During the 1981-1982 term the Ohio Supreme Court rendered 250 written opinions on a wide range of topics from wiretapping to the liability of landlords for injuries. In several cases, individuals gained significant legal rights in dealing with business and others. In addition, there were some significant changes in the law governing municipal sovereignty and immunity. This symposium will not attempt to cover all decisions of the Ohio Supreme Court, but rather to highlight some of the major decisions which affect Ohioans.

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Table of Contents

I. Torts 619
   A. Imputed Negligence 620
   B. Railroads: Duty to Warn 621
   C. Products Liability 623
   D. Landlord-Tenant Relations 628

II. Criminal Law 628
   A. Tape Recorded Telephone Conversations 629
   B. Diminished Capacity 631
   C. In Camera Inspections: Right to Counsel 636

III. Municipal Law 638
   A. Sovereign Immunity 638
   B. Home Rule 644

IV. Insurance 652

V. Workers' Compensation 655

VI. Public Utilities 659

I. Torts

In the ever changing world of tort liability, the Ohio Supreme Court recently made additional changes. Two decisions of the court in 1982 expanded liability concepts in the areas of imputed negligence between drivers and owners of
automobiles, and railroad’s duty to warn at crossings. In a third decision, the Ohio Supreme Court expanded the area of products liability when it ruled that an injured worker could bring legal action against the manufacturer of a machine for putting a defective product on the market. The court also provided tenants with rights previously not available in Ohio by ruling that a landlord is liable for injuries sustained on rental premises which are caused by the landlord’s failure to keep the premises in a fit and habitable condition.

A. Imputed Negligence

In Parrish v. Walsh the Supreme Court of Ohio restricted the doctrine of imputed negligence. In 1955 in Ross v. Burgan, the court had stated broadly that the negligence of a driver of a motor vehicle will be imputed to the owner-passenger in the absence of evidence to rebut the presumption which arises that the owner has control over the vehicle and that the driver is acting as his agent in operating the vehicle. That case involved a suit brought by the owner-passenger against the third party driver of the other vehicle involved in the accident.

In Parrish v. Walsh the administrator of the estate of Dr. Brant (the owner-passenger) instituted a suit against the administrator of the estate of Dr. Brant’s mother (the driver). Both Dr. Brant and his mother had been killed in the automobile accident. The trial court granted summary judgment for the defendant based upon Ross v. Burgan. The court reversed, holding that as between driver and passenger-owner the rule of Ross is not “fair and reasonable” and that a driver may not defeat an action against him by the passenger-owner.

The court analogized to the situation of a joint enterprise and noted that in Bloom v. Leech it had invoked the doctrine of imputed negligence in actions between a third party and any or all members of a joint enterprise. The court expressly set forth in that case that the rule did not apply to an action by one member of the enterprise against another.

As noted by the court, its view as expressed in Parrish is in agreement with the law in other jurisdictions and the opinion of commentators.  

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169 Ohio St. 2d 11, 429 N.E.2d 1176 (1982).
163 Ohio St. 211, 126 N.E.2d 592 (1955).
1 Id. at 220, 126 N.E.2d at 596.
69 Ohio St. 2d 11, 429 N.E.2d 1176 (1982).
163 Ohio St. 211, 126 N.E.2d 592 (1955).
69 Ohio St. 2d at 12, 429 N.E.2d at 1177.
120 Ohio St. 239, 166 N.E. 137 (1929).
4 Id. at 140.
69 Ohio St. 2d at 13, 429 N.E.2d at 1178, citing 7A. AM. JUR.2d §§ 747, 753, 991, 998 (1969); 50 A.L.R.2d §§ 1275, 1285 (1956); 6 Blashfield, Automobile Law and Practice (3 Ed.), Section 251.2, at pages 4 and 5 (1972); PROSSER, TORTS (4 Ed.) 480 § 72 (1971); RESTATEMENT OF AGENCY 2d, § 415, Comment b; (1958); RESTATEMENT OF TORTS 2d, § 491 (2) (1965); Reeves v. Harmon, 475 P.2d 400, 403 (Okla. 1970) and cases cited therin; Summers v. Summers, 40 Ill. 2d 338, 239 N.E.2d 795 (1968); DeGrove v. Sanborn, 70 Mich.
In *Prem v. Cox*, a wrongful death action brought by the administrator of the wife-passerby's estate against the husband-driver, the court held that such suit was not barred by the doctrine of interspousal immunity. The court cited its decision in *Parrish* for the proposition that a cause of action lies for negligence which results in serious injury. These decisions appear to indicate that the court is expanding upon the right to seek redress for injuries and that at least the majority is of the opinion that the right to seek redress is more important than protecting tortfeasors through antiquated doctrines.

**B. Railroads: Duty to Warn**

In *Makovich v. Penn Central Transportation Co.* the court expanded upon the duty of a railroad to provide warnings at highway crossings. The plain-tiff in this case was injured when the motorcycle on which he was riding struck one of defendant's railway cars occupying the track at a crossing. The accident occurred at approximately 2:00 a.m. The only sign was a yellow highway target warning sign located about two hundred feet north of the crossing. Plain-tiff had lived in the area all his life and was aware of the tracks and knew that the tracks were not protected by a cross-buck sign. He also knew that the track was not frequently used and in fact had never seen a train stopped on the crossing before. According to the plaintiff, he glanced in his rear view mirror to locate a friend who was cycling with him, then looked forward and saw the train. He applied his brakes but slid into one of the cars. He testified that he was traveling 30 to 35 miles per hour, which was within the posted limits.

The trial court denied defendant's motion for a directed verdict on the issue of wanton misconduct. The jury found that defendant's conduct constituted wanton misconduct and awarded damages to plaintiff. The court of appeals reversed.

The supreme court reinstated the jury verdict as to Penn Central, in effect reversing a line of prior decisions. In *Reed v. Erie Rd. Co.* the court stated in its syllabus:

A railroad company is not liable for the death of an automobile passenger occasioned when the automobile is driven against a moving freight train rightfully occupying its track at a highway crossing in the open country, where it appears that the company had erected a sign in literal compliance with Section 8852, General Code, that there were other effective signs denoting the presence of the crossing and that the automobile struck the

App. 568, 246 N.W.2d 157 (1976); and Hale v. Adams, 117 So. 2d 524, 527 (Fla. App. 1960) and cases cited therein.

* Ohio St. 3d 149, 443 N.E.2d 511 (1983).

69 Ohio St. 2d 210, 431 N.E.2d 652 (1982).

The court subsequently held in *Capelle v. Baltimore & Ohio Rd. Co.* that the train itself was sufficient notice even where the accident occurred after midnight and no additional signs, signals or warnings, other than those statutorily required, were provided.

The court in *Matkovich* stated that while the concept of a train serving as notice may have been reasonable at the time the above cases were decided, such is no longer the case. The court noted the increased speed at which motor vehicles travel and the darkness of the night, and found that the plaintiff may not have had sufficient time to stop and avoid the collision after he became aware that the train blocked the road. There was no reflective tape on the train and no warning devices were used by the railroad at the crossing. The court held that the duty of ordinary care owed by the railroad included giving additional warning of the presence of the train. This was especially necessary, according to the court, because of the infrequent use of the tracks. Further, trains were more common when the previous cases were decided. Because Penn Central created the hazard by placing the train in the crossing, it was required to warn motorists of the hazard.

The court held that the jury could have reasonably concluded that Penn Central disregarded the safety of motorists and failed to exercise any care whatsoever to motorists, thus satisfying the first prong of the test for wanton misconduct. The court also held that there is a substantial risk of danger to those using the highway over almost every railroad grade crossing, and that the cost to the railroad would be minimal in providing sufficient warnings. Thus the court held that the second prong of the wanton misconduct test had been satisfied.

Justice Holmes dissented, voicing the opinion that the cost to the railroad companies would not be minimal, because it would require either stopping trains at every crossing or providing automatic warning signals or flashers at every crossing. Justice Krupansky also dissented, and was of the opinion that the evidence did not show a total lack of care on the part of Penn Central. The
Justice further would hold that extrastatutory warnings are required only where the crossing is unusually dangerous.\textsuperscript{22}

C. Products Liability

With the decision of *Knitz v. Minster Machine Company*,\textsuperscript{23} the Ohio Supreme Court continued the expansion of product liability concepts. The court determined that a manufacturer could be liable for the injuries which resulted from the use of a product if the product's design was more dangerous than could reasonably be anticipated or if the design embodied excessive preventable dangers. *Knitz* approved and followed *Leichtamer v. American Motors Corporation*\textsuperscript{24} which established the doctrine in Ohio that a product design is in a defective condition if it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or if the benefits of the challenged design do not outweigh the risk inherent in such design.

The facts surrounding the *Knitz* decision are relatively simple. Virginia Mae Knitz began work at the Toledo Die and Manufacturing Company on August 16, 1976. On August 23, 1976, she was assigned to operate a press which was designed and manufactured by the Minster Machine Company. When the press was delivered to the Toledo Die and Manufacturing Company in October, 1971, it was equipped with a two-hand, button tripping device which was comprised of two buttons that were placed at shoulder level above the die ram area. Also, Toledo Die and Manufacturing Company had ordered and received an optional foot pedal tripping device designed by Minster Machine Company. On the date of the accident, the foot pedal was attached to the press and was the sole method of activating the ram.

The accident itself occurred on August 23, 1976. Mrs. Knitz had been operating the press for about two hours when she temporarily left the press. When she returned, the foot pedal had been moved. She leaned on the bolster plate of the press with her right hand and attempted to move the pedal back into place with her foot. In the process, she activated the foot pedal and the ram on the press descended and amputated two fingers of her right hand. Mrs. Knitz filed a complaint against Minster Machine Company on August 2, 1978 in the Lucas County Court of Common Pleas. The complaint alleged that the press was sold in a defective condition which was dangerous to the user of said press. Minster Machine Company filed and was granted a motion for summary judgment.\textsuperscript{25} The court of appeals affirmed the trial court's judgment.\textsuperscript{26} The case was certified to the Ohio Supreme Court.

Justice William B. Brown wrote the opinion for the majority stating that

\textsuperscript{22}Id. at 218, 431 N.E.2d at 657.
\textsuperscript{23}69 Ohio St. 2d 460, 432 N.E.2d 814 (1982).
\textsuperscript{24}67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).
\textsuperscript{25}69 Ohio St. 2d 460, 432 N.E.2d 814 (1982).
\textsuperscript{26}Id.
a manufacturer may be liable for injuries resulting from the use of a product if the product's design makes it more dangerous than would reasonably be anticipated or if the design embodied excessive preventable dangers. In reaching this decision, the court thoroughly reviewed Temple v. Wean United, Inc. because both parties asserted that it was dispositive of this case. In Temple, the plaintiff was injured while operating a punch press when aluminum extrusions fell from the bolster plate onto dual operating buttons. This caused the press ram to close on the plaintiff's arms. The ram tripping device, however, has been altered by the plaintiff's employer who had replaced shoulder level tripping buttons with waist high buttons. The plaintiff brought an action under a theory of strict liability in tort, and the supreme court affirmed a summary judgment for all defendants. In doing so, it also adopted Section 402A of the Restatement of Torts 2nd and its comments. The court reasoned that there was virtually no distinction between Ohio's implied warranty in tort theory and the Restatement version of strict liability in tort. Section 402A thus was adopted as a conceptual overlay upon Ohio's broader definition of strict liability in tort announced in Lonzrick v. Republic Steel Corporation. The supreme court applied Section 402(A)(1)(b) to the facts in Temple and held that because the plaintiff's employer had altered the press before the accident they were precluded from finding strict liability against the manufacturer. It should be noted, however, that the holding in Temple with regard to the manufacturing defect issue was based upon the evidence of substantial changes in the condition of the press made subsequent to the purchase. Furthermore, the supreme court said that the plaintiff did not present a genuine issue of material fact on the question of negligent design of the press. In Knitz, the Minster Machine Company argued that Temple applied equally to a claim of strict liability design defect as well as negligent design defect. The supreme court, however, determined that this was an improper application of the Temple decision. With respect to the design defect, the supreme court said Temple was concerned solely with the issue of defendant's liability for negligence in failing to warn of a dangerous propensity of their product and whether they negligently designed the power press. Therefore, the issue was one of negligence and the standard applied therein was one of reasonableness. Temple therefore did not provide a legal standard for the application of strict liability in tort to design defects.

The supreme court had, however, previously reviewed the concept of strict liability of tort for design defects in Leichtamer v. American Motors Corporation. In that case the plaintiffs were injured while riding in a Jeep Model CJ-7 on an off-road course. The jeep overturned and its rollbar failed

37Id.
396 Ohio St. 2d 227, 218 N.E.2d 185 (1966).
to provided any protection to the passengers. At trial, the plaintiff adduced evidence that the defendant designer-manufacturer had advertised the vehicle as safe for off-the-road use, thus, creating an expectation in the user of the vehicle.

The supreme court reviewed the policy underlying the development of strict liability in tort and concluded that application of a varying tort standard based upon a distinction between defects resulting from manufacturing process and those resulting from design, would provoke what the court felt were needless questions of defect classification, which would add little to the resolution of the underlying claims.\textsuperscript{32} The court reasoned that a person who was injured by an unreasonably dangerous design should be (a) advantaged by Section 402(A); (b) free from proving fault; and (c) placed in the same position as an individual who was injured by a defectively manufactured product which was unreasonably dangerous.\textsuperscript{33}

The court then proceeded to discuss what they considered to be a "defective condition unreasonably dangerous."\textsuperscript{34} They decided that a product was in a "defective condition unreasonably dangerous" if it was more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. This standard, according to the court, reflected the commercial reality that implicit in a product’s presence on the market was a representation that the product would safely do the job for which it was built.

The court reasoned that the situation in Knitz differed from Leichtamer because Knitz presented a situation in which the consumer would not know what to expect because he or she would have no idea how safe the product could be made. The court cited the discussion in Barker v. Lull Engineering Company\textsuperscript{35} and determined that a product design would be in a defective condition to the consumer if it was more dangerous than the ordinary consumer would expect when used in a reasonably or an intended foreseeable manner, or if the benefits of the challenged design did not outweigh the risk inherent in such design. The court said that factors they would look to in the evaluation of defectiveness of the product design included the likelihood that the product design would cause injury, the gravity of the danger posed, and the mechanical and economical feasibility of an improved design.\textsuperscript{36}

\textsuperscript{32}Id.
\textsuperscript{33}Id.
\textsuperscript{34}Id.
\textsuperscript{35}20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). The discussion in Barker indicated that the policy underlying strict liability in tort, namely that the public interest in human life and safety can best be protected by subjecting manufacturers of defective products to strict liability in tort when the product causes harm, required that a product could be defective in design, even if it satisfied ordinary consumer expectations, if through hindsight the jury determined that the products design embodied ‘excessive preventable danger’ or if the jury found that the risk of danger inherent in the challenged design outweighed the benefits of such design.
The court concluded that Mrs. Knitz had established a genuine issue of fact regarding whether Minster Machine Company's press design was defective in allowing accidental tripping of the foot pedal control and in failing to provide a point of operation guard when the foot pedal was operative. Therefore, they reversed the judgment of the trial court and the court of appeals' granting of summary judgment for Minster Machine Company.

In a dissenting opinion, Justice Holmes indicated that a manufacturer could not be held liable for the defective design of a product absent a showing that the manufacturer was negligent in the design of the product. Also, Justice Holmes indicated that he did not believe the machine was in a defective condition. Justice Krupansky also voiced the position that the machine contained no design defect as a matter of law.

Delk v. Holiday Inns, Inc.37 followed Knitz in 1982. Delk came before the federal district court on defendant's motion for a directed verdict. The plaintiffs were former guests of the Holiday Inn at Cambridge, Ohio, who claimed damages for injuries sustained on July 31, 1979. On that date, Gerald Willey poured gasoline on the carpet, ignited it, and a fire ensued. The plaintiffs alleged that their injuries resulted from the excessive smoke and hazardous gaseous by-products of the burning carpet and wallcovering in the hallway of the motel.

In granting the defendant's motion for a directed verdict, the federal district court initially determined a number of preliminary issues. It found that the case did not involve a manufacturing defect since no evidence was presented that the carpet or wallcovering deviated from the manufacturer's intended result. Furthermore, it found no evidence of a breach of an express warranty. Finally, as a preliminary matter, the court ruled that because there were virtually no distinctions between Ohio's implied warranty theory and its Section 402(A) theory of liability, the court's holding on the defendant's Section 402(A) liability was also dispositive of plaintiffs' breach of implied warranty claim.

Following this discussion, the court cited Temple38 and then proceeded to discuss Knitz.39 The federal district court indicated that Knitz dispensed with the requirement of establishing that a product was "unreasonably dangerous." They found that Knitz provided an alternative risk-benefit definition under 402(A), but also said that in Delk even if the risk-benefit test would apply to the facts, the plaintiffs had failed to establish a design defect by not introducing evidence of the mechanical and economic feasibility of an improved design. The court found that following Knitz, a product was defective under Ohio law if it was more dangerous than an ordinary consumer would expect when used

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3850 Ohio St. 2d 317, 364 N.E.2d 267 (1977). The court cited Temple for the proposition that Ohio law provides a cause of action in strict liability under Section 402(A) of the Restatement (Second) of Torts against a products manufacturer or designer for injuries to users of that product.
3969 Ohio St. 2d 460, 432 N.E.2d 814 (1982).
in an intended or reasonably foreseeable manner. In *Delk*, the court found that the plaintiff had failed to produce any evidence that the defendants advertised or represented to purchaser, Holiday Inn, that their products were treated or manufactured in such a way as to be fire and smoke resistant. Furthermore, the intended ordinary use of the product did not include exposure to an incendiary fire. The court continued, however, and addressed the issue of applying the consumer expectancy definition of "defect" in determining whether the products were used in a foreseeable manner. The court pointed out that if the plaintiffs prevailed, the defendants would be held liable for failure to design products that would not cause injury to any person in the event of an incendiary fire. No authority was suggested by plaintiffs and the court could find none. The Ohio case law regarding product liability addresses foreseeable uses, not foreseeable disasters.

The court did not suggest that a carpet manufacturer would be sheltered from all liability. In this case, however, the plaintiffs sought to make the defendants "insurers." The court felt that to extend liability to a situation which might occur, but was not part of the ordinary use of the product or reasonably foreseeable as a result of the ordinary use of the product would render the manufacturer an "insurer" of his product and subject him to absolute liability rather than strict liability. The court rejected the idea of making the manufacturer an "insurer," and determined that in this case reasonable minds could conclude that there was no design defect in the carpet or wallcovering produced by the defendant. The court found that an incendiary fire was not a reasonably foreseeable use of the defendant's product. The court said this rationale was similarly dispositive of plaintiffs' negligent design claim.

Finally, the court observed that because of the monumentum of adjudication, the development of products liability concepts over the past fifteen years has been on a case by case basis. Furthermore, they noted that only recently have courts begun to examine the expansion of product liability concepts, and no such examination has yet apparently been made regarding the question of liability where a product performs satisfactorily under conditions for which it was intended but performs unsatisfactorily when confronted with a disaster for which it was not. This court was unwilling to engraft upon the concept of liability for reasonably foreseeable uses and equivalent liability for possibly foreseeable disasters. It held that the failure of a product to perform under disastrous conditions which were not the intended nor reasonably foreseeable uses of the product did not render an otherwise nondefective product defective under Section 402(A).

*Id.* The consumer expectancy test is designed to reflect the commercial reality that implicit in a product's presence on the market is a representation that it will safely do the jobs for which it was built.

*545 F. Supp. 969 (S.D. Ohio 1982).*

*Strimber v. American Chain and Cable Co., 516 F. 2d 781 (6th Cir. 1975).*

*Gossett v. Chrysler Corp., 359 F.2d 84 (6th Cir. 1966).*

*545 F. Supp. 969 (S.D. Ohio 1982).*
D. Landlord-Tenant Relations

*Shroades v. Rental Homes, Inc.* was a significant decision in the area of landlord and tenant relations. Reversing *Thrash v. Hill,* decided fifteen months earlier, the court broadened the scope of a landlord's liability for personal injuries sustained by a tenant due to the failure of the landlord to maintain his rental property in a fit and habitable condition.

The *Thrash* decision held that the Ohio Landlord-Tenant Act did not abrogate the common law rule that a landlord was not subject to tort liability for injuries sustained by a tenant unless the landlord had either possession or control of the area where the injuries were sustained. The 4-3 decision in *Thrash* was short-lived, however.

*Shroades,* by the same margin of 4-3, held that violation by a landlord of the duties imposed under the Landlord-Tenant Act, constituted negligence per se. The court found that the remedies provided by the Act are cumulative, "... intend[ing] to be preventive and supplemental to other remedial measures." Holding that violation of statutory duties by a landlord is negligence per se does not mean that a claim is established. An injured tenant must still show both proximate causation and that the landlord had either actual notice of the defect or that the tenant had made "... reasonable, but unsuccessful, attempts to notify the landlord."

The majority in *Shroades* viewed its decision as a move toward joining "... the overwhelming majority of states who have abolished either in whole or in part, the traditional immunity enjoyed by landlords." As to objections by the dissenters regarding the failure to follow *Thrash,* Justice Clifford Brown in his concurring opinion said, "In view of the injustice created by *Thrash,* the lament concerning the erosion of stare decisis should fall on deaf ears."

II. Criminal Law

Three highly controversial areas of criminal law in the Ohio courts were recently settled by decisions of the Ohio Supreme Court. The controversy raged in the areas of suppression of evidence, diminished capacity and the "present and participating" language of Rule 16 of the Ohio Rules of Criminal Procedure.

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68 Ohio St. 2d at 26, 427 N.E.2d at 777 (1981).

*Id.* at 25, 427 N.E.2d at 777.

*Id.* at 27, 427 N.E.2d at 788.

*Id.* at 26, 427 N.E.2d at 777.

*Id.* at 29, 427 N.E.2d at 780.
A. Tape Recorded Telephone Conversations

The issue of whether the Federal Constitution requires the suppression of evidence obtained by the warrantless recording of a telephone conversation between a consenting police informant and non-consenting defendant has been addressed and settled by the United States Supreme Court.\footnote{United States v. White, 401 U.S. 745 (1971).}

If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.\footnote{Id. at 751.}

Justice White's words formed the basis of the plurality opinion of the United States Supreme Court in \textit{United States v. White}. That holding was subsequently ratified by a majority of that Court in \textit{United States v. Caceres}.\footnote{440 U.S. 741 (1979).}

Since \textit{White}, many state supreme courts have found it necessary to consider whether state law requires the suppression of evidence obtained by the warrantless recording of a telephone conversation between a consenting police informant and a non-consenting defendant. The results have varied, with some state supreme courts following the lead of \textit{White},\footnote{See, e.g., Blackburn v. State, 290 S.E.2d 22 (W.Va. 1982).} and others interpreting their individual state constitutions as imposing greater restrictions on police procedure, thereby requiring a warrant.\footnote{See, e.g., People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975); \textit{cert. denied} 423 U.S. 878 (1975).}

In \textit{State v. Geraldo} the Supreme Court of Ohio found it necessary to analyze Ohio's Constitution, statutes, and administrative laws to determine whether any or all of them required the suppression of evidence obtained against a defendant during his "bugged" telephone conversation with a consenting police informer.\footnote{68 Ohio St. 2d 120, 429 N.E.2d 141 (1981); \textit{cert. denied}, 456 U.S. 962 (1982).} In \textit{Geraldo}, the defendant, Samuel Geraldo, received a phone call from one Hugh Thom, who was acting as a police informant. The entire conversation was tape recorded by an audio pickup device that a police sergeant had attached to the phone used by Thom.\footnote{Id. at 125, 429 N.E.2d at 143.} It was undisputed that Mr. Thom voluntarily consented to the recording, that the defendant was unaware that the conversation was being recorded, and that no search warrant had been obtained prior to the recording.\footnote{Id. at 120, 429 N.E.2d at 142.} A grand jury returned a multiple count indictment against Geraldo. Defense counsel's motion to suppress the statements secured through the electronic surveillance was granted. However, a split court
of appeals reversed the trial court's decision and denied the motion to suppress the evidence. 62

On appeal appellant contended that "inasmuch as the privacy rights guaranteed by the Fourth Amendment are but a subset of those liberty interests protected by the Due Process Clause of the Fourteenth Amendment, it is entirely appropriate, and indeed necessary, for a court to look to state law to determine the scope of constitutionally protected Fourth Amendment interests..." 63 The Ohio Supreme Court rejected appellant's "elaborate Fourth Amendment theory," 64 holding that "[n]either the federal constitution nor state law requires the suppression of evidence obtained by the warrantless recording of a telephone conversation between a consenting police informant and a non-consenting defendant." 65

Section 14 of Article I of the Ohio Constitution, which is virtually identical to the Fourth Amendment, provides:

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized. 66

The court considered whether the above section of Ohio's Constitution should be interpreted as requiring a more stringent standard of reasonableness than is required by the corresponding federal constitutional standards. While recognizing that a state is free as a matter of its own law to impose greater restrictions on police activity than the Supreme Court holds to be necessary, 67 the Ohio Supreme Court was "disinclined to impose greater restrictions in the absence of explicit state constitutional guarantees protecting against invasions of privacy that clearly transcend the Fourth Amendment." 68 (emphasis added.) The Geraldo court recognized that two states had found that a warrant requirement did exist based on explicit provisions in their state constitutions. 69 However, stated the Geraldo court, "[i]t is our opinion that the reach of Section 14, Article I, of the Ohio Constitution with respect to the warrantless monitoring of a consenting informant's telephone conversation is coextensive with that of the Fourth Amendment to the United States Constitution." 70 Geraldo, then, adhered to the rule expressed in White.

62Id. at 121, 429 N.E.2d at 143.
63Id. at 123-24, 429 N.E.2d at 144.
64Id. at 124, 429 N.E.2d at 145.
65Id. at 120, 429 N.E.2d at 142.
66Ohio Const. art. 1, § 14.
6868 Ohio St. 2d at 125, 429 N.E.2d at 145.
7068 Ohio St. 2d at 126, 429 N.E.2d at 146.
Geraldo also addressed appellant's contention that Ohio statutory law "expressly and categorically prohibits telephone wiretapping." Ohio Revised Code Section 4931.28 states:

No person shall willfully and maliciously cut, break, tap, or make connection with a telegraph or telephone wire or read or copy in an unauthorized manner, a telegraphic message or communication from or upon a telegraph or telephone line, wire, or cable, so cut or tapped, or make unauthorized use thereof, or willfully and maliciously prevent, obstruct, or delay the sending, conveyance, or delivery of an authorized telegraphic message or communication by or through a line, cable, or wire, under the control of a telegraph or telephone company.

Appellant argued that the General Assembly has twice rejected an amendment to Ohio Revised Code Section 4931.28 that would have added a consent exception. Geraldo rejected this argument saying "[i]t is clear that the General Assembly chose not to enact a consent exception to R.C. 4931.28. It is also clear that the General Assembly chose not to enact a statutory exclusionary rule that would come into play when evidence is obtained in violation of R.C. 4931.28." Geraldo followed the lead of recent Ohio Supreme Court cases holding that "the exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights" and thereby "refuse[d] to constitutionalize" R.C. 4931.28.

Addressing appellant's final argument, Geraldo stated that the Ohio Bell Telephone Company General Exchange Tariff "creates no constitutional right to a 'beep tone'."

Geraldo has been cited with approval by the West Virginia Supreme Court in Blackburn v. State.

B. Diminished Capacity

The doctrine of diminished capacity originated in England as a covert judicial response to perceived inequities in the criminal law, that is, to reduce the punishment of the "partially insane." In the United States, California

Id.

Ohio Rev. Code § 4931.28.


68 Ohio St. 2d at 128, 429 N.E.2d at 147.

Id. at 129, 429 N.E.2d at 147. See, Kettering v. Hollen, 64 Ohio St. 2d 232, 416 N.E.2d 598 (1980); State v. Unger, 67 Ohio St. 2d 65, 423 N.E.2d 1078 (1981).

68 Ohio St. 2d at 129, 429 N.E.2d at 148.

Ohio Bell Tel. Co. Gen. Exch. Tariff, Section 20, Order No. 75-725-TP-ATA, subsection II(B)(3)(a) requires "a distinctive signal that is repeated at intervals of approximately 15 seconds when recording equipment is in use."

68 Ohio St. 2d at 129, 429 N.E.2d at 148.


H.M. Advocate v. Dingwall, 466 J.C. 830 (1867).
became the first advocate of the diminished capacity doctrine. That state's definition of diminished capacity was set out in *United States v. Brawner*:81

*[E]xpert testimony as to a defendant's abnormal mental condition may be received and considered, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime — even though he was aware that his act was wrongful and was able to control it, and hence was not entitled to complete exoneration.*82

The diminished capacity doctrine, then, offers a criminal defendant an alternative to the all-or-nothing insanity plea. Instead of being found "not guilty by reason of insanity" and sentenced to an undetermined term in a mental institution, the criminal defendant who pleads guilty but requests diminished capacity to negate the elements of specific intent in his crime may find himself in prison — but for a definite term, and one often much less than that associated with a straight guilty plea.

In *State v. Jackson*83 the Supreme Court of Ohio rejected the diminished capacity doctrine. In *Jackson* the defendant was indicted on three counts of first degree murder. Having waived his right to a jury trial, defendant pled not guilty and not guilty by reason of insanity to a panel of three judges. Defendant was found guilty of all three counts.84 On appeal one of appellant's assignments of error was the court's failure to consider "the proposition of diminished mental capacity because of an impairment of reason."85 The Ohio Supreme Court stated that "'[a] complete search of the record in no way reveals any merit to this [the diminished capacity] contention. . . . Such evidence [of diminished capacity] was not before the trial court, and we find no merit in this proposition.'"86

In *State v. Wilcox*87 the diminished capacity issue was again raised in the Supreme Court of Ohio. Wilcox and one Jessee Custom shot a man to death in the course of a burglary. While in jail Wilcox made a statement (unchallenged at trial and on appeal) admitting his involvement but implicating Custom as the triggerman. Wilcox was indicted for aggravated murder and burglary and referred to the court psychiatric clinic for a determination as to whether he was competent to stand trial. He was found to be "'borderline retarded, schizophrenic, dyslexic, and suffering from an organic brain syndrome.'"88 Based on the psychiatric report, the court ruled that Wilcox was incompetent to stand

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82*Id.* at 998.
84*Id.* at 204, 291 N.E.2d at 432.
85*Id.* at 206, 291 N.E.2d at 433.
86*Id.*
87770 Ohio St. 2d 182, 436 N.E.2d 523 (1982).
88*Id.*
trial and committed him to a state hospital for treatment. Seven months later another hearing was held by the court and Wilcox was determined competent to stand trial. At a jury trial Wilcox entered a plea of not guilty by reason of insanity and introduced psychiatric testimony with respect to the plea. "The trial court refused to permit additional testimony or charge the jury on the question of whether defendant's supposed diminished capacity precluded him from forming the specific intent to commit the offenses of aggravated murder and burglary." The jury rejected Wilcox's insanity defense and found him guilty on both counts. The court of appeals, in a split decision, reversed the holding of the trial court stating that "diminished capacity is a valid defense as tending to negate the elements of specific intent in crimes."9

The supreme court held that "the partial defense of diminished capacity is not recognized in Ohio and a defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime."91

The court in Wilcox seemed somewhat baffled that neither petitioner nor respondent cited to State v. Jackson in their briefs, since Jackson "explicitly, albeit cursorily"92 rejected the diminished capacity defense. Therefore, Wilcox "endeavored . . . to spell out . . . (its) . . . objections to the diminished capacity doctrine defense and thereby overcome whatever confusion . . . (its) . . . nearly invisible treatment of diminished capacity in Jackson has engendered among bench and bar."93

Wilcox's rejection of the diminished capacity doctrine for Ohio was based upon "review of the history and policies underlying the diminished capacity concept and the experience of jurisdictions that have attempted to apply the doctrine."94 The most frequently purported justifications for the diminished capacity doctrine are:

1. It ameliorates defects in a jurisdiction's insanity test criteria;
2. It permits the jury to avoid imposing the death sentence on mentally disabled killers who are criminally responsible for their acts;
3. It permits the jury to make more accurate individualized culpability judgments;
4. It has a certain logical appeal when juxtaposed against the settled rule that evidence of voluntary intoxication may be considered in determin-

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9Id. at 183, 436 N.E.2d at 523.
90Id. at 184, 436 N.E.2d at 524.
91Id. at 199, 436 N.E.2d at 533.
92Id. at 184, 436 N.E.2d at 524.
93Id.
94Id. at 185, 436 N.E.2d at 525.
ing whether an accused acted with the requisite specific intent. Wilcox addressed and rejected each of the above "justifications."

Addressing the first justification, Wilcox noted that "the ameliorative argument loses much of its force in jurisdictions that have abandoned or expanded upon the narrow M'Naghten Standard." Known as the "right from wrong" test for insanity, M'Naghten held that:

To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Wilcox noted that "it is no coincidence that California, the pioneer of diminished capacity, for many years adhered to a strict M'Naghten standard." The test for insanity in Ohio, however, is "considerably more flexible than the M'Naghten rule":

One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of law.

According to Wilcox, the trial court record, replete with expert testimony going to the question of appellee's sanity, illustrates the "relative liberality of Ohio's insanity rule." Satisfied that Ohio's test for criminal responsibility "adequately safeguards the rights of the insane," the Wilcox Court was "disinclined to adopt an alternative defense that could swallow up the insanity defense and its attendant commitment provisions."

Wilcox "quickly disposed of" the second argument, that diminished capacity alleviates the harshness of the death penalty. Wilcox himself faced no death penalty threat because, at the time, Ohio's capital punishment statute had been struck down. Also, Ohio's recently enacted death penalty statute makes mental capacity a formal mitigating factor at the punishment stage in capital cases in Ohio. "Thus, the ameliorative purpose served by the diminish-

9 Id. at 186; State v. Fox, 68 Ohio St. 2d 53, 428 N.E.2d 410 (1981).
9070 Ohio St. 2d at 188, 436 N.E.2d at 526.
91 Id. at 187, 436 N.E.2d at 526.
92 Id. at 188, 436 N.E.2d at 527.
93 Id.
9570 Ohio St. 2d at 188, 436 N.E.2d at 527.
96 Id. at 189, 436 N.E.2d at 527.
97 Id.
98 Id. at 190, 436 N.E.2d at 527.
100 Ohio REV. CODE ANN. § 2929.03(D)(1) (Page 1981).
ed capacity defense in capital cases has largely been accomplished by other means."

Addressing the third issue of whether the diminished capacity doctrine permits the jury to make more accurate individualized culpability judgments, Wilcox noted the all-or-nothing complications of the legal insanity doctrine. "Legal insanity does not square with psychiatric concepts of insanity. In law a defendant is either sane and responsible or insane and not responsible. In reality, however, neither normal persons or mentally disturbed persons are ever all or nothing." Wilcox determines that the all-or-nothing determination is, however, within the jury's realm. The jury is able to distinguish between the two distinct groups of sane or insane. However, the diminished capacity doctrine necessitates that the jury go farther. The jury must focus on the sane group and attempt to identify blurred lines of responsibility within that group. "This line drawing to determine responsibility is beyond the realm of psychiatric explanation and certainly beyond the jury's understanding."

Finally, Wilcox conceded to "the superficial attractiveness of the intoxication-diminished capacity analogy."

However, "exposure to the effects of age and intoxicants upon state of mind is a part of common human experience which fact finders can understand and apply. Indeed, the would apply them even if the state did not tell them they could. The esoterics of psychiatry are not within the ordinary ken."

The Wilcox Court found that:

The California experience with diminished capacity does not inspire imitation. The California courts struggled to evolve a coherent framework but the difficulties inherent in the doctrine, e.g., its subjectivity, its non-uniform and exotic terminology, its open-endedness, its quixotic results in particular cases, were not overcome, and therefore consistent and predictable application of the diminished capacity concept in California became an elusive and unachieved goal.

California was finally forced to abolish the diminished capacity defense by statute. Thus, diminished capacity has been repudiated, not only by Ohio and many other states, but by the very jurisdiction that formerly gave the greatest credence to the doctrine.

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107 Ohio St. 2d at 190, 436 N.E.2d at 528.


109 Ohio St. 2d at 193, 436 N.E.2d at 530.

110 Id.

111 Id. at 194, 436 N.E.2d at 530, quoting Wahrlich v. Arizona, 479 F.2d 1137, 1138 (9th Cir. 1973), cert. denied, 414 U.S. 1011 (1973).

112 Ohio St. 2d at 195, 436 N.E.2d at 530.

C. In Camera Inspections: Right to Counsel

Ohio Criminal Rule of Procedure 16 provides:

Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and prior statement.\textsuperscript{114}

The words "present and participating," as used in the rule, have been the subject of much controversy among many Ohio trial and appellate courts. As interpreted by a number of appellate courts,\textsuperscript{115} "present and participating" did not require the physical presence of defense counsel at the in camera inspection. Rather, it required that defense counsel merely be available for consultation with the trial court during the in camera inspection of the witness' statement. However, when a Cuyahoga County appellate decision interpreted the "present and participating" language of Crim. R. 16 to require the actual physical presence of defense counsel at the in camera inspection,\textsuperscript{116} the Supreme Court of Ohio in State v. Daniels\textsuperscript{117} found it necessary to make a final determination of the ambiguous Crim. R. 16 issue.

In Daniels the Cuyahoga County grand jury returned a multiple count indictment against James Daniels and his co-defendant for events which had transpired on August 19 and 20, 1979 at the home of one Gregory Wilson.\textsuperscript{118} At trial Wilson was called as a witness for the prosecution. During Wilson's testimony, defense counsel discovered for the first time that Wilson had made a statement to the police on August 21, 1979 concerning his observation and recollection of the events which had precipitated the indictment of Daniels.\textsuperscript{119} After Wilson's testimony defense counsel made a timely motion pursuant to Crim. R. 16 for an in camera inspection of Wilson's out of court statement with the prosecuting attorney and defense counsel "present and participating."\textsuperscript{120} The trial court, however, did not make the statement available to defense counsel. Instead, the trial court alone reviewed the statement and overruled defense counsel's motion for an in camera inspection, determining that "the written statement has no inconsistency with the testimony of the witness."\textsuperscript{121}

\textsuperscript{114}Ohio R. Crim. P. 16(B)(1)(g).
\textsuperscript{116}State v. Daniels, 1 Ohio St. 3d 69, 70, 437 N.E.2d 1186, 1187 (1982).
\textsuperscript{117}1 Ohio St. 3d 69, 437 N.E.2d 1186 (1982).
\textsuperscript{118}Id. at 69, 437 N.E.2d at 1187.
\textsuperscript{119}Id.
\textsuperscript{120}Id.
\textsuperscript{121}Id.
Daniels was subsequently found guilty of seven of the eight counts of the indictment. The court of appeals affirmed the trial court’s denial of appellant’s motion for an in camera inspection, evidently feeling constrained by precedent.

The supreme court reversed the decision by the court of appeals, holding that:

[O]nce the trial court independently determines that a producible out-of-court witness statement exists, attorneys for all parties, upon the granting of a defendant’s timely motion for an in camera inspection of the statement, must be given the opportunity to: (1) inspect the statement personally; and (2) call to the court’s attention any perceived inconsistencies between the testimony of the witness and the prior statement.

The Daniels court based its interpretation of the “present and participating” language of Crim. R.16 upon the “straight-forward and unambiguous” definition of “participate” set out in Webster’s Third International Dictionary. “Participate” means “to take part in something (as an enterprise or activity) usually in common with others.” Participation usually connotes the concept of “being engaged in an activity” rather than “mere presence.” Daniels found that the trial court’s simply permitting the attorneys to be passively present and available for consultation during the in camera inspection constituted reversible error. The adoption of the “physical presence” procedure “will ensure meaningful participation by all attorneys in reviewing the statement and will assist the trial court in evaluating whether there are inconsistencies between the testimony of such witness and the prior statement.”

A lengthy dissent by Justice Krupansky objected to the majority’s “defeating the intent of the rule by spot-lighting one phrase out of the context” (referring to the “present and participating” language). Justice Krupansky looked to different language in the rule:

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney. If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney. . . .

Justice Krupansky maintains that Crim. R.16, taken in its entirety, gives the court the dominant role in the in camera inspection. The “present and par-

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123Id.
124Id. at 70, 437 N.E.2d at 1187.
125Id. at 69, 437 N.E.2d at 1187.
126Id. at 70, 437 N.E.2d at 1188.
127Id. quoting Martin v. Mutual Life Ins. Co. of New York, 189 Ark. 291, 71 S.W.2d 694 (1934).
128Id. at 71, 437 N.E.2d at 1188.
129Id.
130Id. at 71, 437 N.E.2d at 1189.
131OHIo R. CRIM. P. 16(B)(1)(g).
1321 Ohio St. 3d at 73, 437 N.E.2d at 1190.
"Participating" language merely allows the attorney to "aid and assist" the court when called upon to do so. Nowhere does the rule even hint that the defense attorney should make the determination as to whether there are inconsistencies. Justice Krupansky seems to be inferring that defense counsel, in his motion for the in camera inspection, was demanding more than was in fact requested. Defense counsel did not request the right to make the actual "determination" as to whether there were inconsistencies in the out-of-court statement by Wilson. Defense counsel merely requested the right to participate in the in camera inspection. As it was, the trial court did not even allow James Daniels' attorney the opportunity to look at the out-of-court statement. Furthermore, "at no time was defense counsel permitted to participate in this in camera inspection or to use the statement for cross examination or impeachment purposes.'

III. MUNICIPAL LAW

The Ohio Supreme Court took two large steps in the area of municipal law in 1982. The court joined the majority of states and abrogated the doctrine of sovereign immunity for municipal corporations. The court also dispensed with the traditional method of analyzing the Ohio Home Rule Amendment and adopted instead a statewide concern doctrine.

A. Sovereign Immunity

Ohio municipal corporations have, since 1854, had their functions treated as either governmental or proprietary. Proprietary functions were subject to liability, while those functions classified as governmental were shielded from liability under the doctrine of sovereign immunity.

Governmental immunity of municipal corporations has been continued in Ohio despite legislative abrogation of immunity for the state. The doctrine has been criticized as confused, illogical, and unfair, having no place

132 Id. at 72, 437 N.E.2d at 1190.
133 Id. at 73, 437 N.E.2d at 1190.
134 Id. at 69, 437 N.E.2d at 1191.
135 Dayton v. Pease, 4 Ohio St. 80 (1854). Prior to Dayton, Ohio seems to have recognized the liability of municipalities without distinction of function. Hack v. City of Salem, 174 Ohio St. 383, 189 N.E.2d 857 (1963 Gibson, J. concurring).
136 There was a period of three years where the governmental/proprietary distinction was abrogated. Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919). Fowler was overruled by Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922), and the distinction was re-instated.
137 OHIO REV. CODE ANN. § 2743.01, 02 (Baldwin 1977), interpreted as not waiving the immunity of political subdivisions in Haas v. Hayslip, 51 Ohio St. 2d 135, 364 N.E.2d 1376 (1977). See also Wilkins, Tort Claims Against the State: Comparative and Categorical Analyses of the Ohio Court of Claims Act and Interpretations of the Act in Tort Litigations Against the State, 28 CLEV. ST. L. REV. 149, 154 (1979): "Thus, to the extent that political subdivisions had obtained governmental immunity prior to the passage of the act, that immunity is retained." Id.
in a democratic society. It is not the purpose of this note to trace the doctrine's history in Ohio (that has been done well elsewhere), to make a comparison with the policies of other states, or to examine the distinctions made in Ohio courts between governmental and proprietary functions. Rather, this note will examine the case of Haverlack v. Portage Homes, Inc. and the status of the doctrine of governmental immunity of municipal corporations following that decision.

The Haverlack decision may have abrogated the governmental/proprietary distinction which has existed since 1922 in Ohio and was reaffirmed by the Ohio Supreme Court as recently as 1981.

The cause of action in Haverlack was based upon negligent operation of a sewage treatment plant and sought both damages and an injunction for the nuisance created by the plant's operation. The properties of the plaintiffs, Frank and Harriet Haverlack and Robert and Virginia Richter, were within two hundred and four hundred feet of the plant respectively. The plaintiffs claimed injury from odor and noise. Suit was filed after construction of the second expansion of the plant, but before it began operations. The construction was done by Portage Homes, Inc., and the plant was operated by the City of Aurora for the benefit of a residential suburb, Walden. The suit named Portage Homes Inc., Manuel Barenholtz, Walden Co. Ltd. (collectively "Walden") and the City of Aurora as defendants.

Both defendants moved for summary judgment based on failure to exhaust administrative remedies before the Environmental Protection Agency (E.P.A.); Aurora also interposed the defense of sovereign immunity. The trial court

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142 Eversole v. City of Columbus, 169 Ohio St. 205, 15 N.E.2d 515 (1959); Broughton v. City of Cleveland, 167 Ohio St. 29, 146 N.E.2d 301 (1957); City of Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210, 52 ALR 518 (1927). In Eversole, Judge Zimmerman state, "The question of whether in a specific instance a municipality is engaged in a governmental or a proprietary undertaking is sometimes difficult of determination and the lines drawn in differentiating between those activities are not always clear or satisfactory." Id. at 207, 15 N.E.2d at 517; W. Prosser, Handbook of the Law of Torts, § 131 at p. 982 states "Obviously this is an area in which the law has sought in vain for some reasonable and logical compromise and has ended with a pile of jackstraws." See also 21 O. Jur. 3d, Counties §§ 649-51.

143 Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982).

144 Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922).

granted both motions; the court of appeals affirmed the granting of summary judgment for the city but modified judgments to dismissal of complaints against Walden. Plaintiffs moved for the supreme court to certify the record.

The supreme court in an opinion written by Chief Justice Celebrezze, joined by Justices W. Brown, Sweeney, and C. Brown, reversed the judgments of the court of appeals and remanded. The court ruled that plaintiffs, appellants herein, did not need to seek and exhaust administrative remedies before the Ohio E.P.A. before filing a civil action for damages.146

Part II of the opinion addressed the issue of sovereign immunity and its validity as a bar to an action against a municipality, in this instance, the City of Aurora. The court gave a brief overview of sovereign immunity and its application to governmental, but not proprietary functions. It found that the distinction has not been satisfactory: "Attempts to classify municipal functions into these two categories have caused confusion and unpredictability in the law."147 Citing Hack v. City of Salem148 and Eversole v. City of Columbus149 the opinion stated, "Thus, this 'bramble bush' . . . deserves clarification with the formulation of a definite rule of law."150

The court then listed several variables which were to be taken into account in view of the unjust results of the doctrine.151 First, many innocent victims of negligence by a municipality have been barred from recovery.152 Secondly, the municipality is better able to bear the costs of harm as compared to the victim.153 Thirdly, the municipality should have the same duty of care as any

1462 Ohio St. 3d at 28, 442 N.E.2d at 751. The court found that the issue was readily determined by the language of the statute, Ohio Rev. Code § 3704.09, which reads in part, "Nothing in Chapter 3704 of the Revised Code shall be construed to abridge, limit, or otherwise impair the right of any person to damages or other relief on account of injury to persons or property and to maintain any action or other appropriate proceedings therefor."

1472 Ohio St. 3d at 29, 442 N.E.2d at 752.


149Eversole, 169 Ohio St. 205, 158 N.E.2d 515 (1959). P. 208, Justice Zimmerman states; "We are frank to confess that it is impossible to reconcile all the decisions of this court dealing with the subject of governmental and proprietary functions in relation to a municipality." Id. at 208, 158 N.E.2d at 518.

1502 Ohio St. 3d at 29, 442 N.E.2d at 752 (1982).

151Id. at 29, 158 N.E.2d at 752.

152Note that Ohio has statutorily waived the governmental immunity of municipalities in certain areas: Ohio Rev. Code Ann. § 723.01, imposes a duty to keep public grounds and highways "open, in repair and free from nuisance" and § 701.02 prohibits negligent operation of vehicles by agents of the city (with exceptions for police and firemen in the exercise of their duties). Ohio Rev. Code Ann. §§ 701.02 and 723.01 (Baldwin 1977).

business. Finally, the municipality is authorized to obtain liability insurance.

The court then states that, "Because Ohio's doctrine of sovereign immunity for municipalities was judicially created, it can be judicially abolished." As for any problems created by the doctrine of stare decisis, the court said that it alone was "... not a sufficient reason to retain the doctrine which serves no purpose and produces such harsh results." Pointing out that only six other states still hold to the traditional common law immunity doctrines, the court said, "Therefore, we join with the other states in abrogating the doctrine."

This general statement, which apparently abrogates the defense of sovereign immunity for municipal corporations regardless of whether the function might be denominated as governmental or proprietary, must be squared with the specific and limiting language of the syllabus which states in paragraph two, "[T]he defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in an action for damages alleged to be caused by the negligent operation of a sewage treatment plant."

In his dissent, Justice Locher, joined by Justices Holmes and Krupansky,

154 See Fowler v. City of Cleveland, 100 Ohio St. 158, 164, 126 N.E. 72, 74 (1919). "A modern city may be said to be a great public service corporation, and no reason is apparent why, in the respects in which it entrusts purely ministerial duties to agents and employees, it should not be subject to the liabilities of such persons and companies." Id. See also 18 E. McQuillen, THE LAW OF MUNICIPAL CORPORATIONS, § 53.01a. "As a general rule, the courts endeavor to hold municipalities to the same standard of right and wrong that the law imposes on individuals." Id. at 102.

155 OHIO REV. CODE ANN., § 9.83 (Baldwin 1977) which grants any political subdivision authority to obtain liability insurance for its agents in the use of vehicles in the course of business. J. CROWLEY, OHIO MUNICIPAL LAW, § 4148 (2d ed. 1975). "However, independent of any affirmative act of the legislature, it would appear that under its home rule powers an Ohio municipality would have the power to purchase public liability insurance if the local legislative body were to sanction such action." Id. at 465.

156 2 Ohio St. 3d at 30, 442 N.E.2d at 752; Accord, Schenkolewski v. Metroparks System, 67 Ohio St. 2d 31, 38, 426 N.E.2d 784, 787: "Thus, it is within our constitutional authority to modify or abrogate common law doctrines of governmental or sovereign immunity. To the extent that prior decisions of this court imply or hold that the immunity doctrine is not subject to judicial modification or abrogation, those decisions are overruled."; compare Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), which states: Although the doctrine of governmental immunity was originally judicially created, it is not now subject to judicial re-examination. When the people of Ohio, in 1912, adopted Section 16 of Article I as part of the organic law of this state, they foreclosed to this or any other court the authority to examine the "soundness" or "justice" of the concept of governmental immunity. The people of Ohio placed that policy decision in the hands of the General Assembly. Id. at 147, 285 N.E.2d at 745.

157 2 Ohio St. 3d at 30, 442 N.E.2d at 752. For further comments on stare decisis see Shroades v. Rental Homes, 68 Ohio St. 2d 20, 427 N.E.2d 774 (1980). "[T]he lament concerning the erosion of stare decisis should fall on deaf ears. Stare decisis is only a maxim of the law, and not a 'legal principle'." Id. at 26, 427 N.E.2d at 780 (C. Brown, J. concurring).

158 2 Ohio St. 3d at 30, 442 N.E.2d at 752. The court had earlier noted that seven states (including Ohio) "... adhered to the traditional common law immunity doctrines as to local governmental units." Schenkolewski v. Metroparks System, 67 Ohio St. 2d 31, 38, 426 N.E.2d 784, 788 (1981). That figure had been derived by updating a survey in Harley and Wasinger, GOVERNMENTAL IMMUNITY: DESPOTIC MANTEL OR CREATURE OF NECESSITY, 16 WASHBURN L.J. 12, 34 (1976). However, the Schenkolewski decision was based upon the traditional governmental/proprietary dichotomy. (See paragraphs two and three of the Syllabus by the court.)

159 2 Ohio St. 3d at 30, 442 N.E.2d at 753.

160 Id. at 30, 442 N.E.2d at 753.
noted the discrepancy:

Ultimately, it will be necessary for this court to reconcile the apparently narrow wording of the syllabus with the broad language of the opinion. Although the syllabus seems limited to "the negligent operation of a sewage treatment plant," the opinion speaks broadly: "... [W]e join with the other states in abrogating the doctrine." 161

It should be noted that the maintenance of a nuisance, here the operation of a sewage treatment plant, has often resulted in liability irrespective of the government/proprietary dichotomy. 162 Such has not been the case in Ohio. 163 It is also necessary to note that Justice Locher's identification of the discrepancy between the syllabus and the opinion bespeaks a situation which will need further explanation. 164

Justice Locher's dissent as to the court's abrogation of sovereign immunity marshals the many prior decisions of the court in which the governmental/proprietary distinction was followed. 165 He states that the governmental distinction should be preserved since "... departure from this analytical framework creates, rather than dispels, 'confusion and unpredictability' and may ultimately expose many political subdivisions to liability of unimagined proportions." 166

161 Id. at 32, 442 N.E.2d at 753 (Lochner, J. dissenting).
162 W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 131 at 982-83, "One anomaly is the generally accepted view that the municipality is liable if it can be found to have created or maintained a nuisance, even though it be in the course of an otherwise 'governmental' function."; 18 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 53.59d, "A municipality may not itself create and maintain a nuisance which results in an injury to person, or inflicts or involves damage to private property, without subjecting itself to civil liability for its wrongful and unlawful act." Id. at 268; 1A C. ANTEAU, MUNICIPAL CORPORATION LAW, § 11.08, "Although a few cases have limited nuisance recoveries against local governments to property damages, these decisions are without justification and the great weight of authority acknowledges the propriety of recovery on nuisance theory for personal injuries." Id. at 11-27, 28.
163 Unless specifically abrogated by statute (e.g., OHIO REV. CODE ANN. § 723.01 (Baldwin 1977)), municipalities in Ohio have had immunity from a suit in nuisance while acting in a governmental capacity. McKee v. City of Akron, 176 Ohio St. 282, 199 N.E.2d 592 (1964); Osborn v. City of Akron, 171 Ohio St. 361, 171 N.E.2d 492 (1960); Crisafi v. City of Cleveland, 169 Ohio St. 137, 158 N.E.2d 379 (1959); C. F. Gaines v. Village of Wyoming, 77 Ohio Ap. 373; 66 N.E.2d 162 (1946) where a distinction was made as to liability for an "absolute" as compared to a "qualified" nuisance. See also J. CROWLEY, OHIO MUNICIPAL LAW, §§ 41.09-13 (2d ed. 1975, Cum. Supp. 1981); G. VAUBEL, MUNICIPAL CORPORATIONS OHIO MATERIAL, 183-85 (9th ed. 1974).
164 Ohio's syllabus rule can be found in paragraph one of the syllabus in Williamson Heater Co. v. Radich, 128 Ohio St. 124, 190 N.E. 403 (1934). This was quoted with approval by Justice Guernsey in Hack v. City of Salem, 174 Ohio St. 383, 189 N.E.2d 857 (1963), quoting Williamson Heater Co., "It is of course true that the syllabus of the Supreme Court of Ohio states the law of Ohio. However, that pronouncement must be interpreted with reference to the facts upon which it is predicated and the questions presented to and considered by the court. It cannot be construed as being any broader than those facts warrant. When obiter creeps into a syllabus it must be so recognized and so considered. (Emphasis in original)." Id. at 385, 189 N.E.2d at 859. See also New York Central R. Co. v. Delich, 252 F.2d 522, 525 (6th Cir. 1958); State v. Nickels, 159 Ohio St. 353, 358, 112 N.E.2d 531,536.
165 2 Ohio St. 3d at 31, 442 N.E.2d at 753.
The objections that abolishing immunity would create a flood of litigation or that it would financially cripple local governments are insufficient to require a negative answer .... In addition, if the burden of damages must be imposed, it is much fairer that it be imposed on the municipality than
Justice Locher also notes that the majority has reversed the role of legislation as it impacts governmental immunity. Prior to this in Haas v. Hayslip, the court viewed governmental immunity as a shield which could be pierced only by legislative mandate. Now the shield has been stripped away and can only be reconstructed by legislative mandate. If the case does stand either as a blanket abrogation of governmental immunity or merely an indication that the court is opposed to governmental immunity, it would seem logical to assume that pressure will be placed upon the General Assembly for special legislation shielding political subdivisions from liability in certain areas.

The reach of this decision has yet to be determined. It was a four to three decision; and one of the dissenter has been replaced. The commitment of Chief Justice Celebrezze to the decision was demonstrated by his concurring opinion in a case decided one week following Haverlack, Doughtery v. Torrence. The case involved construction of Revised Code Section 701.02 and its application as to volunteer firemen. Chief Justice Celebrezze’s concurrence notes that the majority opinion did not mention Haverlack, in which “sovereign immunity for a municipal corporation, unless provided by statute, was abolished. Consequently, the liability of a municipal corporation, absent a statute, now depends on the merits instead of the often difficult and inconsistent classification of municipal functions as governmental or proprietary to determine liability.” It is clear that the Chief Justice views the Haverlack decision as a broader abrogation of governmental immunity than that which is stated in the syllabus of the case.

The court has clearly changed its course from the position stated by Judge Zimmerman in Broughton v. City of Cleveland: “Perhaps we are behind the times, but, in the absence of legislation by the General Assembly, this court is not yet ready to abandon the position adopted and retained for so many... on the victim.


151 Ohio St. 2d at 136, 364 N.E.2d at 1377. “Except as otherwise provided by statute, municipal corporations are immune from liability in the performance of their governmental functions.” Id.

142 Ohio St. 3d at 32, 442 N.E.2d at 753 (quoting the syllabus paragraph two): “The defense of sovereign immunity is not available in the absence of a statute providing immunity . . . .” Id.

16W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 131 at 986.


11Justice Krupansky was replaced in the November, 1982 election by Justice Celebrezze.

12Doughtery v. Torrence, 2 Ohio St. 3d 69, 442 N.E.2d 1295 (1982).

13Id. at 71, 442 N.E.2d at 1297 (1982). The Chief Justice went on to say, “Because there is a statute providing immunity, this decision is consistent with Haverlack.”

14167 Ohio St. 29, 146 N.E.2d 301 (1957).
The legislature made a step in the direction of remedying the defect of governmental immunity with the Court of Claims Act.\textsuperscript{7} The Act did not waive immunity of political subdivisions, however.\textsuperscript{17} It remained for the Ohio Supreme Court to look past stare decisis to allow individuals to seek redress for injuries from entities which had previously been unreachable. This had been done before in 1919\textsuperscript{178} only to be overruled three years later in 1922.\textsuperscript{179}

In his dissent in \textit{Haas}, Justice William Brown said, "Because the judicially-created doctrine of sovereign immunity for municipalities is a legal anachronism which denies recovery to injured individuals without regard to the municipality's culpability or the individual's need for compensation, I believe this court should join the ranks of the majority of American jurisdictions and abolish it."\textsuperscript{180} It appears that the court has decided to abrogate the doctrine of governmental immunity for municipalities, but the scope and durability of that decision are yet to be determined.

\textbf{B. Home Rule}

In 1982 the Ohio Supreme Court elevated to the status of a "fundamental principle of Ohio law" a concept of state authority so elastic that it could pose a threat to local government home rule powers.\textsuperscript{181}

The court also recommitted itself to a relatively new definition of the term "local" for purposes of describing local government authority, a definition which is so restrictive that it too would pose a threat to local government authority.\textsuperscript{182}

Both of these developments came in the 1982 majority opinion of \textit{State ex rel. Evans v. Moore}\textsuperscript{183} written for the court by Chief Justice Frank D.

\textsuperscript{7}Id. at 31, 146 N.E.2d at 303.
\textsuperscript{18}See note 137.
\textsuperscript{19}Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919).
\textsuperscript{17}Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922); 18 E. \textit{MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS}, §§ 53.02 at 106 (3d rev. ed. 1977). "This effort by the courts to 'prune and pare the rule of immunity' as one court has put it, 'rather than to uproot it bodily' and lay it aside as an archaic and outmoded concept, was the result partly of an adherence of the doctrine of stare decisis and partly the belief that any change should come from the legislature." For the source of this belief in Ohio, see Raudabaugh v. State, 96 Ohio St. 512, 118 N.E. 102 (1917), explained in Note, \textit{Claims Against the State of Ohio: Sovereign Immunity, the Sundry Claims Board and the Proposed Courts of Claims}, 35 OHIO ST. L.J. 462, 470 (1974).
\textsuperscript{181}51 Ohio St. 2d at 145, 364 N.E.2d at 1382 (1977).
\textsuperscript{182}State \textit{ex rel. Evans v. Moore}, 69 Ohio St. 2d 88, 89-90, 431 N.E.2d 311, 312 (1982)
\textsuperscript{183}Id. at 90, 431 N.E.2d at 312.
Celebrezze. The case involved an action by the state to compel the City of Upper Arlington to honor state prevailing wage laws in awarding city contracts. The city maintained that as a charter municipality it was not required to comply with such laws, citing as its authority Section 3 of the Home Rule Amendment to the Ohio Constitution.

The court was thus required to construe Section 3, one of the Home Rule Amendment's most important and heavily litigated sections. Section 3 states: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general law."

Instead of construing Section 3 according to conventional methods of analysis, the Chief Justice invoked a sparingly used concept which blurs traditional distinctions and worries home rule proponents, a concept which he termed "the 'statewide concern' doctrine."

According to its conventional method of analyzing Section 3, the court has viewed the section as containing two discrete parts, the first dealing with authority "to exercise all powers of local self government", and the second pertaining to authority "to adopt and enforce . . . such local police, sanitary and other similar regulations as are not in conflict with general laws." The court has also held that the words "not in conflict with general laws" modify the words "local police, sanitary and other similar regulations" in the second part, but do not modify the words "power of local self government" in the first part.

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184 In 1977, Helen W. Evans, Director of the Ohio Department of Industrial Relations, filed an action in the Court of Common Pleas in Franklin County seeking a writ of mandamus to compel Upper Arlington to comply with state prevailing wage laws. The writ was denied, but on appeal the court of appeals reversed, arguing that since Upper Arlington had no charter provision, ordinance or resolution which conflicted with state laws, the state laws should be honored. In response, Upper Arlington adopted Ordinance 75-78 putting it in conflict with state prevailing wage laws. The state then initiated the present action.

185 Ohio Const. amend. XVIII, § 3.

187 Id.

188 Vaubel notes that the concept of "statewide concern" as currently understood did not surface until 17 years after the adoption of the Home Rule Amendment in 1913, despite frequent litigation construing the amendment during those years. There was an upsurge in use of the concept in the 1950's and 1960's, particularly in cases involving state efforts to control municipal police and fire departments, but the concept did not surface again until 1968 in Cleveland Electric Illuminating Co. v. City of Cleveland, 15 Ohio St. 2d 125, 129, 239 N.E.2d 75, 78 (1968). Vaubel, Municipal Home Rule in Ohio (pt. 4), 3 Ohio N.U.L. Rev. 1100, 1107 (1976).

189 Vaubel, supra note 186 at 1113 expresses the opinion that insofar as the term "statewide concern" emphasizes a statewide power approach to the problem of intergovernment power, "it poses a distinct threat to the development of municipal autonomy."

190 Moore, 69 Ohio St. 2d at 90, 431 N.E.2d at 312.

191 Novak v. Perk, 64 Ohio St. 2d 43, 45-46, 413 N.E.2d 784, 786 (1980); Dies Electric Co. v. City of Akron, 62 Ohio St. 2d 322, 325, 405 N.E.2d 1026, 1028 (1980) ("The words 'as are not in conflict with general laws' place a limitation upon the power to adopt 'local police, sanitary and other similar regulations,' but do not restrict the power to enact laws for 'local self government'"); State ex rel. Petit v. Wagner, 170 Ohio St. 297, 301, 164 N.E.2d 574, 577 (1960) ("While the insertion of the comma would have been
Thus, the court has recognized a sphere in which municipalities have constitutional authority to act regardless of whether their actions conflict with state law: namely, the sphere of “local self government.”

For example, the court said in *Noval v. Perk*:191 “This court has made it clear that in Section 3 of Article XVIII, the words ‘as are not in conflict with general laws’ do not modify the words ‘powers of local self government’ . . . Thus, municipal exercises of authority which involve powers of local self government ordinarily prevail over state laws.” And in *City of Canton v. Whitman*,193 the court said: “The power of local self-government and that of the general police power are constitutional grants of authority equivalent in dignity . . . the state may not restrict the exercise of the powers of self government within a city.”

Similarly, in *Dies Electric Co. v. City of Akron*,195 where a city policy of withholding a portion of contractors’ payments to guarantee performance conflicted with state law, the Court said: “Therefore, a charter municipality, in the exercise of its powers of local self government under Section 3 of Article XVIII of the Constitution of Ohio, may . . . enact retainage provisions . . . which differ from the retainage provisions of [the Ohio Revised Code].” And in *Froelich v. City of Cleveland*,197 the court said: “The constitution authorizes the City to exercise part of the sovereign power, and in the proper exercise of that part, it is immune from general laws. If this is not so, it will have been demonstrated that this provision (Section 3) . . . which the people believed had given them the power to manage their own . . . affairs is an empty shell.”

But rather than recognizing this protected sphere of local government autonomy, and rather than undertaking to determine whether Upper Arlington’s action constituted a valid exercise of local self government (or, instead, an abuse of its power to adopt police regulations not in conflict with state law), the court discarded these distinctions in deciding *Evans*, and applied a single, all encompassing test. The court said: “It is a fundamental principle of Ohio law that,
pursuant to the ‘statewide concern’ doctrine, a municipality may not, in the regulation of local matters, infringe on matters of general and statewide concern.”

Concluding easily that the state did indeed exhibit a statewide concern when it enacted statewide prevailing wage laws, the court held Upper Arlington’s ordinance infringing on these laws to be invalid. The court said: “... we conclude, for the reasons that follow, that the General Assembly, in enacting the prevailing wage law, manifested a statewide concern for the integrity of the collective bargaining process in the building and construction trades. Thus, the prevailing wage law preempts and supercedes any local ordinance to the contrary.”

Under its conventional method of analysis, the court might well have reached the same result. But the conventional method involved a step by step analysis which, unlike the statewide concern concept, minimized the risk of a limitless expansion of state authority, an expansion which could swallow up local home rule powers in the process.

Thus, under its traditional analysis, the court would first have determined whether Upper Arlington’s action was an exercise of local self government or an exercise of its authority to adopt local police regulations. If the action was an exercise of local self government, the analysis would end. Municipal acts of local self government were valid, regardless of how concerned the state might be.

On the other hand, if the court determined that Upper Arlington’s action

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199 Moore, 69 Ohio St. 2d at 89-90, 431 N.E.2d at 312.

200 Id. at 90-91, 431 N.E.2d at 313.

201 The Chief Justice, applying his statewide concern test, did not stop to make this determination. However, in one of two concurring opinions in the case, Justice Clifford F. Brown found Upper Arlington’s ordinance to be a police regulation, Moore, 69 Ohio St. 2d at 93, 431 N.E.2d at 314 (Brown, J., concurring), while Justice Ralph S. Locher in a dissenting opinion found it an exercise of local self government. Id. at 96, 431 N.E.2d at 316 (Locher, J., dissenting).

202 When the court has found legitimate exercises of local self government by municipalities, it has not hesitated to uphold them, even in the face of conflicting state laws. 64 Ohio St. 2d 43, 413 N.E.2d 784 (Cleveland charter provision giving control over the stationing of firemen to the city’s executive branch conflicted with a state statute giving such control to the city’s legislative branch); Northern Ohio Patrolmen’s Benevolent Assn. v. City of Parma, 61 Ohio St. 2d 375, 204 N.E.2d 519 (1980) (Parma ordinance gave city employees absent on reserve duty less compensation than required by state law); State ex rel. Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (Safety Director for the City of Columbus used a method of selecting a deputy police inspector conflicting with state law); Fitzgerald v. City of Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913) (a Cleveland ordinance made the positions of City Solicitor, City Auditor and City Treasurer appointive rather than elective contrary to state law). One qualification should be noted. The court has held that the home rule powers granted under § 3 of Article XVIII “are subject to other ‘restrictions and limitations’ contained in any other provision in the Constitution.” Dies, 62 Ohio St. 2d at 325, 405 N.E.2d at 1028 (quoting State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 88, 100 N.E.2d 225, 229 (1968)). Bazell v. City of Cincinnati, 13 Ohio St. 2d 63, 233 N.E.2d 864 (1968). The Department of Industrial Development argued (Brief for Appellee at 6), that § 34 of Article II of the constitution (giving the state certain powers to regulate labor) constituted one such ‘restriction’ on § 3 powers, and had the effect of superceding § 3 in this case. The majority did not address this issue. Moore, 69 Ohio St. 2d at 92, 431 N.E.2d at 314 (Brown, J., concurring).
was an exercise of local police regulation authority, the court would then consider (1) whether the state prevailing wage laws were "general laws" and (2) whether Upper Arlington's ordinance was truly "in conflict" with these laws.

On its face, Upper Arlington's act of ignoring state prevailing wage laws has few of the hallmarks of what the court has recognized as an exercise of the power of local self government. Rather, the court has generally viewed this power as relating to matters concerning the internal organization and management of a municipality.

For instance, the court has stated: "As to the scope and limitations of the phrase 'all powers of local self-government'... the powers referred to are clearly such as involve the exercise of the functions of government, and they... relate to the municipal affairs of the particular municipality." Local self government includes those powers which "... in view of their nature and the field of their operation, are local and municipal in character." They involve "a matter of business management and economic wisdom in connection with the city's local government affairs"; and "matters which have to do with city management, the distribution of official function and responsibility... [are] within (the power of local self government)." (On the same topic, the U.S. District Court, in applying Ohio law, stated: "The power of local self government granted to municipalities by Article XVIII relates solely to the government and administration of the internal affairs of the municipality...")

Similarly, the court has said: "What constitutes all powers of local self-government is one of the many questions presented in this case for which there is no definitive answer... The internal organization of a municipal corporation is within the ambit of this grant of power"; "The organization... of its police force, as well as its civil service functions, are within a municipality's power of local self-government"; "The right of a municipality to determine the compensation of its employees is, without question, a power of local self government"; and "it has been firmly established that the ability to determine the salaries paid to city employees is a fundamental power of local self government."
Nonetheless, Upper Arlington still maintained that its actions were an exercise of local self government, and at least one justice agreed. The city deemphasized the public policy and social philosophy aspects of its stance against state prevailing wage laws and argued more narrowly that the laws "force the City to assume the burden and expense of providing manpower and administrative devices" to implement the laws, thereby allowing the state to in effect involve itself in the "establishment and determination of [city employees] duties." Such areas of internal municipal management, the city argued, clearly intruded upon local self government.

Notwithstanding these arguments, under its conventional method of analyzing Section 3 the court could easily have found that Upper Arlington’s ordinance constituted the adoption of a "police regulation" rather than an exercise of the power of local self government. This is true because the court has viewed traditional exercises of local police power as falling under the police regulation part of Section 3, and has considered governmental actions — including labor laws — which involve the direct restraint, compulsion or regulation of private citizens to be exercises of police power.

For example, the court in Greater Fremont, Inc. v. City of Fremont said: "A rudimentary definition would be that the police power is the power to control human behavior either for the general health, safety and welfare or in connection with the use of publicly owned or controlled property. The control must have as its basis the solution or prevention of some problem which it is a legitimate function of government to solve." In a footnote to the same opinion, the court added: "It is perhaps best to remember that the criminal law, tariffs, anti-trust, zoning and pure foods and drug laws, not to forget wage and hour legislation, are all examples of the exercise of police power" (emphasis added).

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211Moore, 69 Ohio St. 2d at 96, 431 N.E.2d at 316 (Locher, J., dissenting).

212Brief of Appellant at 1, Moore, 69 Ohio St. 2d 88 (1982). Ohio’s prevailing wage laws require, inter alia, that the city (1) designate a prevailing wage coordinator, (2) indicate in certain bidding documents that contractors must pay their employees no less than designated sums, and (3) keep records and make reports concerning contractors’ compliance with the laws. OHIO REV. CODE ANN. §§ 4115.03-.15 (Page 1980).

213In his dissent, Justice Locher characterized the critical issue in the case as involving "a central power of self government — the power of the purse." Moore, 69 Ohio St. 2d at 96, 431 N.E.2d at 316 (Locher, J., dissenting). He also criticized the majority for not finding dispositive, or even citing, Craig v. City of Youngstown, 162 Ohio St. 215, 123 N.E.2d 19 (1954) in which the court held that the City of Youngstown could disregard state prevailing wage laws in paying classified civil service workers. 69 Ohio St. 2d at 96, 431 N.E.2d at 316 (Locher, J., dissenting).

214It should be noted that under some definitions the words "police power" are viewed as embracing virtually all possible governmental actions. The court has not adopted this broad definition in construing the police regulation part of § 3 since it would swallow up the sphere of local self government and render the first part of § 3 meaningless. Froelich, 99 Ohio St. at 388-89, 124 N.E. at 215-16. See Judge Wanamaker’s dissent in Cleveland Telephone Co. v. City of Cleveland, 98 Ohio St. 358, 405-08, 121 N.E. 701, 714-15 (1918) (Wanamaker, J., dissenting).

215Greater Fremont, 302 F. Supp. at 661.

216Id. at 661-62 n.18 (emphasis added).
Likewise, the court has said: "Police power is the power to impose restrictions upon personal or property rights of private persons." And quoting from Freund's treaties on police power, the court has said: "From the mass of decisions, in which the nature of the power has been discussed . . . it is possible to evolve at least two main attributes or characteristics which differentiate the police power; it aims directly to secure and promote the general welfare, and it does so by restraint and compulsion . . . . The police power restraints and regulates, for the promotion of the public welfare, the natural or common liberty of the citizens in the use of his property.'

Assuming then, that under its conventional method of analysis the court might well have considered Upper Arlington's ordinance a "police regulation," the court would then have to consider whether state prevailing wage laws were "general laws" and whether Upper Arlington's ordinance was "in conflict" with these laws.

The "in conflict" issue would have presented no difficulty. Not only did Upper Arlington concede that its ordinance was in conflict with state prevailing wage laws, it also admitted that the ordinance was specifically drafted to so conflict. As adopted, the ordinance clearly met the court's requirements for a "conflict" to exist.

But whether the court would find state prevailing wage laws to be "general laws" is less clear cut, although a strong case can be made that it would so find. The court has defined "general laws" as follows: "Concerning the provision in Section 3 . . . the general laws referred to are obviously such as relate to police, sanitary and other similar regulations, and which apply uniformly throughout the state. They involve the concern of the state for the peace, health and safety of all of its people, wholly separate and distinct from, and without reference to, any of its political subdivisions . . . ."

Clearly, state prevailing wage laws apply statewide wholly separate and
distinct from, and without reference to, any of its political subdivisions. But Upper Arlington maintained that these laws do not apply uniformly throughout the state since they affect only public construction projects and do not apply to private contractors working on private jobs. The court in Moore did not address this argument, but in a case decided since Moore the court made it clear that it did not find the argument persuasive. The court indicated that a state law does not have to have universal application to be a "general law."

It is not unlikely that the court would have found Upper Arlington's ordinance an unconstitutional "police regulation" in conflict with state law if it had used its conventional method of home rule analysis. But in opting to employ the doctrine of statewide concern, the court sanctioned the use of a concept which is so open ended and expansive that it could alter the results of future cases, possibly at the expense of municipal authority.

Nearly 70 years ago the court recognized that the state could assert a "statewide concern" about virtually any matter which affects citizens of the state, regardless of how local and municipal in character such a matter might be. Thus, the state could be said to be genuinely interested in the purity of local elections throughout the state or the effective expenditure of local tax dollars statewide or even the efficient management of municipal operations throughout the state. But obviously some limit must be placed on the state's authority to involve itself in these concerns if local governments are to have any home rule power at all.

To limit and harness this "statewide concern" concept the court will be compelled to exercise judgment, weighing case by case whether the state's concern is sufficient to preempt local authority. But by requiring such judicial balancing, the statewide concern doctrine introduced a degree of subjectivity not present in the court's traditonal home rule analysis, one which could subject local government powers to wide ranging expansions and contractions based on the philosophy of the court at any given time.

A similar concern arises from the meaning which the court in Moore assigned to the word "local" as it appears in the phrases "powers of local self government" and "local police, sanitary and other similar regulations." Rather than viewing the word as a territorial limitation of the application of municipal laws,
the court said a municipal action is "local" only if it is without "significant extra-territorial effects" (emphasis added), a much more restrictive concept.  

Quoting from a 1975 decision in which this notion was developed, the court said: "Thus, even if there is a matter of local concern involved, if the regulation of the subject matter affects the general public of the state as a whole more than it does the local inhabitants, the matter passes from what was a matter for local government to a matter of general state interest."  

To illustrate how this weighing might work, suppose a city decides to limit the operating hours of all taverns within the city limits. Even though such an action would apply only to those within the city limits, it could very well affect persons beyond the city's limits (e.g. patrons or suppliers), and therefore be said to have "extra-territorial effects."  

To harness this concept, the court would again be compelled to exercise judgment, deciding whether the extra-territorial effects were significant enough to permit the state to preempt the city's authority. With this judicial balancing would come a new degree of subjectivity in the Court's method of resolving home rule amendment disputes, a subjectivity which could pose a threat to local government authority.  

IV. INSURANCE  

Many insurance customers have been unaware of the meaning of complex language in their policies which reduced their coverage. Insurance companies may no longer put restrictions in uninsured motorist insurance policies which do not comply with the purpose of the statute requiring that uninsured motorist coverage be offered.  

The uninsured motorist coverage statute, Section 3937.18 of the Ohio Revised Code, became effective June 25, 1980 and required insurance policies to be issued with an equivalent amount of coverage for the protection of insured persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles.  

This statute has been considered and interpreted on several occasions by the Ohio Supreme Court. The court has consistently determined that the public policy of the uninsured motorist statute is to protect persons injured in motor

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228 For a discussion of the "territorial application" versus no "extra-territorial effects" concepts of the meaning of "local," see Vaubel, supra note 186 at 1124-28.

229 Moore, 69 Ohio St. 2d at 90, 431 N.E.2d at 312 (quoting Cleveland Electric Illuminating, 15 Ohio St. 2d at 129, 239 N.E.2d at 78).

230 OHIO REV. CODE ANN. § 3937.18 (Page 1980).

231 Id.

vehicle accidents from losses which, because of the tortfeasor's lack of liability insurance coverage, would otherwise go uncompensated. The court has specifically stated that the statute is designed to protect persons, not vehicles, and is personal in nature.233

The court has also previously concluded that Section 3937.18 of the Ohio Revised Code234 requires mandatory offering of uninsured motorist coverage which cannot be restricted or limited by private parties in a manner contrary to the intent of the statute.235 However, it has been held that this statute has not made the purchase of such coverage mandatory.236 This remains a matter of contract between the insurance carrier and the insured.

The issue of whether a particular contractual restriction on the coverage mandated by Section 3937.18 compiled with the statutory intent was raised in Ady v. West American Insurance Co.237 There, plaintiff was operating a motorcycle when he was struck by an uninsured motorist. As a result of the accident he sustained injuries. He had insurance coverage which only paid for a portion of his expenses, and he attempted to collect the additional amount under the uninsured motorist provision of his father's policy with defendant herein. However, defendant denied coverage based upon an exclusion contained in the policy.238

The trial court found that plaintiff was an insured person under his father's policy and could collect benefits for expenses not compensated by his own policy. The court concluded that the exclusion would be against public policy and contrary to Section 3937.18.239 The court of appeals affirmed that decision.240

The Ohio Supreme Court was presented with the issue of whether the exclusion contained in the uninsured motorist coverage of this particular insurance policy was valid. The court emphasized the importance of considering the nature of the parties involved. The stronger position of an insurance company must be remembered when assessing the validity of an exclusion which reduces the mandated coverage.241 In Ady, the exclusion appeared in a preprinted policy in small print and complex terminology.242 The court held that any restrictions must be closely scrutinized, and must be found to be conspicuous and in terminology easily understood by a customer. 'A customer must be aware of the

232Ohio REV. CODE ANN. § 3937.18 (Page 1980).
233Abate v. Pioneer Mutual Casualty Co., 22 Ohio St. 2d at 165, 258 N.E.2d at 432.
234Orris v. Claudio, 63 Ohio St. 2d 140, 143, 406 N.E.2d 1381, 1383.
23569 Ohio St. 2d 593, 433 N.E.2d 547 (1982).
236Id.
237Id. at 594, 433 N.E.2d at 548.
238Id.
239Id. at 597, 433 N.E.2d at 549.
240Id. at 597, 433 N.E.2d at 550.
provision, understand the meaning and voluntarily agree to any restrictions on the full coverage.\textsuperscript{243} In \textit{Ady}, it was not shown that the customer understood and knowingly rejected the coverage. It was not even shown that the customer was aware of the exclusion.\textsuperscript{244} Thus, the court held that the exclusion was invalid. In so holding, the court overruled the holding in \textit{Orris v. Claudio}\textsuperscript{245} to the extent that the exclusion therein was invalid as not meeting the above-stated requirements.\textsuperscript{246}

In \textit{Orris}, Justice Holmes wrote for the majority in holding that the terms of the contract of insurance must be given due consideration and that weight must be given to what was contemplated by the parties.\textsuperscript{247} In \textit{Sexton v. State Farm Mutual Automobile Insurance Company},\textsuperscript{248} Justice Holmes dissented, stating that "a policy of insurance is essentially a contract between the insurance carrier and its insured. The terms of such policy which form the body of the contract should be supported by the courts if such terms are clear and unambiguous, are lawful, and are not contrary to public policy."\textsuperscript{249} In \textit{Orris}, the court found the particular insurance policy to contain "reasonably specific language"\textsuperscript{250} and upheld it as consistent with Section 3937.18.\textsuperscript{251}

Justice Holmes dissented in \textit{Ady} on the basis that \textit{Orris} had stated good law.\textsuperscript{252} Justice Holmes noted that, in the contractual sense, the exclusionary provisions of the policy in \textit{Ady} should be applied with even more firm basis than in \textit{Orris}.\textsuperscript{253} In \textit{Orris}, the insured was the contracting party who had paid the premiums on the covered automobile.\textsuperscript{254} Here, the plaintiff was not the contracting party, but simply an insured by reason of the extended coverage.\textsuperscript{255}

Justice Holmes felt that the court must not unduly restrict the free right of contract and must allow for a certain amount of latitude for the policyholder as to the amount of coverage he desires. He stated that an exclusion of an owned automobile of this insured was a subject of negotiation and contract by the parties.\textsuperscript{256}

\textsuperscript{241}Id. at 599, 433 N.E.2d at 551.

\textsuperscript{242}Id.

\textsuperscript{243}69 Ohio St. 2d 140, 406 N.E.2d 1381 (1981).

\textsuperscript{244}Ady, 69 Ohio St. 2d at 599, 433 N.E.2d at 551.

\textsuperscript{245}63 Ohio St. 2d at 143, 406 N.E.2d at 1383.

\textsuperscript{246}69 Ohio St. 2d at 431, 433 N.E.2d at 555 (1982).

\textsuperscript{247}69 Ohio St. 2d at 437, 433 N.E.2d at 560 (Holmes, J., dissenting).

\textsuperscript{248}63 Ohio St. 2d at 143, 406 N.E.2d at 1383.

\textsuperscript{249}Id.

\textsuperscript{250}69 Ohio St. 2d at 604, 433 N.E.2d at 553 (Holmes, J., dissenting).

\textsuperscript{251}Id.

\textsuperscript{252}63 Ohio St. 2d at 143, 406 N.E.2d at 1383.

\textsuperscript{253}69 Ohio St. 3d at 604, 433 N.E.2d at 533.

\textsuperscript{254}Id.
However, the Ohio Supreme Court has since followed its decision in Ady and considered the status of the parties to the contract and their unequal bargaining positions when assessing the validity of an exclusion. In Prudential Insurance Co. v. Marshall, the court held that the insured must expressly reject uninsured motorist coverage, and the insurance company has the burden of showing that any rejection was knowingly made by the customer. Absent the express rejection of higher limits of uninsured motorist coverage, such higher limits will be and are provided by law.

These holdings clearly give the insured more protection in the area of uninsured motorist coverage, while demanding that the insurer strictly comply with the requirements set forth in Ady. As a practical matter, these decision will require insurance companies that use preprinted forms to redraft them in compliance with the stated requirements.

V. WORKERS' COMPENSATION

During the 1981-82 term the Ohio Supreme Court was confronted with the issue of whether Ohio Workers' Compensation Law prevents employees from suing an employer for injuries caused by the employer's intentional acts. The court concluded that intentionally caused injuries are not a part of the Workers' Compensation system and therefore employees can directly sue an employer for intentional injuries.

In Blankenship v. Cincinnati Milacron Chemicals, Inc., the Ohio Supreme Court was faced with the issue of whether the trial court properly granted the defendant's motion to dismiss plaintiff's complaint on the ground that an employee is barred by Section 35 Article II of the Ohio Constitution and Section 4123.74 of the Ohio Revised Code from prosecuting an action at law for an intentional tort committed by an employer against his employee. The employer had fully complied with all requirements under the Workers' Compensation Act.

As was discussed in Blankenship, the Workers' Compensation system is based on the premise that an employer is protected from a suit for negligence in exchange for compliance with the Workers' Compensation Act. The Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedies and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability.

24 Ohio App. 3d 397 (1982).
25 Id. at 399.
26 60 Ohio St. 2d 608, 433 N.E.2d 572 (1982).
27 Id. at 614, 433 N.E.2d at 577.
28 Id.
However, the protection afforded by the Act has always been for negligent acts and not for intentional tortious conduct. Workers' Compensation Acts were designed to improve the plight of the injured worker, to provide less than full compensation for injured employees, and to promote a safe and injury-free work environment.

Section 35, Article II of the Ohio Constitution serves as a basis for Ohio legislation enacted in the area of Workers' Compensation by providing, in pertinent part:

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.

The Ohio legislature implemented this constitutional provision by Ohio Revised Code Section 4123.74 which provides that employers who comply with statutory requirements shall not be liable to respond in damages at common law or by statute for any injury "received or contracted by any employee in the course of or arising out of his employment." (emphasis added)

The emphasized language was not present in the statute before 1959, and it clearly limits the categories of injuries for which the employer is exempt from civil liability. In the past Section 4123.74 had been applied liberally in granting immunity to complying employers. As was stated in Bevis v. Armco Steel Corp., under Section 35, Article II of the Constitution of Ohio, and Section 1465-70, General Code, "the open liability of employers is abolished, and in every case where the injury, disease, or bodily condition occurred in or arose out of the employment, no matter how incurred, the Workmen's Compensation Act is the exclusive remedy." Such condition is either compensable under

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260 Ohio St. 2d at 614, 433 N.E.2d at 577.
261 State, ex rel. Crawford v. Industrial Commission, 110 Ohio St. 271, 275, 143 N.E. 574, 575 (1924).
262 See Whirlpool Corp. v. Marshall, 445 U.S. 1. Not only is an employer required to provide a safe workplace under Ohio Law, but under federal law no employee may be discriminated against because he refuses to work when he has a reasonable belief that his health and safety are in jeopardy.
263 OHIO CONST. art II, § 35.
264 OHIO REV. CODE ANN. § 4123.74 (Page 1980).
265 1959 Ohio Laws 743, 770.
267 Id. at 533, 93 N.E.2d at 37.
that law or not at all, and no action of any kind may be brought against a complying employer therefore.\textsuperscript{271}

However, in 1959 the General Assembly enacted a rule of construction applicable to determining the scope of employment and the employer's exemption, providing for a liberal construction in favor of employees and the dependents of deceased employees.\textsuperscript{272}

The Ohio Supreme Court used these guidelines as a basis in reaching its decision in Blankenship v. Cincinnati Milacron Chemicals, Inc.\textsuperscript{273} There, the plaintiffs alleged that they were employed by the defendant and that while they were stationed at its chemical manufacturing facility, they were exposed to the fumes and otherwise noxious characteristics of certain chemicals within the scope of their employment which rendered them sick, poisoned, and chemically intoxicated.\textsuperscript{274} Plaintiffs further alleged that even though the defendants had knowledge of such conditions, they failed to warn the employees.\textsuperscript{275} Plaintiffs claimed that such failure was intentional, malicious, and in willful and wanton disregard of their health.\textsuperscript{276} Defendants moved to dismiss the complaint citing R.C. 4123.74 and Section 35, Article II of the Ohio Constitution.\textsuperscript{277} The trial court dismissed the action with prejudice on the grounds that the action was barred by relevant sections of the Ohio Constitution and the Ohio Workers' Compensation Act which afforded an employer and his employees total immunity from civil suit.\textsuperscript{278} The court of appeals affirmed that holding, reasoning that the purpose of Section 35, Article II of the Ohio Constitution was to abolish civil actions by employees against complying employers for work-related injuries.\textsuperscript{279}

The Ohio Supreme Court reviewed the history and purposes of the Workers' Compensation Act and examined the applicable statutory provisions. The court held that by designating as compensable only those injuries received in the course of employment, the General Assembly expressly limited the scope of compensability and in so doing did not intend to remove all remedies from the employee whose injury is not compensable under the Act.\textsuperscript{280} An employee's remedy under the Workers' Compensation Act is not exclusive.\textsuperscript{281} Injury that is not related to the employment or does not arise in the course of it accords

\textsuperscript{271}Id.
\textsuperscript{272}Ohio Rev. Code Ann. § 4123.95 (Page 1980).
\textsuperscript{273}69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).
\textsuperscript{274}Id.
\textsuperscript{275}Id. at 609, 433 N.E.2d at 574.
\textsuperscript{276}Id.
\textsuperscript{277}Id.
\textsuperscript{278}Id. at 610, 433 N.E.2d at 574.
\textsuperscript{279}Id.
\textsuperscript{280}Id. at 612, 433 N.E.2d at 576.
\textsuperscript{281}Id. at 613, 433 N.E.2d at 576.
no right to compensation by the Act. Generally speaking, an employee is in the course of his employment while he is performing the obligation of his contract of employment, and an injury incident to or the result of an act done by a workman while in the course of his employment, which act is appropriate and helpful to the accomplishment of the purpose of his employment, is a risk of such employment.

The court noted that “no reasonable individual would . . . contemplate the risk of an intentional tort as a natural risk of employment.” Therefore, the court held that an employee may resort to a civil action in tort when he has been injured by an employer’s intentional tort, since an employer’s intentional conduct does not arise out of employment. According to Blankenship, Ohio Revised Code Section 4123.74 does not bestow upon employers immunity from civil liability for their intentional torts.

The court justified its decision by analyzing the stated purposes of the Workers’ Compensation Act and determining that its holding would be consistent with such goals. The court suggested that if it were to hold that intentional torts are covered under the Act, it would be encouraging such conduct. This clearly could not be reconciled with the motivating spirit and purpose of improving the plight of injured workers. In addition, should the court afford an employer immunity for intentional behavior, the designated purpose of promoting a safe and injury-free work environment would not be fulfilled.

In a concurring opinion, Justice Brown noted that the decision in Blankenship establishes that the supreme court retains an appreciation for the need for the growth of the law in the field of Workers’ Compensation. The result reached adopted and amplified the rule already recognized in Ohio and should serve as a good example to courts in other jurisdictions to adopt similar rules. The Ohio Supreme Court itself has followed this decision in Nayman v. Kilbane.

However, the decision in Blankenship was not without a strong dissent. Justice Krupansky stated that the intent of the General Assembly in enacting Section 4123.35 was to eliminate all damage suits outside the Act for injury

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282Id.
283Industrial Commission v. Davison, 118 Ohio St. 180, 160 N.E. 693 (1928).
284Id.
285Id.
286Id.
287Id. at 614, 433 N.E.2d at 577.
288Id.
289Id. at 615, 433 N.E.2d at 577.
290Id. at 618, 433 N.E.2d at 579 (Brown, J., concurring).
291Id.
292Id.
293Ohio St. 3d 269, 439 N.E.2d 888 (1982).
or disease arising out of employment, including suits based on intentional tort.\textsuperscript{293} The majority's approach was said to disrupt the "delicate balance struck by the Act between the interests of labor, management, and the public and signals the erosion of a valuable system which has served its purpose of providing a common fund for the benefit of all workers."\textsuperscript{294}

Justice Holmes felt the opinion "radically departed from historic Ohio law by validating actions brought by employees against their employers for their condition, illness or disease arising out of their employment, and while working within the scope of their employment."\textsuperscript{295} In the subsequent case of \textit{Nayman v. Kilbane}\textsuperscript{296} Justice Holmes noted that he was unalterably opposed to the majority decision of \textit{Blankenship}. It appears that Justice Holmes will remain a strong opposing force to future claims for damages by employees against their employers for intentional torts.

\textbf{VI. PUBLIC UTILITIES}

Public utility customers benefited from two recent decisions. In these cases the court ruled that public utilities can not include their charitable contributions and advertising expenditures as operating expenses to be passed on and paid by the customer.

The Ohio Supreme Court, reinforcing principles which it first outlined in 1980, has upheld restrictions on the advertising expenses which utility companies may pass on to customers through their rates.\textsuperscript{297}

In upholding the restrictions, the court has supported the Ohio Public Utilities Commission for acting in accord with the court's 1980 teachings.\textsuperscript{298} In 1980 the court had criticized the Commission for permitting the Cleveland Electric Illuminating Company to pass on certain advertising costs through its rates "without requiring it to demonstrate that any of these expenditures primarily benefited its customers,"\textsuperscript{299} an action the court found "unreasonable and unlawful."\textsuperscript{300}

In its latest ruling, \textit{East Ohio Gas Co. v. Public Utilities Commission},\textsuperscript{301}
the court upheld a P.U.C. decision to disallow inclusion of nearly $1.3 million in advertising expenses in an East Ohio Gas Company rate application. The court agreed with the P.U.C. that the expenses did not meet the court's test of providing a "direct and primary benefit" to consumers.302

The expenses at issue were for "promotional and institutional" advertising, two of four categories of utility advertising which the court discussed in its 1980 case, City of Cleveland v. Public Utilities Commission,303 which the court calls its "seminal case regarding the recovery of advertising expenses by a public utility."304 Borrowing definitions from an Oklahoma utility commission, the court in City of Cleveland divided the field of utility advertising as follows:305

1. Consumer or informational: advertising intended to inform customers of "rates, charges and conditions of service, of benefits and savings available to the consumer, of proper safety precautions and emergency procedures and similar matters."306

2. Conservation: advertising geared toward informing the consumer "of the means whereby he can conserve energy and reduce his usage" and encouraging him "to adopt those means."307

3. Promotional: advertising designed to "obtain new utility customers, or to increase usage by present customers, or to encourage . . . one form of energy in preference to another."308

4. Institutional: advertising intended to "enhance or preserve the corporate image of the utility, and to present it in a favorable light."309

The first two of these categories — informational and conservation advertising — presented no problem for the court. It said these types of utility advertising obviously provide direct benefits to utility ratepayers. Therefore, the cost of such advertising can normally be passed on to customers in their rates. Moreover, the court placed the burden of challenging the legitimacy of these expenses on the challenger.310

But the court viewed institutional and promotional advertising very differently.311 It said such expenses are of questionable benefit to customers,
often benefiting the owners of the utility companies more directly than rate-payers, and therefore should normally not be passed on to consumers. The burden is on the utility company, the court said, to rebut a presumption against the validity of charging customers for these expenses.312

In deciding *East Ohio Gas Co.*, the court applied these principles directly, citing the test which it had outlined in *City of Cleveland*. It said that """"[u]nless a utility company can demonstrate that its institutional and promotional advertising expenditures . . . provide a direct, primary benefit to its customers such expense items are not allowable as operating expenses for rate-making purposes.""""313

In adopting this position, the court joined what it called the """"recent trend"""" in judicial review of utility company advertising expenses.314 Courts have traditionally been reluctant to interfere with utility company advertising since it was viewed as a means of fostering growth and expansion which utility companies had a right to employ.315 Judicial interferences with this legitimate means were considered improper intrusions into the prerogatives of utility company management.316

In addition, courts emphasized that consumers do benefit from promotional and institutional advertising by utility companies, even if only in an indirect and secondary way. Promotional advertising was said to increase demand for utility service, and increased demand, in turn, was said to distribute the heavy capital costs of utilities among greater numbers of people, thereby reducing unit costs to the consumer.317

Even institutional advertising was viewed as benefiting ratepayers. Through a variation of the trickle-down theory, the courts argued that institutional advertising attracted the interest of investors and lending institutions. Such interest led to increases in the value of company stock and reductions in the cost of the company's debt. All of which, it was argued, redounded to the interest of the consumer.318 However, the court said that inflation and the national

31263 Ohio St. 2d at 72, 406 N.E.2d at 1378-79.
3131 Ohio St. 3d at 32, 437 N.E.2d at 595.
31463 Ohio St. 2d at 70, 406 N.E.2d at 1377.
316*New England Tel. & Tel. Co. v. Dep't of Pub. Util.*, 360 Mass. at 483, 275 N.E.2d at 493. (""""The type and quantity of (utility) advertising . . . are matters to be decided originally by the duly authorized managers of the Company's business.""""); *Petition of New England Tel. & Tel. Co.*, 115 Vt. 494, 510-11, 66 A.2d 135, 145-46 (1949). (""""The function of a public service commission is that of control and not of management . . . . This matter of . . . advertising expense calls for the exercise of judgment on the part of management of the company.""""); *Re Consolidated Edison Co.*, 41 Pub. Util. Rep. 3d 305, 364-65 (1961). (""""Management should control advertising expenditures as long as they are within the limits of reason."""").
concern about energy supplies required that it reexamine these notions and adopt a "more careful scrutiny" of utility advertising.\textsuperscript{319}

Promotional advertising, by definition, encourages energy consumption. Therefore, the court questioned how this type of advertising could be worth its cost to consumers during a period of national energy shortage.\textsuperscript{320} And institutional advertising, if it affects investors and lending institutions at all, probably affects them insignificantly. Thus, the Court quoted with approval a suggestion that a simple profit and loss statement would influence investors more than the elaborate "self congratulations" characteristic of institutional advertising.\textsuperscript{321}

In deciding \textit{East Ohio Gas Co.}, the court offered an additional illustration of how indirect the benefits to consumers can be where promotional advertising by utility companies is concerned.\textsuperscript{322} Of the $1.3 million in advertising expenses disallowed by the P.U.C. in \textit{East Ohio Gas Co.}, approximately $440,000 had been paid by the company to gas appliance dealers to subsidize the dealers' advertising.\textsuperscript{323} The company reasoned that gas use will increase as the sale of gas appliances increase, and that once again the gas consumer will ultimately benefit from the subsidies.\textsuperscript{324}

But here the appliance dealers are obviously the most direct beneficiaries of the advertising, since one of their costs of doing business is being directly underwritten. And arguably the utility companies are the next most directly benefited. In any event, however, the Court concluded that the gas customer is clearly "not the direct and primary beneficiary" of the subsidies.\textsuperscript{325}

\textsuperscript{319}63 Ohio St. 2d at 70, 406 N.E.2d at 1377.
\textsuperscript{320}Id. at 71, 406 N.E.2d at 1378.
\textsuperscript{321}Id.
\textsuperscript{322}1 Ohio St. 3d at 32, 437 N.E.2d at 595.
\textsuperscript{323}Id.
\textsuperscript{325}1 Ohio St. 3d at 32, 437 N.E.2d at 595.