ALLEN & HAMILTON, INC., FINAL REPORT ON THE CALIFORNIA LOWER COURT STUDY 28 (Sept. 15, 1971).

32. *See* note 18 *supra* and accompanying text.

33. In so holding, the court rejected the state's contention that the defendant's right of appeal from the justice court judgment satisfied due process.

34. *See* State *ex rel.* Boedigheimer v. Welter, 208 Minn. 338, 293 N.W. 914 (1940); note 10 *supra* and accompanying text.

35. Although the court did not cite any statistics, the most recent figures show there has been a 20.53% increase in the number of lawyers in California from 1963 to 1970. AMERICAN BAR FOUNDATION, THE 1971 LAWYER STATISTICAL REPORT 26 (1972).

36. 115 Cal. Rptr. at 639.

another district or an attorney judge from another area would have to be assigned to preside over the matter. In either situation, delay and confusion would result, especially if the right to an attorney judge is found in every misdemeanor case, regardless of the punishment involved.

In *Argersinger,* the Supreme Court had to deal with the same practical problems that faced the instant court, namely a paucity of attorneys in some rural areas and a large volume of misdemeanor cases. The Supreme Court responded by recognizing the right to counsel in misdemeanor cases, but limiting the scope of that right to cases in which the defendant actually faced incarceration.[37] Thus, since an alleged misdemeanant could be tried without counsel but not imprisoned, attorneys would not be required for every misdemeanor case.

The instant court announced that it would minimize the practical problems "to the extent constitutionally possible."[38] The court, however, failed to achieve this goal because it extended the right to an attorney judge[39] to all misdemeanor cases[40] instead of following the *Argersinger* rationale and limiting the right to cases in which the defendant actually faces imprisonment. If the court had strictly followed *Argersinger* a nonattorney judge could still preside over a trial involving a potential jail sentence even though incarceration could not be imposed.[41] Adoption of this approach would have reduced substantially the number of cases requiring an attorney judge because while many offenses carry potential imprisonment, few actually result in loss of freedom.[42] Thus, fewer attorneys would be

37. In *Argersinger* the Court said "every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel." 407 U.S. at 40. Further, the Court stated, "We hold, therefore, that absent a knowing and intelligent waiver, no person may be *imprisoned* for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. at 37 (emphasis added).

38. 115 Cal. Rptr. at 639.

39. A strong argument can be made that the instant court's opinion also expands the right to counsel in California beyond the scope of the right to counsel recognized in *Argersinger.* The instant court stated that "defendant's fundamental right to the assistance of counsel is guaranteed to him regardless of the severity of the punishment he faces if convicted." 115 Cal. Rptr. at 638. This language would seem to guarantee criminal defendants the right to counsel even if the only punishment is a fine. Under *Argersinger,* incarceration is the only punishment that cannot be inflicted without counsel. *See* Argersinger v. Hamlin, 407 U.S. 25, at 37 (1972). Thus, the instant court has either misinterpreted the scope of *Argersinger,* or extended the right to counsel to cases in which only a fine (or any other punishment) is involved.

40. *See* notes 29, 31-33 *supra* and accompanying text.

41. The instant court could have analogized to the Supreme Court's holding in *Argersinger. See* note 37 *supra* and accompanying text.

42. Argersinger v. Hamlin, 407 U.S. 25, 39 (1972).

required to serve as judges and less delay and confusion would result if the instant court had made the right to an attorney judge coextensive with the right to counsel recognized in *Argersinger*.

The United States Supreme Court may soon recognize the right of criminal defendants to have an attorney judge as a logical extension of recent advances in the standards of due process,[43] particularly in the area of the right to counsel. Since criminal defendants are guaranteed the right to counsel, it follows that they should have a judge qualified to understand and utilize counsel's legal arguments. The Court has recognized that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law."[44] These words originally were written concerning criminal defendants, but the rationale of the statement is equally applicable to lay judges. Moreover, fifteen states already have constitutional provisions requiring attorney judges at all court levels,[45] and the increased complexity and volume[46] of misdemeanor cases make it essential to staff as many courts as possible with legally qualified personnel.

Although the Court should recognize the right to have an attorney judge in misdemeanor cases, attendant practical problems[47] require that the right be limited.[48] The problem becomes one of determining where to draw the line. In *Argersinger*, the Court noted that the line delineating the scope of the right to counsel is most logically drawn between cases that actually involve the threat of imprisonment and those that do not.[49] If and when[50] the Supreme Court recoguizes the right of defendants to have an attorney judge preside

43. *See* notes 16-21 *supra* and accompanying text.

44. Powell v. Alabama, 287 U.S. 45, 69 (1932).

45. *See* note 10 *supra*.

46. In *Argersinger* the court cited statistics that demonstrate tbe volume of misdemeanor cases (between 4 and 5 million annually), 407 U.S. 25, at 34 n.4, indicating that a few judges are expected to handle a great volume of misdemeanor cases. 407 U.S. at 34-35. It seems likely that a judge with a legal education will be able to handle a crowded docket better than a lay judge.

47. *See* notes 34-42 *supra* and accompanying text. Also, some states have a higber population-lawyer ratio than others and thus may have a more difficult time finding lawyers to serve as judges. In California, for example, there is one attorney for every 583 persons. AMERICAN BAR FOUNDATION, THE 1971 LAWYER STATISTICAL REPORT 26 (1972). In Kentucky, there is one attorney for every 831 persons (this fact may have influnced the *Ditty* court), and in North Carolina there is one attorney for every 1,095 persons, almost twice as many people per attorney as California. *Id.*

48. In addition to *Argersinger*, other precedent exists for limiting the scope of a right protected by due process. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (right of jury trial limited to cases that, were they tried in a federal court, would come witbin the sixth amendment's guarantee of trial by jury).

49. *See* note 37 *supra* and accompanying text. *See also* 407 U.S. at 38-39 n.10.

50. *See* note 26 *supra* and accompanying text.

over criminal proceedings, the scope of that right should correspond with its pronouncements on the scope of the right to counsel as delineated in *Argersinger*.

GERARD THOMAS NEBEL

Constitutional Law—Right to Travel—Phased Development Plan Unconstitutionally Burdens the Right to Travel of Persons Excluded

I. FACTS

Plaintiff construction association brought suit[1] challenging the constitutionality of the development plan instituted by defendant city.[2] The "Petaluma Plan," adopted in 1971, provided that for a period of fifteen or more years, no annexation or extension of municipal services to areas beyond a set "urban extension line" would be allowed and that future housing construction would be limited to 500 units per year through 1977,[3] a level below market demand.[4] Plaintiff contended that the restrictions the plan placed on growth were exclusionary and an unconstitutional burden on the right to travel of nonresidents who might attempt to migrate to Petaluma in the future.[5] Defendant argued that the control measures were not

1. Although the Court did not specify the statutory basis for the action, it was apparently brought pursuant to the Declaratory Judgments Act, 28 U.S.C. §§ 2201-02 (1970).

2. The defendant city, Petaluma, California, is within commuting distance of San Francisco and is part of the San Francisco Bay Area metropolitan region.

3. The plan was drafted to effectuate an official growth policy adopted by the city council. The preamble to the statement of policy asserted that "[i]n order to protect its small town character and surrounding open spaces, it shall be the policy of the City to curtail its future rate and distribution of growth . . . ." The city's urban extension line was found by the court to be adequate to accomodate only 500 new units a year until 1990, when a level of 55,000 inhabitants, the optimum level sought by city officials, would be reached. The permits for building the limited number of units was granted by the residential development evaluation board. An intricate rating system is employed to determine which requests should be granted and its effect is the establishment of a competitive situation among the applicants. Construction Indus. Ass'n. v. City of Petaluma, 375 F. Supp. 574, 575-77 (N.D. Cal. 1974).

4. The number of new units completed in Petaluma was 891 in 1971 and 591 in 1970. *Id.* at 575.

5. Although arguments could have been made challenging the standing of plaintiff, a construction association, to litigate the interests of unnamed individuals who might be prevented from migrating to Petaluma because of the city's limitations on new growth, the court chose not to discuss the issue. The opinion would have more precedential value had the court developed a basis for the plaintiff's standing. Rationales have been developed in similar situations by other courts, but the Supreme Court has yet to confront the problem. *See* Park View Hts. Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972) (plaintiff, an "aggrieved party" because of his economic interest in a zoned-out low-income housing project, held to

purposely designed to exclude future immigrants, but were necessary to insure the availability of future water supplies and sewage treatment facilities.[6] Defendant further maintained that a town has an inherent right to control its rate of growth and to retain the character its inhabitants desire. The United States District Court for the Northern District of California *held* judgment for plaintiff. Absent a showing of compelling justification, a municipal development plan that directly or indirectly seeks to control future growth by any means other than market demands violates the right to travel by excluding some nonresidents who otherwise would immigrate. *Construction Industry Association v. City of Petaluma,* 375 F. Supp. 574 (N.D. Cal. 1974), *judgment stayed pending receipt of respondent's brief,* 2 BNA HOUSING AND DEV. REP. 186 (Douglas, Circuit Justice, July 29, 1974).

II. LEGAL BACKGROUND

The United States Supreme Court first recognized land use controls as a legitimate exercise of the states' reserved powers in 1926 in the leading case of *Village of Euclid v. Ambler Realty Co.*[7] Confronted with a substantive due process challenge to a local ordinance designed to limit the expansion of nearby industry into a suburban residential area, the Court held that the regulation was valid unless shown to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[8] In subsequent years this policy of deferring to the local legislature on zoning matters became firmly established.[9] Zon-

have standing to represent the interests of potential tenants); Kennedy Park Homes Ass'n. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied* 401 U.S. 1010 (1971) (home association allowed to represent rights of future residents in challenging a zoning ordinance as being racially discriminatory). *See generally* Ayer, *The Primitive Law of Standing in Land Use Disputes: Some Notes from a Dark Continent,* 55 IOWA L. REV. 344 (1966); Note, *Extending Standing to Nonresidents—A Response to the Exclusionary Effects of Zoning Fragmentation,* 24 VAND. L. REV. 341 (1970). This Comment will not deal with the question of plaintiff's standing to raise the right to travel, but will examine the merits of the application of this right in the zoning context.

6. As part of its overall plan, tbe city has based improvement of sewage facilities on the rate of growth of 500 units per year and has contracted with its water supplier for 9.8 million gallons of water through 1990, enough for a population of 55,000 people. 375 F. Supp. at 577.

7. 272 U.S. 365 (1926).

8. *Id.* at 391.

9. *See* Washington *ex. rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Gorieb v. Fox, 274 U.S. 603 (1927); Zahn v. Board of Public Works, 274 U.S. 325 (1927); Comment, *The Right to Travel: Another Constitutional Standard for Land Use Regulations?,* 39 U. CHI. L. REV. 612 (1972) [hereinafter cited as *Another Constitutional Standard*].

ing measures, most of which were designed to insure against the proximate location of disharmonious land activities, were developed to meet the needs of a society facing rapid industrialization and corresponding rapid growth of residential neighborhoods.

During the past twenty years, demographic and economic changes have produced a phenomenon best described as "urban sprawl,"[10] in which growth has emanated from major metropolitan centers at such an increased rate that a multitude of new problems has developed for suburban communities.[11] To counter this phenomenon, the cities affected have reevaluated the roles played by their land use controls and developed new zoning devices and new functions for the old "Euclidean" measures. In an effort to exclude or at least control the steady stream of new residents seeking a comfortable place to live, towns have adopted such conventional devices as large-lot zoning, minimum floor space requirements, and limitations on multifamily dwellings; municipalities also have developed such new measures as spot zoning, timed growth plans, and absolute limits on population.[12] These practices have received widespread criticism because of their exclusionary effect,[13] and many commentators have called upon the courts to abandon the *Euclid* policy of deferring to the locality in zoning matters and to adopt a more active stance in preventing cities from effectively excluding new residents.[14] The courts, they have argued, must look beyond the community affected to determine which general public interests a zoning regulation should serve.[15] To induce the courts to change

10. "Urban sprawl" has been defined as:

> A term of art employed to describe the uncontrolled development of land situated on the outskirts of America's major cities. It refers to an unfettered form of urban expansion which is characterized by the initial nonuniform improvement of isolated and scattered parcels of land located on the fringes of suburbia, followed by the gradual urbanization of the intervening undeveloped areas.

Note, *A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development*, 47 N.Y.U.L. REV. 723 (1972).

11. For a discussion of the new problems confronting the community located on the urban fringe see Freilich, *Development Timing, Moratoria, and Controlling Growth*, INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 147, 148-50 (1974).

12. *See generally* Freilich, *supra* note 11.

13. "Exclusionary zoning may be defined as the complex of zoning practices which results in closing suburban housing and land markets to low-and moderate-income families." Davidoff & Davidoff, *Opening the Suburbs: Towards Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509, 519 (1971). As used in this comment, the application of the term "exclusionary zoning" shall include all nonresidents affected by certain zoning practices.

14. *E.g.*, Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the World?*, 1 FLA. S.U.L. REV. 234 (1973); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

15. In *Euclid*, the Court asserted that "[i]t is not meant by this, however, to exclude the possibility of cases where the *general public interest* would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." 272 U.S.

their approach to exclusionary cases, commentators have recommended numerous constitutional grounds,[16] including the infringement of the right to travel of excluded persons.[17]

Although the Articles of Confederation recognized the right to free ingress and egress among the several states,[18] no specific mention of any such rights appears in the Constitution. The first recognition of a constitutional right to travel came in a dissenting opinion by Chief Justice Taney in the *Passenger Cases*[19] in 1849. In *Crandall v. Nevada*[20] the Court subsequently cited this dissent in invalidating a statute that taxed every individual departing the state. Much later, in the 1941 decision of *Edwards v. California,*[21] the Court expanded the right to travel to encompass the right to migrate and settle among the several states. Considering the validity of a statute making it a criminal offense to aid indigents in migrating to California, the majority of the Court examined the commerce clause and found that it prohibited "attempts on the part of any single state to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders."[22] Almost twenty years later, the significance of the right to travel was buttressed by two passport cases[23] as well as a civil rights case in

at 390 (emphasis added). Commentators and courts have suggested that consideration of the needs of the region is proper in determining what is the true "general public interest." *See* National Land & Inv. Co. v. Easttown Township Bd. of Adj., 419 Pa. 504, 215 A.2d 597 (1965); Bosselman, *supra* note 14, at 256-57.

16. *See* Bigham and Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy,* 25 VAND. L. REV. 1111, 1132-37 (1972).

17. The right to travel in this context includes the right to migrate and settle in a new place and is not restricted to the right to move freely interstate. *See* Comment, *The Right to Travel and its Application to Restrictive Housing Laws,* 68 NW. U.L. REV. 635 (1971) [hereinafter cited as *Right to Travel*]; Comment, *The Equal Protection Clause: A Single-edged Sword for the Gordian Knot of Exclusionary Zoning,* 40 U. MO. K.C.L. REV. 24 (1971) [hereinafter cited as *Gordian Knot*]; *Another Constitutional Standard, supra* note 9.

18. ARTICLES OF CONFEDERATION art. IV (1781).

19. 48 U.S. (1 How.) 282, 492 (1849) (Taney, C. J., dissenting).

20. 73 U.S. (6 Wall.) 35 (1867).

21. 314 U.S. 160 (1941). Mr. Justice Rehnquist has challenged the interpretation that this case concerned a right to migrate and settle. He views the statutory provision attacked as merely intended to deter ingress. Memorial Hospital v. Maricopa County, 415 U.S. 250, 282 (1974) (Rehnquist, J., dissenting). *But see Another Constitutional Standard, supra* note 9, at 624-25.

22. 314 U.S. at 173. In a concurring opinion, Justices Douglas, Black, and Murphy decided that the right was basic to national citizenship and more appropriately protected by the privileges and immunities clause of the fourteenth amendment. *Id.* at 179. Justice Jackson agreed with the rationale, finding that "the migrations of a human being . . . do not fit easily into my notions as to what is Commerce." *Id.* at 182. One commentator has questioned how long present practices can continue before running "afoul of the spirit of *Edwards v. California.*" Ayer, *supra* note 5, at 375.

23. In Kent v. Dulles, 357 U.S. 116 (1958), the Secretary of State denied passports to persons because of their communistic beliefs and associations. Although the Court based its

which the Court recognized the right as "fundamental" and protected even from private interference.[24] In the 1969 case of *Shapiro v. Thompson,*[25] the Court applied this fundamental right in an equal protection context, and held that a twelve-month durational residency requirement as a prerequisite to the receipt of welfare benefits by an indigent could be justified only by a showing that it served a compelling state interest. The Court found that the residency requirement penalized the indigent's exercise of his constitutional right to "migrate, resettle, find a new job, and start a new life"[26] by denying him the basic "necessities of life."[27] Subsequent applications have clarified this penalty framework. In two cases concerning *Shapiro*-based constitutional challenges but not the right to travel, the Court rejected arguments that the compelling interest test in *Shapiro* was triggered not by the right to travel, but by a fundamental right to welfare[28] or a suspect classification based on wealth.[29] The Court also refused to apply the *Shapiro* equal protection analysis to an alleged due process violation of the right to travel and upheld a local one dollar charge imposed on each passenger enplaning a commercial aircraft.[30] Distinguishing *Crandall* as involving a direct tax upon travel itself, the Court found that the charge was not a penalty on travel but was reasonably related to the costs of

holding that the denial was unconstitutional on grounds other than the right to travel, in dictum the Court stated that the right to exit was a personal right included in the fifth amendment's guarantee of "liberty" and "when activities or enjoyment . . . necessary to the well being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail . . . them" *Id.* at 129. Later in Aptheker v. Secretary of State, 378 U.S. 500 (1964), the Court relied upon *Kent* in invalidating a regulation denying passports to Communists. Finding the right to travel closely related to other personal liberties such as those protected by the first amendment, the Court reiterated that statutes regulating basic freedoms must be narrowly drawn. *Id.* at 517. *See Another Constitutional Standard, supra* note 9, at 640-42.

24. United States v. Guest, 383 U.S. 745 (1966). In *Guest* the murder of a Negro traveling tbrough Georgia led to the conviction of six private citizens for conspiring to deprive Negroes of their constitutional rights, including the right to travel. Eight justices agreed that the right to travel was secured by the Constitution as a whole, as a fundamental right, rather than by any specific provision. *Id.* at 759.

25. 394 U.S. 618 (1969). Prior travel cases dealt with the right to travel in the framework of due process violations.

26. *Id.* at 629.

27. *Id.* at 627.

28. Dandridge v. Williams, 397 U.S. 471, 484-85 n.16 (1970) (state law imposing a ceiling on welfare grants regardless of family size or need held constitutional).

29. James v. Valtierra, 402 U.S. 137 (1971). The Court upheld a provision of the California Constitution that required local voter approval of all proposed low-rent housing projects. The Court refused to impose strict scrutiny as it found "no distinction based on race," *Id.* at 141, and declined to extend this standard to wealth classifications as urged by Mr. Justice Marshall in dissent. *Id.* at 144.

30. Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, 405 U.S. 707 (1972).

the services provided to the passenger.[31] Applying the *Shapiro* analysis in later cases, the Court held that a residency requirement for lower in-state tuition at state colleges was not a penalty,[32] but that residency requirements for voting[33] and free hospital care for indigents[34] were penalties sufficient for imposition of the compelling interest test. In *Dunn v. Blumstein*[35] the Court asserted that if less restrictive alternatives were available to further the states' interests without unduly burdening travel, they must be used. In *Memorial Hospital v. Maricopa County*[36] the Court attempted to synthesize the penalty analysis as a two-step determination: whether migration is deterred;[37] and if so, whether the exercise of the right to travel is penalized sufficiently to impose strict scrutiny.[38] Noting that the ultimate limits of *Shapiro* are yet unclear, the Court stated that the penalty must constitute the denial of either another fundamental right or one of the basic necessities of life, which include welfare assistance and free medical care.[39]

Commentators have urged that the *Shapiro* penalty analysis is applicable in exclusionary zoning cases,[40] but in no cases has this been successfully argued. The Supreme Court has considered the penalty argument in a more conventional zoning case in which it upheld an ordinance restricting an area to single-family residences and defining "family" as traditionally related households or groups of not more than two unrelated persons living together.[41] The Court rejected plaintiffs' allegation that their right to travel was violated by their exclusion pursuant to the zoning ordinance and found that the ordinance was not aimed at immigrants.[42] Implicit in this analysis is an assertion that exclusionary zoning schemes might run afoul

31. *Id.* at 712; *accord,* Hendrick v. Maryland, 235 U.S. 610 (1915) (fee charged to all drivers to help defray the costs of road construction and repair upheld).

32. Vlandis v. Kline, 412 U.S. 441 (1973); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970) *aff'd mem.,* 401 U.S. 985 (1971).

33. Dunn v. Blumstein, 405 U.S. 330 (1972).

34. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

35. 405 U.S. 330, 353-54 (1972).

36. 415 U.S. 250.

37. The Court stated that it was unnecessary for the person challenging the right to show that any individual actually was deterred. *Id.* at 258. Also, the Court refused to comment on whether the right to travel intrastate was the same as the right to travel interstate, finding it unnecessary for the holding. *Id.* at 256. Lower courts have decided this issue, finding the right to travel the same in either context. King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir.), *cert. denied,* 404 U.S. 863 (1971); Cole v. Housing Authority, 312 F. Supp. 692 (D.R.I.), *aff'd,* 435 F.2d 807 (1st Cir. 1970).

38. 415 U.S. at 256-57.

39. *Id.* at 258.

40. *See* materials cited at note 17 *supra.*

41. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

42. *Id.* at 7.

of the right to travel. Although no state court has expressly utilized the right to travel to invalidate an exclusionary zoning ordinance, it appears that considerations of the right were instrumental in convincing some state courts that exclusionary ordinances were unconstitutional.[43] The primary example of this is a series of Pennsylvania cases beginning with *Bilbar Construction Co. v. Board of Adjustment,*[44] in which the Supreme Court of Pennsylvania, applying the *Euclid* doctrine of deference, upheld a one-acre minimum lot size requirement. The court reasoned that while this type of ordinance could well be related to the general welfare, which includes aesthetic considerations,[45] if the lot size requirement was so large as to be exclusionary, it might not be sustained because it would then serve a private rather than a public interest.[46] The township involved in *Bilbar* later reevaluated its zoning ordinance and added a minimum lot size requirement of four acres in certain residential districts. Again applying the traditional rational basis test of *Euclid* to a substantive due process challenge, the court held the ordinance unconstitutional in *National Land and Investment Co. v. Kohn.*[47] The court, however, based its holding on considerations previously not cognizable under that doctrine; the court considered the location of the township in the path of a steady flow of people migrating to the suburbs in search of a comfortable place to live and determined that an ordinance whose primary purpose is to avoid future burdens on public services and facilities does not promote the general welfare and cannot be held valid.[48] Although the court avoided developing a constitutional rationale for its anti-exclusionary zoning stance, it has been suggested that the basis for this far-reaching decision was a consideration of the right to travel.[49] This appears to be supported by the court's consideration of the ordinances's effect on both the city's residents and nonresidents who are part of the population explosion to the suburbs.[50] In two subsequent cases in which the Pennsylvania Supreme Court struck down town ordinances that zoned out apartments[51] and imposed a three-acre minimum lot requirement,[52] the court again failed to give a

43. *See Another Constitutional Standard supra* note 9, at 658-62.
44. 393 Pa. 62, 141 A.2d 851 (1958).
45. *Id.* at 72, 141 A.2d at 856.
46. *Id.* at 76, 141 A.2d at 858.
47. 419 Pa. 504, 215 A.2d 597 (1965).
48. *Id.* at 532, 215 A.2d at 612.
49. *See Another Constitutional Standard, supra* note 9, at 659-60.
50. 419 Pa. at 532, 215 A.2d at 612.
51. Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).
52. Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970).

constitutional basis for its conclusion that a community may not adopt zoning regulations that effectively restrict population to near present levels. In these latter cases the court seemed to abandon the *Euclid* rational basis standard in favor of a stricter test of justification, but this extension also was not given any constitutional rationale.[53] Only a few courts in other states have reached results similar to Pennsylvania in invalidating exclusionary zoning plans.[54] The New York Court of Appeals applied the Pennsylvania rationale in upholding a sequential or time controlled growth plan. In *Golden v. Planning Board of the Town of Ramapo,*[55] the court asserted that although a scheme restricting the free mobility of people until some future date when adequate public facilities might be available was suspect, phased zoning was well within the ambit of permissible zoning legislation.[56] Citing the Pennsylvania cases, the court asserted that exclusionary ordinances were unconstitutional, but distinguished the sequential growth plan[57] as merely a control device based on valid considerations of available services and facilities rather than as an exclusionary measure.[58] The court, apparently recognizing that the growth plan infringed on the right to travel of those people forced to wait for available housing, chose to apply the traditional standard of review.

III. The Instant Decision

In the instant case, the court first considered the basis for the plaintiffs' constitutional challenge to the development plan. Recognizing the right to travel as a fundamental right and citing

53. The court in both cases used the due process formulation of the problem but showed no deference to the local government.

54. *See* Kavanewsky v. Zoning Board of Appeals, 160 Conn. 397, 279 A.2d 567 (1971) (large-lot zoning held unconstitutional when based solely on desire to maintain town's rural character); Oakwood at Madison, Inc. v. Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971) (minimum floor space and large-lot zoning held invalid). *But see* Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972), in which the court upheld a large-lot zoning ordinance as a stop gap measure, but stated that it was understood to be only an interim measure necessary to meet an emergency situation.

55. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed,* 409 U.S. 1003 (1972). Suggesting that phased growth is not necessarily the answer to the problems of urban sprawl but at least a valid interim measure that is not totally exclusionary, many commentators have praised tbis decision. *See* Freilich, *supra* note 11, at 161-68; Comment, *The Limits of Permissible Exclusion in Fiscal Zoning,* 53 B.U.L. Rev. 453 (1973). *But see* Bosselman, *supra* note 14.

56. 30 N.Y.2d at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150.

57. *Id.* at 378-79, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

58. The court stated that the town's assessment of available services and facilities was unchallenged. This seems to suggest that had the assessment been shown to be unfounded, the development plan might have been held unconstitutional. *See id.* at 366 n.1, 285 N.E.2d at 294 n.1, 334 N.Y.S.2d at 142 n.1.

Maricopa, the court asserted that to establish standing the plaintiff did not need to introduce evidence relating to any individual who actually had been excluded from the city because of the Petaluma Plan.[59] The court found that the plan's expressed purpose and its intended and actual effect were to exclude substantial numbers of people who otherwise would move to the city. Citing *Maricopa* and *Shapiro,* the court concluded that since no meaningful distinction between a law penalizing the exercise of a right and one denying it altogether can be made, a compelling governmental interest had to be shown to justify the instant growth plan. Noting that the city had used a growth rate much below market demands as a basis for planning expansion of its sewage treatment facilities[60] and contracting for future water needs,[61] the court rejected the justification offered by the city for its growth control measure. Citing *Dunn,* the court concluded that less restrictive alternatives, such as expanding existing sewage treatment facilities and recontracting for additional water supplies, were available to the city, making it unnecessary to burden the right to travel. Rejecting arguments that these were unreasonable alternatives, the court stated that neither "city officials, nor the local electorate may use their power to disapprove bonds at the polls as a weapon to define or destroy fundamental constitutional rights."[62] Noting Petaluma's location in the San Francisco Bay metropolitan region and the effects its exclusionary policy would have on nearby cities, the court, citing *Edwards v. California,* adopted the rationale of the Supreme Court of Pennsylvania as the proper view of the validity of such exclusionary measures. Concluding that a city has no inherent right to control its growth and maintain a desired character by using methods that serve to isolate it from future responsibilities and problems by maintaining population at near present levels, the court held that a zoning ordinance or development plan having as its purpose the exclusion of future residents is an unconstitutional burden upon the right to travel of those excluded.[63]

IV. COMMENT

As the first decision expressly applying the right to travel in the context of a constitutional attack upon a local land use regulation,

59. 375 F. Supp. at 581. The court seems to have confused the threshold issue of standing with the requirements of the *Shapiro* penalty analysis. *See* notes 5 and 37 *supra.*

60. The court found that the present sewage treatment facilities in Petaluma could provide for an additional 6,000 to 12,000 inhabitants. 375 F. Supp. at 578.

61. *See* note 6 *supra.*

62. 375 F. Supp. at 583.

63. The court did not comment on or attempt to distinguish the *Ramapo* case, though

the instant case must be considered highly significant to future plaintiffs attacking exclusionary zoning practices. The precedential value of this case, however, is lessened by the court's failure to develop a usable rationale for its imposition of the compelling interest test and to tailor its holding to the requirements of the case.

The court based its use of the compelling interest test solely upon *Shapiro, Dunn* and *Maricopa*; but it failed to show that the instant situation fits into the penalty framework on which those cases were based. Also, the court apparently viewed the right to travel as an absolute right, any encroachment of which must be justified by a compelling interest.[64] This view is not supported by prior cases in which the Supreme Court seemed to interpret the right as subject to limited encroachments if a rational basis for the intrusion exists.[65] After a certain level of deterrence is reached, the violation can be justified only if a compelling interest is served.[66] A better approach might have been to expand the holding of *Edwards v. California,* which can be interpreted as supporting the view that an exclusionary zoning ordinance is an attempt by a city to isolate itself from the problems common to all communities—an attempt prohibited by the Constitution because of the resulting burden placed on the right to travel.[67] This rationale is apparent, though unexpressed, in the Pennsylvania cases and in *Ramapo.*[68] To justify the expansion of *Edwards,* it would be necessary to find that the right to travel applies to intrastate as well as interstate travel.[69] The

it did cite an article criticizing that decision for not considering regional needs. *See* Bosselman, *supra* note 14.

64. The court stated the interpretation as follows:

> . . . [t]he plaintiffs contend that the question of where a person should live is one within the exclusive realm of that individual's perogative, not within the decision-making power of any governmental unit. Since Petaluma has assumed the power to make such decisions on the individual's behalf, it is contended that the city has violated the people's right to travel. Considering the facts of this case, we agree.

375 F. Supp. at 581. This view of the right is supported to a degree by the Supreme Court's opinion in *Aptheker,* which noted the close kinship between the right to travel and first amendment rights. *See* note 22 *supra.*

65. *See* notes 30-31 *supra* and accompanying text.

66. *See* note 27 *supra* and accompanying text.

67. *See* notes 21-22 *supra* and accompanying text.

68. Support for this view can also be found in Justice Rehnquist's dissenting opinion in *Maricopa.* Challenging the penalty analysis of *Shapiro,* he suggested that a test based on direct purposeful barriers to immigration, such as those struck down in *Shapiro* and *Edwards,* would be "sensible and workable." 415 U.S. at 285.

69. *See* note 35 *supra.* The *Edwards* majority based its holding on the commerce clause, which applies solely to interstate commerce. The problem presented in adapting that case to a local setting seems minimized, however, by the various views that have been expressed as the source of that right. *See generally* notes 22-24 *supra*; material cited at note 17 *supra.*

court then could analyze the situation to determine whether the challenged ordinance is actually exclusionary. Although in *Ramapo* this analysis resulted in a determination that a phased development ordinance was not exclusionary,[70] the growth plan in the instant case can be distinguished from *Ramapo* in two respects: Petaluma set an unnatural limit on growth—the urban extension line;[71] and the instant plan was based on unsubstantiated claims of inadequacies.[72] Once it was determined that the measure was exclusionary, the compelling interest test could be invoked. If the court had squarely met the problems of applying the right to travel in a zoning case and dealt with the adverse presence of the *Ramapo* decision, future courts would have a much more useful guide in balancing a city's interests in meeting the problems of expansion against the interests of nonresidents affected by the zoning measure.

The precedential value of this opinion would also have been enhanced had the court exercised judicial restraint by conforming its remedy more closely to the problems presented. By holding that the right to travel is an absolute personal right, that a city may not use referenda to define or deny fundamental liberties, and that the only means by which a town can control growth is by market demands, the court too broadly curtailed local government powers, which have previously been presumed valid unless shown to be arbitrary and unreasonable. The court's determinations evidence inadequate reasoning and a failure to consider adequately approaches of other courts. The denunciation of the use of referenda as a means of curtailing services that would have to be expanded to parallel growth at market demands was made without mention of the Supreme Court's sanctioning of a requirement for referendum approval of all low-rent housing projects,[73] and without discussion of the prominent constitutional position granted referenda in the past.[74] The court gave equally cursory treatment to its conclusion that the right to travel is absolute. By making these determinations and finding that market demand must be allowed to define future growth unless legislatures or the federal government choose to enact

70. *See* notes 55-58 *supra* and accompanying text.

71. Although the Petaluma Plan set no specific maximum population level, the court found that the policy on which it was based contemplated a maximum limit of 55,000 inhabitants. 375 F. Supp. at 576. The *Ramapo* capital plan has been said to have been based on a maximum supportable population of 72,000. Bosselman, *supra* note 14, at 239.

72. *Ramapo* involved a comprehensive development plan based on what the court found to be valid considerations of the adequacy of facilities to withstand rapid growth. The instant plan was found to be not so comprehensive and based on desires concerning character instead of on actual needs.

73. *See* James v. Valtierra, 402 U.S. 137 (1971). *See* note 24 *supra*.

74. *See* materials cited in note 17 *supra*.

regional development plans, the court left the municipality in a precarious position. If the court's analysis is accepted, the various measures presently used to control urban sprawl are now of questionable validity because to some extent each curtails someone's right to travel. Had the court better reasoned its application of the right to travel, these expansive holdings would have been unnecessary. The city could have been allowed to continue coping with the problems of rapid expansion provided its measures did not reach the extreme of being exclusionary. This would have been a much more practical result which other courts, mindful of the plight of suburban cities, could more readily adopt in future cases.

CRAIG V. GABBERT, JR.

Physicians and Surgeons—Standard of Care—Medical Specialist May Be Found Negligent as a Matter of Law Despite Compliance with the Customary Practice of the Specialty

I. FACTS AND HOLDING

Plaintiff, a patient under defendant ophthalmologists'[1] care, brought a malpractice suit alleging that severe and permanent damage to her eyes resulted from defendants' negligent diagnosis and treatment in failing to administer a simple pressure test that would have detected the presence of open angle glaucoma.[2] Defendants had fitted plaintiff with contact lenses[3] and subsequently treated her over a five-year period[4] for an eye irritation, which defendants

1. The 2 defendants were partners specializing in the practice of ophthalmology, the specialty of diagnosis and treatment of defects and diseases of the eyes. Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974).

2. Primary open angle glaucoma is a disease of the eye in which an interference occurs with the ease with which the nourishing fluids can flow out of the eye. This condition results in an increase in pressure against the eye wall, causing damage to the optic nerve with resultant loss of vision, beginning in the periphery of the field of vision. This disease usually has few symptoms and, in the absence of a pressure test, is often undetected until extensive, irreversible damage has resulted. *Id. See also* B. MALOY, THE SIMPLIFIED MEDICAL DICTIONARY FOR LAWYERS 338 (3d ed. 1960).

3. Plaintiff consulted defendants for treatment of myopia, or nearsightedness, in 1955, at which time she was fitted with contact lenses.

4. Plaintiff next consulted defendants in September, 1963, with additional visits in October, 1963; February, September and Octoher, 1967; and May, July, August, September and October, 1968. Thirty days after plaintiff's first complaint of a visual field problem, defendants administered a pressure test that indicated that plaintiff had glaucoma.

considered to be related solely to complications with her contact lenses. After plaintiff's first complaint of a visual field problem, defendants tested her eye pressure and field of vision, which indicated that plaintiff, who was then thirty-two years of age, had primary open angle glaucoma and had permanently lost most of her vision. Defendants contended that they were insulated from liability by adherring to the customary practice among ophthalmologists, established by undisputed testimony of medical experts, which does not require routine pressure tests for patients under forty years of age, because of the rarity of glaucoma in that age group.[5] Following a defense verdict, the trial court entered judgment for defendants, and the Washington Court of Appeals affirmed. On petition for review to the Washington Supreme Court, *held*, reversed. Although a specialist has complied with the customary practice among ophthalmologists for the diagnosis and treatment of a patient's condition, the court may find him negligent, as a matter of law, for his failure to administer a simple test that effectively could have detected the existence of a dangerous, irreversible disease. *Helling v. Carey*, 83 Wash. 2d 514, 519 P.2d 981 (1974).

II. BACKGROUND

In any negligence action, plaintiff must show a breach of the standard of care, customarily measured by the standard of a reasonable, prudent man under the same or similar circumstances.[6] Likewise, in any medical malpractice action, plaintiff must show a breach of the standard of care for the medical profession. Although this standard has assumed a variety of verbal formulations,[7] it generally has provided that phsyicians and surgeons are required "to use and exercise that degree of care, skill, and proficiency which is commonly exercised by the ordinarily skillful, careful, and prudent physician and surgeon engaged in similar practice under the same or similar conditions."[8] This standard seemingly is an objective one, but because of the various interpretations of the "same or similar

5. Defendants' statistics, recognized by the court, show the incidence of glaucoma in persons under 40 years of age to be in the neighborhood of one in 25,000 people. Helling v. Carey, 83 Wash. 2d 514, 518, 519 P.2d 981, 983 (1974).

6. *See* W. PROSSER, THE LAW OF TORTS § 32, at 150 (4th ed. 1971) [hereinafter cited as PROSSER]; Note, *An Evaluation of Changes in the Medical Standard of Care*, 23 VAND. L. REV. 729 (1970) [hereafter cited as Note].

7. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 558-59 (1959) [hereinafter cited as McCoid].

8. 5A L. FRUMER, R. BENOIT, M. FRIEDMAN & L. PILGRIM, PERSONAL INJURY, *Physicians and Surgeons* § 1.01 [1][a], at 4 (1966) [hereinafter cited as FRUMER].

conditions,"[9] particularly due to the "locality rule"[10] and the "school of practice doctrine,"[11] courts have not uniformly applied this standard. Nevertheless, the courts have generally agreed that the standard established for the medical profession necessitates neither the exercise of the highest degree of skill, since this would eliminate all but the best physicians, nor the exercise of an average degree of skill, since this would include "quacks" and place the standard too low.[12] Rather, the courts have assumed that the standard includes only the skill possessed by those in good professional standing.[13] Furthermore, if one holds himself out as a specialist or

9. 40 FORDHAM L. REV. 435, 438 (1971).

10. The locality rule as first announced in Tefft v. Wilcox, 6 Kan. 46 (1870), set forth the proposition that a physician could only be held to that degree of skill and care ordinarily exercised by other physicians in good standing located *in the same community, locality or neighborhood.* The rationale behind this rule reflected the obvious inequities existing at that time between physicians practicing in remote rural areas and those practicing in large metropolitan centers. 40 FORDHAM L. REV. 435, 438 (1971). Since the defendant physician was judged by local standards, the plaintiff patient sustained the burden of proving a breach of duty by the testimony of an expert medical witness familiar with the particular locality. 43 MISS. L.J. 587 (1972). This requirement necessarily led to 2 harsh results. First was the difficulty that plaintiff often was unable to find such a witness, or one willing to testify, due to the "conspiracy of silence" among local practitioners. 40 FORDHAM L. REV. 435, 438 (1971). Second was the possibility that a small group of local doctors would establish an unsatisfactory local standard of care. 60 KY. L.J. 209, 210 (1971). Thus, the "same locality" rule was superseded by the "similar locality" rule, which, although eliminating some of the practical difficulties inherent in the former rule, inevitably led to the problem of determining what constituted "similarity." *Id.* at 212. The locality rule became further liberalized as its original rationale no longer ceased to exist. Recognizing changes in population distribution, improved medical technology, better transportation and communication, and increased standardization of medical practice through specialization, many courts gradually abandoned this rule, adopting locality as only one factor to be considered in determining the standard of care. *See, e.g.,* Hodgson v. Bigelow, 335 Pa. 497, 7 A.2d 338 (1939); Viita v. Dolan, 132 Minn. 128, 155 N.W. 1077 (1916). *See generally* 40 FORDHAM L. REV. 435, 439 (1971); 43 MISS. L.J. 587, 589 (1972). Accordingly, the Washington Supreme Court rejected the "same or similar locality" rule in Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967), noting that the "locality rule" has no present-day value, except as one element to be considered in determining the requisite degree of care and skill. *See* 44 WASH. L. REV. 505 (1969). In particular, a number of courts have specifically rejected the locality standard for specialists. Thus, the Washington Supreme Court adherred to the Pederson standard in Douglas v. Bussabarger, 73 Wash. 2d 476, 438 P.2d 829 (1968), recognizing the uniformity of practice that exists throughout the nation today for specialists. *See also* Note, *supra* note 6, at 730-41; McCoid, *supra* note 7, at 569-75.

11. The courts, particularly in early cases, held that the requisite standard of care was to he treated hy the general principles of the particular school of medicine that a practitioner followed. Although this doctrine seems to have lost much of its original vigor, a correlative principle still remains that when 2 or more methods of treatment are accepted by the medical profession, a practitioner who adherred to one espoused by a reputable minority cannot be held liable for malpractice. McCoid, *supra* note 7, at 565.

12. Scarano v. Schnoor, 158 Cal. App. 2d 612, 323 P.2d 178 (1958); Holtzman v. Hoy, 118 Ill. 534, 8 N.E. 832 (1886). *See generally* Symposium—*Standard of Care,* 44 CHI-KENT L. REV. 107 (1967).

13. *See* PROSSER § 32, at 163.

as having greater knowledge or skill in a particular area of practice, he is bound to employ this special degree of skill and knowledge and is held to a higher standard of care than the normal practitioner.[14] Thus, a specialist is required to possess the same degree of knowledge and ability and to exercise the same amount of care and skill as other specialists of a similar class, having regard to the current state of knowledge in his field.[15]

In establishing a breach of the proper standard of care, the overwhelming weight of authority adheres to the rule that the determination whether a physician or surgeon was negligent in diagnosing or treating a patient must be based on expert testimony.[16] Accordingly, expert testimony is required to establish the applicable standard of care, the breach of that standard, and the proximate cause of plaintiff's injury.[17] The underlying policy reasons for this rule, enunciated by the Washington Supreme Court in *Fritz v. Horsfall,*[18] emphasize the need to inform the jury and court of the facts and criteria upon which this standard of care rests. Since jurors and courts are in no way conversant with the complexities of medical practice, they have not been allowed to determine arbitrarily the proper methods of diagnosis and treatment, which are mat-

14. *See, e.g.,* McPhee v. Reichel, 461 F.2d 947 (3d Cir. 1972); Ayers v. Parry, 192 F.2d 181 (3d Cir. 1951); Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1953). *See also* Annot., 21 A.L.R.3d 953 (1968). In Hundley v. Martinez, 151 W.Va. 977, 158 S.E.2d 159 (1967), defendant ophthalmologist was held to a higher standard because the court reasoned that in order for a physician to attain this degree of specialization, he must undertake additional medical education and training and, of necessity, must learn the latest in surgical procedures and treatments of the eyes. *Id.* at 994-95, 158 S.E.2d at 169. *Accord,* Barnes v. Bovenmyer, 255 Iowa 220, 122 N.W.2d 312 (1963).

15. B. SHARTEL & M. PLANT, THE LAW OF MEDICAL PRACTICE § 3-05, at 118 (1959) [hereinafter cited as SHARTEL].

16. Beane v. Perley, 99 N.H. 309, 109 A.2d 848 (1954); *accord,* Washington Hosp. Center v. Butler, 384 F.2d 331 (D.C. Cir. 1967); Ayers v. Parry, 192 F.2d 181 (3d Cir. 1951). The requirement of medical expert testimony led to the problem of the "conspiracy of silence", whereby members of the medical profession refuse to testify against fellow practitioners. (*See* note 9 *supra,* discussing the "conspiracy of silence" arising from the "locality rule".) Nevertheless, in order for the victim of a legitimate malpractice suit to be properly compensated, it is essential that physicians and surgeons cooperate in the judicial process as expert witnesses, despite their feelings of loyalty to fellow practitioners. SHARTEL § 3-16, at 130. Consequently, to overcome this problem a few states have enacted legislation allowing the admissibility of medical textbooks and treatises as expert substitutes. *Id.* § 3-17, at 132. Negligence can also be proved by a defendant's own admissions both in and out of court. *Id.* § 3-18, at 133. In Groce v. Myers, 224 N.C. 165, 29 S.E.2d 553 (1944), the court emphasized that the rules of evidence requiring expert medical testimony should be strictly enforced, both in the interest of justice and to protect a profession particularly susceptible to malpractice suits when the patient does not obtain the results hoped for. "It is often said that the physician does not insure the result; and that is simply to say that he is not God, and does not hold in his hand all the issues of life." *Id.* at 169, 29 S.E.2d at 556.

17. FRUMER § 1.01 [4][a], at 34-36.

18. 24 Wash. 2d 14, 163 P.2d 148 (1945).

ters for learned medical experts.[19] Moreover, the courts normally have given preferred treatment to medical practitioners.[20] Thus, in the absence of such expert proof by plaintiff, the courts generally have dismissed the case at the close of plaintiff's evidence[21] or have directed a verdict for the defendant at the close of all the evidence[22] for failure to establish by expert testimony that defendant breached the standard of care. An exception, however, has been applied to cases in which want of skill or lack of care on the part of the physician is so grossly apparent that it is within the common understanding and experience of laymen.[23] In such cases expert testimony is not required because proof of the injury and the conditions under which it occurred are enough to make a prima facie case against the physician for negligence.[24]

The cumulative effect of applying the standard of care defined by expert medical testimony is the establishment of a standard of care based almost exclusively on custom within the profession, giving the medical profession the unique privilege of setting its own

19. *See* Ewing v. Goode, 78 F. 442 (C.C.S.D. Ohio 1897) (holding that where a case concerns the highly specialized art of treating an eye for cataracts or glaucoma, of which a layman cannot be expected to have any knowledge, the court and jury must depend on expert testimony); Evans v. Sarrail, 208 Cal. App. 2d 478, 25 Cal. Rptr. 424 (1962) (where uncontroverted expert evidence showed that simple glaucoma was difficult to diagnose because it has few symptoms, none of which reveals themselves to laymen, negligence could not be established in the absence of expert testimony); Mayo v. McClung, 83 Ga. App. 548, 64 S.E.2d 330 (1951); Carbone v. Warburton, 22 N.J. Super. 5, 91 A.2d 518 (App. Div. 1952). *See generally* Annot., 81 A.L.R.2d 597 (1962); Annot., 68 A.L.R.2d 426 (1959).

20. *See generally* Note, *supra* note 6, at 743 and McCoid, *supra* note 7, at 608 (pointing out the harsh results that might occur from hindsight judgments of doctors, although suggesting that the injured patient may be forgotten in protecting the doctor).

21. Hurspoll v. Ralston, 48 Wash. 2d 6, 290 P.2d 981 (1955); Skodje v. Hardy, 47 Wash. 2d 557, 288 P.2d 471 (1955).

22. SHARTEL § 3-16, at 130.

23. Atkins v. Hume, 110 So. 2d 663 (Fla. 1959); *accord,* Ayers v. Parry, 192 F.2d 181, 184 (3d Cir. 1951); Barham v. Widing, 210 Cal. 206, 291 P.173 (1930); Stone v. Sisters of Charity, 2 Wash. App. 607, 469 P.2d 229 (1970).

24. SHARTEL § 3-19, at 134. For this exception to apply, three requirements must be met: (1) the event must be one that would not ordinarily take place with the proper exercise of care and skill; (2) the conduct or instrumentality causing the injury must have been under of sole control of defendant, or someone under his control; and (3) plaintiff must not have participated in any manner that would have contributed to the injury. If these requirements are met, the doctrine of *res ipsa loquitur* will be applied to establish a prima facie case against the defendant without expert testimony. *Id.* § 3-19, at 134. *See also* PROSSER § 39, at 214. This doctrine most commonly is applied when foreign objects are left in the body, *see, e.g.,* Jefferson v. United States, 77 F. Supp. 706 (D. Md. 1948) (towel 18" x 30" found in plaintiff's body); French v. Fischer, 50 Tenn. App. 587, 362 S.W.2d 926 (1962) (sponge left in patient's body); when the injury occurs to a part of the body not under treatment, *see, e.g.,* Evans v. Roberts, 172 Iowa 653, 154 N.W. 923 (1915) (tongue cut off in removing adenoids); or when burns are found on the body, *see, e.g.,* Montgomery v. Stary, 84 So. 2d 34 (Fla. 1955) (hot towels applied to newborn baby causing burns). *See generally* FRUMER § 1.01 [4][a][ii], at 38-40.

legal standard of conduct.[25] Conversely, in negligence actions other than malpractice cases, evidence of customary performance in the occupation is generally admissible[26] as one factor in determining the proper standard of care, but it is in no way conclusive.[27] Rather, the courts have held consistently that a trade or business cannot establish its own negligent standard of care by concurring in a careless or dangerous practice,[28] below the standard of reasonable prudence.[29] Therefore, with the exception of medical malpractice suits,[30] the courts ultimately have determined what standard of conduct is required.[31]

Despite the generally accepted principle that adherence to the established medical standard of care will result in immunity from tort liability, a few decisions have held to the contrary, indicating a possible relaxation of the expert-testimony rule when the customary practice fails to meet the test of reasonable care and diligence.[32] This area of change is illustrated by *Morgan v. Sheppard,*[33] in which the Ohio Supreme Court stated that "usual and customary methods generally employed by physicians and surgeons in the diagnosis, care and treatment of a patient, no matter how long such methods have continued to be employed, cannot avail to prove and establish

25. Note, *supra* note 6, at 742. Morris takes a practical approach to the problem and concludes that the rationale behind the conformity rule is that it is the only workable test available. The plaintiff who has endured suffering is an appealing plaintiff to jurors, particularly since it is widespread knowledge that doctors usually carry liability insurance. But, because a doctor who loses a malpractice suit stands to lose his reputation and practice as well, the need for a test that will protect doctors against undeserved liability is essential. Morris, *Custom and Negligence,* 42 COLUM. L. REV. 1147, 1164-65 (1942) [hereinafter cited as *Custom and Negligence*].

26. Sometimes evidence of conformity with the custom of the trade is not admissible when the custom is so hazardous that the negligence of those who follow it is patent. *Custom and Negligence* at 1149. *See* Mayhew v. Sullivan Mining Co., 76 Me. 100, 112 (1884) (evidence that the customary practice was to leave ladder-holes in the platforms of dark mines unguarded and unlit held inadmissible).

27. *See* Note, *supra* note 6, at 741; James & Sigerson, *Particularizing Standards of Conduct in Negligence Trials,* 5 VAND. L. REV. 697 (1952) [hereinafter cited as James & Sigerson]. In Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 331, 211 N.E.2d 253, 257 (1965), the court explained that custom is relevant in determining the standard of care because it suggests what is feasible, what is within the realm of knowledge, and what the far-reaching consequences of the court's decision might be.

28. Marsh Wood Prod. Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932) (expert testimony showed custom of trade to be negligent).

29. Texas & Pac. Ry. v. Behymer, 189 U.S. 468, 470 (1903) (concerning the usual custom of bumping train cars together with brakemen standing on top of them).

30. McCoid, *supra* note 7, at 710 n.74. *See also Custom and Negligence, supra* note 25, at 1165, in which Morris notes that the reasonably prudent man test would "enable the ambulance chaser to make a law suit out of any protracted illness."

31. The T.J. Hooper, 60 F.2d 737 (2d. Cir. 1932) (regarding seaworthiness of oceangoing barges unequipped with radio receiving set).

32. *See* Note, *supra* note 6, at 745-47.

33. 91 Ohio L. Abs. 579, 188 N.E.2d 808 (1963).

as safe in law methods and conduct which are in fact negligent."[34] The court, however, added that evidence of conformity to the usual and customary methods, along with all of the other circumstances, should be considered by the jury in determining whether the physician or surgeon exercised the degree of care required under the law.[35] This philosophy was adopted by the Illinois court in *Lundahl v. Rockford Memorial Hosptial Association,*[36] which indicated in dictum that although the treatment was "usual" or "customary" defendant would not be absolved from liability on that basis alone, because what is customary practice might also be negligent practice.[37] Thus, a few recent cases have shown a willingness by the courts to require more of the doctor than mere compliance with the customary standard by considering the customary practice as only one factor among others in the determination of negligence.[38]

III. INSTANT OPINION

The instant court recognized initially that defendants' diagnosis and treatment of plaintiff's condition had complied with the customary practice among ophthalmologists, which was established by uncontroverted medical expert testimony.[39] Furthermore, the court conceded that this case did not involve a question of imposing a higher duty of care on defendant ophthalmologists by reason of their possessing any greater special ability or knowledge than other

34. *Id.* at 593, 188 N.E.2d at 816-17. The court in Naccarato v. Grob, 12 Mich. App. 130, 137-38, 162 N.W.2d 305, 309 (1968), quoted this section from *Morgan* but stated that by implication it applied only when the physician's standard of conduct fell below the standard of reasonably prudent care.

35. 91 Ohio L. Abs. at 593, 188 N.E.2d at 817.

36. 93 Ill. App. 2d 461, 235 N.E.2d 671 (1968).

37. *Id.* at 465, 235 N.E.2d at 674. To a more limited extent, this doctrine was applied by the court in Toth v. Community Hospital at Glen Cove, 22 N.Y.2d 255, 239 N.E.2d 368, 292 N.Y.S.2d 440 (1968), to physicians and specialists who possess superior skills and knowledge. The court noted that a second principle, supplementing tbat of the customary standard of care, required a physician to exercise at all times his best judgment and whatever superior qualities he might possess, and that in failing to do so, he would not automatically be insulated from liability merely because he followed tbe customary practice of his profession. *Id.* at 262, 239 N.E.2d at 372-73, 292 N.Y.S.2d at 447. Similarly, this doctrine was applied to negligent, but customary, *local* practice by the court in Favalora v. Aetna Cas. & Sur. Co., 144 So. 2d 544 (Ct. App. La. 1962). The court held a radiologist negligent for failing to take the known precautions of checking a patient's history, although this was not the customary procedure of similar practitioners *in the same community,* where the procedure was recognized by members of the same profession not only as being faulty, but also as being contrary to medical training. *Id.* at 550-51. Subsequent cases construing the rule in *Favalora* have limited its application to negligent *community* practices, rather than expanding it to customary practices in general. *See, e.g.,* Davis v. DuPlantis, 448 F.2d 918 (5th Cir. 1971); Chapman v. Argonaut-Southwest Ins. Co., 290 So. 2d 779, 786 (Ct. App. La. 1974).

38. *See* Note, *supra* note 6, at 746-47 (1970).

39. *See* notes 14-20 *supra* and accompanying text.

physicians of the same class.[40] Rather the court stated the issue was whether defendants' compliance with the standard of their specialty, which did not require the administration of a routine pressure test to patients under forty years of age, should protect them from liability under the facts of the instant case. Acknowledging defendants' statistical evidence that the incidence of glaucoma is one out of 25,000 persons under forty years of age, the court nevertheless pointed out that this one individual was entitled to the same protection afforded persons over forty by the timely application of this simple, relatively inexpensive and harmless pressure test. The court then emphasized that the precaution of giving this test to patients under forty is so imperative to avoid the devastating results of glaucoma that "irrespective of its disregard by the standards of the ophthalmology profession, it is the duty of the courts"[41] to determine what reasonable standard should have been followed. Under the undisputed facts of this case,[42] the court held, as a matter of law, that reasonable prudence dictated the administration of this simple medical test to patients under forty, and in failing to do so, defendants were liable for plaintiff's blindness, which proximately resulted from their negligence.

IV. COMMENT

The most troublesome issue presented by the instant decision is to determine the scope of the Washington Supreme Court's holding. This determination involves the two interrelated problems of ascertaining the theory of tort liability upon which the court based its holding and ascertaining the breadth with which its holding is to be interpreted. Although the underlying rationale and amplitude of the immediate decision seem vague from the court's opinion, several possible interpretations are suggested by the language of the case.[43]

40. *See* Pederson v. Dumouchel, 72 Wash. 2d 73, 79, 431 P.2d 973, 978 (1967).

41. Helling v. Carey, 83 Wash. 2d 514, 519, 519 P.2d, 981, 983 (1974). The court relied on two cases dealing with the customary practice of a trade or business. *See* notes 27-28 *supra* and accompanying text, and note 48 *infra* and accompanying text.

42. Helling v. Carey, 83 Wash. 2d 514, 519, 519 P.2d 981, 983 (1974).

43. Another possible interpretation is advanced by Associate Justice Utter in his concurring opinion, in which he suggests that the court's holding was actually an imposition of strict liability, or liability without fault, rather than a finding of negligence.

> The difficulty with [the majority's] approach is that we as judges, by using a negligence analysis, seem to be imposing a stigma of moral blame upon the doctors who, in this case, used all the precautions commonly prescribed by their profession in diagnosis and treatment. Lacking their training in this highly sophisticated profession, it seems illogical for this court to say they failed to exercise a reasonable standard of care. It seem[s] to me we are, in reality, imposing liability, because, in choosing between an innocent

The most narrow reading of the case would limit the holding to the factual question presented—whether defendant ophthalmologists were negligent in failing to administer a pressure test for glaucoma to plaintiff, a patient under forty years of age.[44] Obviously, this interpretation would have very restricted application to future malpractice cases.

A slightly more expansive construction of the court's holding would restrict application of the decision to situations in which a simple test with definitive results could have been administered to prevent the injurious results of a harmful disease, which could have been successfully arrested by early detection.[45] This simple test rationale arguably strengthens the court's holding since a physician could have prevented the damaging results by taking a simple precaution that was beyond the patient's control. It is questionable, however, whether the instant decision pivoted on the simplicity of the glaucoma test, which the court failed to distinguish as the one conclusive factor. Further, such an approach would create two immediate problems: (1) who should determine what constitutes a "simple" test—the court or the medical profession?; and (2) when should a doctor be required to administer such a test—when a patient first enters his office, which necessitates the administration of *all* "simple" tests used in his speciality, even when the presence of a particular disease is unsuspected, or when the patient first complains of a remote symptom, or when a symptom persists for a certain period of time? These two crucial questions weaken the applicability of a simple test rationale to the instant opinion.

Another explanation of the court's decision would construe the case as an extension of the doctrine of *res ipsa loquitur,*[46] most familiarly applied in medical malpractice suits in the "sponge cases",[47] under which the trier of fact may find a physician negligent without expert testimony when the nature and extent of the injuries are within the common understanding of laymen.[48] Ordinarily, this

plaintiff and a doctor, who acted reasonably according to his speciality but who could have prevented the full effects of this disease by administering a simple, harmless test and treatment, the plaintiff should not have to bear the risk of loss. As such, imposition of liability approaches that of strict liability.

Id. at 520, 519 P.2d at 984 (1974). *See generally* Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 239-43 (1971).

44. *See* 18 Personal Injury Newsletter No. 7, at 79 (Oct. 7, 1974).

45. *See* Associate Justice Utter's concurring opinion in Helling v. Carey, 83 Wash. 2d 514, 520-22, 519 P.2d 981, 984-85 (1974).

46. *See* note 24 *supra* and accompanying text.

47. *See, e.g.*, French v. Fischer, 50 Tenn. App. 587, 362 S.W.2d 926 (1962); Young v. Fishback, 262 F.2d 469 (D.C. Cir. 1958).

48. *See* PROSSER § 39, at 227-28.

doctrine has not been applied to instances of mistaken diagnosis or improper treatment, of which laymen are not considered qualified judges; rather, its application has been restricted to cases of gross medical and surgical errors, which in and of themselves establish a prima facie case against the physician for negligence without expert testimony.[49] Thus, the instant opinion could be read to extend the application of *res ipsa loquitur* to diagnostic errors and allow the jury, who had been apprised of the facts of the case, to determine whether the defendant physician was negligent in failing to administer a particular test to the individual plaintiff. In the instant case, it is dubious whether the facts presented such an unequivocal case of negligence that the court could find defendants negligent as a matter of law based on the theory of *res ipsa loquitur,* which ordinarily is applied only to the extremes of medical abuse. Moreover, it seems doubtful that the court would rely inferentially on such a well-known doctrine without some indication or suggestion thereof.

Therefore, although the court may retreat to one of these narrower holdings in future malpractice suits, it appears that in the instant decision the Washington Supreme Court departed from the traditional rule that a determination of a physician's negligence is to be based on a breach of the standard of care established by expert medical testimony.[50] Adherence to the court's reasoning would allow a court, in any malpractice case, to overlook the accepted professional standard of care and to hold a physician liable whenever he could have prevented the injurious results by administering a simple, harmless test.[51] Nevertheless, the underlying rationale for the traditional rule has always been that jurors and judges, lacking the requisite, highly specialized medical training, are not competent to determine what constitutes ordinary care for the medical profession.[52] Moreover, in an age of increased medical specialization, this rationale seems even more valid than before. Despite this, however, in the face of undisputed medical expert testimony concerning defendants' compliance with the customary practice of their specialty, the instant court undertook to determine the reasonable standard of care for the specialty of ophthalmology.

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49. *Id. See also* note 24 *supra* and accompanying text.

50. *See* notes 14-20 *supra* and accompanying text.

51. Associate Justice Utter, in his concurring opinion, states that when one of two innocent parties must bear the risk of loss, it should fall on the doctor, since he could have prevented the disease. Helling v. Carey, 83 Wash. 2d 514, 520, 519 P.2d 981, 984 (1974).

52. *See* notes 18, 30 *supra* and accompanying text. As Associate Justice Utter so aptly pointed out, in his concurring opinion, the difficulty with the approach of the instant decision is that it seems illogical for the court, lacking defendants' training in ophthalmology, to say that defendants failed to exercise a reasonable standard of care. Helling v. Carey, 83 Wash. 2d 514, 520, 519 P.2d 981, 984 (1974).

The court's reliance on cases dealing with negligent, customary practice in the commercial world,[53] to which the medical profession has always been the one recognized exception,[54] seems to indicate that the court intended to abolish the preferred treatment traditionally bestowed on the medical profession by bringing it within the general rule applied to all other occupations. Conceptually, this approach does not seem illogical, because under the American system of justice the courts always have been the final arbiters in determining the proper standard of care, and it seems improper for any group to be excluded from this traditional scheme of justice. Nevertheless, countervailing arguments justify retention of this important distinction between negligence cases arising in the commercial, industrial sphere and medical malpractice cases.[55] In the former, an underlying assumption is made that the businessman, influenced by the profit motive, may engage in unsafe practices to save time, effort, and money,[56] and thereby reduce production costs. The courts, therefore, necessarily subject these customary practices to their own external and objective standard of reasonable, prudent care. Underlying the courts' approach to the medical profession, however, is the assumption that physicians and surgeons are dedicated to the health and safety of their patients and will engage only in practices designed to achieve that end. Furthermore, by the very nature of the profession, the medical practitioner impliedly represents to the public that he will exercise his best judgment and follow customary methods. Thus he should not be held to any higher standard than that expected by his patients.[57]

The court also seemed to rely, at least implicitly, on the fact that a physician is better able financially to bear the loss through the use of insurance.[58] This arguments seems to overlook the adverse effects that malpractice suits may have on the practicing physician and the patient as well. First, the premiums that physicians and surgeons must pay for professional liability insurance have risen drastically in the last few years because of the rapid increase in the number of malpractice cases.[59] Unfortunately, the insurance companies' cost of providing malpractice coverage has risen even more

53. *See* notes 27-28 *supra* and accompanying text.

54. *See* notes 29-31 *supra* and accompanying text.

55. *See* 18 Personal Injury Newsletter No. 7, at 80 (Oct. 7, 1974).

56. PROSSER § 33, at 167.

57. *Id.* § 32, at 165.

58. *See* note 43 *supra*.

59. For example, in New York City rates increased 439% from July 1, 1966 to July 1, 1971. Andrew, *Malpractice Suits: The Increased Cost of Health Care*, 8 TULSA L.J. 223, 226 (1972) [hereinafter cited as Andrew].

rapidly and, thus, for most companies medical liability insurance has become a losing venture.[60] Many companies have abandoned this type of coverage completely, making malpractice insurance difficult, if not almost impossible, to obtain in some states.[61] Thus, professional liability insurance is becoming more difficult for doctors to obtain and to afford, and few doctors can afford to be self-insurors for very long.[62] Secondly, the fear of a malpractice suit may affect the physician's method of practice.[63] Physicians are no longer sure of the standard of practice they must follow, since, as the instant decision indicates, even the customary practice may be held negligent by the courts. This confusion necessarily operates as a restraint on medical advancement, proper experimentation, and choice of treatments, since physicians must choose to follow a "safe mediocrity" in their practice,[64] which is not necessarily "safe" in protecting the physician from liability. Thirdly, the adverse publicity of a medical malpractice suit can ruin a physician's professional reputation and his practice.[65] This seems extremely unfair in cases in which the physician did everything he had been taught and adhered to the customary practice of his profession, for it is unlikely that the public will be aware of these facts. Likewise, the patient also feels the adverse effects of malpractice suits. As a consumer, the patient is subjected to the substantial increases in the cost of health care,[66] since the physician out of financial necessity must spread the high cost of insurance premiums to his patients.[67] Fur-

60. From 1966 to 1971, almost without exception, insurance carriers lost substantial sums of money on medical malpractice cases. Aetna, alone, sustained underwriting losses of $25,000,000 on malpractice coverage. Linster, *Insurance View of Malpractice,* 38 INS. COUNSEL J. 528, 529 (1971).

61. Most compaines have discontinued writing medical malpractice insurance since it is almost impossible to predict with any accuracy tbe frequency and cost of malpractice claims because of the increasing number of cases and the size of the verdicts. *Id.* Recently, insurance companies quit insuring doctors in Hawaii, and to some extent in Utah, Colorado and New Mexico. Morris, *Medical Reports: Malpractice Crisis—A View of Malpractice in the 1970's,* 38 INS. COUNSEL J. 521 (1971) [hereinafter cited as Morris]. *See* Uhthoff, *Medical Malpractice—The Insurance Scene,* 43 ST. JOHN'S L. REV. 578, 579, 587-95 (1969) [hereinafter cited as Uhtboff].

62. Morris, *supra* note 61, at 521.

63. Andrew, *supra* note 59, at 226. *See also* 18 Personal Injury Newsletter No. 7, at 80 (Oct. 7, 1974), in which Lawrence S. Charfoos, a plaintiff's lawyer, stated in his letter protesting the instant court's decision that the far reaching effects of this case "would inevitably end up with the medical profession carrying out their practice in *blind* ignorance of what is right and wrong within the law. No professional group can work within such a framework." *Id.*

64. Uhthoff, *supra* note 61, at 579.

65. Andrew, *supra* note 59, at 227.

66. According to the Consumer Price Index, from 1967-1972, the daily hospital service cbarge increased 67.1% and the physician's fee increased 32.3%. *Id.*

67. Uhthoff, *supra* note 61, at 579.

thermore, the patient also must bear the cost of extra tests, additional consultations, and other defensive practices adopted by the physician to avoid the possibility of malpractice liability.[68] Admittedly, some of these defensive practices will inevitably lead to better diagnosis and treatment, but many are extraneous and serve only as a necessary precaution for the physician. Moreover, defensive practice is not always the best practice[69] because it stifles responsible experimentation with possible cures for the patient. Therefore, the cumulative effect of these considerations raises serious questions whether relaxation of the customary-practice doctrine, which will necessarily increase the number of malpractice suits and impose greater liability on physicians, is the best approach to be taken. With the introduction of new techniques and practices, and with the increasing specialization in the medical field, it is unlikely that the adverse effects of malpractice suits will diminish in the near future. It is ironic that at a time when health care is better than ever before, doctors are subjected to greater liability. Seemingly, the best solution[70] is to maintain a consistent standard of care based on the customary practices of the medical profession as established by expert testimony, in order to achieve a balance between the need for the patient's safety and the need to protect doctors from unwarranted malpractice suits.

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68. *Id.*

69. Andrew, *supra* note 59, at 226-27.

70. Morris suggests a two-fold solution: (1) to reduce patient's need to sue by "mal-occurence" insurance, which the patient would take out upon entering the hospital for unforeseen and unwanted increases in expenses; and (2) to reduce patient's ability to sue by channeling malpractice suits through preliminary screening panels and arbitration boards. Morris, *supra* note 61, at 523-26.