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FIGHTING, WHICH IN OLDEN TIMES was admired as valor in youth, has become a crucial contemporary problem of international proportions—the courts have been loath to recognize this phenomenon and to depart from the comfortable refuge of *stare decisis* by giving redress to plaintiffs injured by the young rebels.[1] Yet the constitutions of most, if not all, the jurisdictions of the United States ironically assure their inhabitants of a remedy for every injury.[2]

The Ohio Supreme Court and Rebellious Youth

A recent Ohio Supreme Court decision which kindly refused to acknowledge the problem raised many a legal eyebrow within the state. In *Howard v. Rogers,* Chief Justice Taft pronounced: "we can not take judicial notice of the likelihood of fighting at a teen-age dance . . . fighting at teen-age dances can not yet be regarded as common enough to support a reasonable inference that defendants should have known of its likelihood." [3]

Defendants in the case were professional promoters of teen-age dances. The event in question occurred on November 9, 1963, in the junior high school gymnasium of Franklin, Ohio (Warren County), population approximately 8000, six miles from Middletown, Ohio, population approximately 42,000. Plaintiff, a 15-year-old girl, accompanied by a girl friend, paid her admission fee and entered the gymnasium at about 7 or 7:30 p.m.[4]

At about 10 p.m. there was some "rumbling," followed by a fracas, which the girls tried to avoid by attempting to leave the gymnasium. As they were doing so, a 13-year-old boy was hurled against plaintiff by one of the brawlers. Police had evidently been called by one of the

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[1] Neither American nor British courts are famous for keeping abreast of social progress, as more than one commentator has noted: "The great tides and currents which engulf the rest of men do not turn aside in their course, and pass the judges by." Cardozo, Nature of the Judicial Process 168 (1921), as cited by McNamara, Ragbag of Legal Quotations 132 (1960); "If a statute . . . is apt to reproduce the public opinion not so much of to-day as of yesterday, judge-made law occasionally represents the opinion of the day before yesterday." Dicey, Law and Opinion in England (lecture xi), as cited by McNamara at 139.

[2] See Ohio Constitution, Art. 1, § 516: "And every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law."

[3] 19 Ohio St. 2d 42, 249 N.E. 2d 804, 807 (1969).

[4] *Id.* at 804, 806.

defendants about 15 minutes earlier, in regard to an unexplained "disturbance" outside the school, which had dispersed before an officer arrived. Shortly thereafter the officer was re-summoned. However, the fight had ended, as had the dance, when he returned; and he merely "stood by until the building was cleared." Remarkably, there was "no evidence" as to the number of teenagers attending the dance. In addition to the defendants and the janitor, 4 other adults were present.[5]

Previously, defendants had conducted more than a half dozen similar dances at the neighboring Middletown Armory, attended by uniformed policemen, allegedly as a prerequisite for a permit to rent the accommodation. According to one defendant, his band played at about 100 such dances a year. Holding that there was "no evidence from which reasonable minds could find that defendants either knew or in the exercise of ordinary care should have known of the likelihood of a fight such as occurred at this dance," the Ohio Supreme Court absolved defendants from liability.[6]

Devoting an entire column of his weekly feature *Law for Living,* in the Sunday edition of a large metropolitan Ohio daily, Distinguished Professor of Law Howard L. Oleck, of Cleveland State University, wrote:

> Perhaps the learned judges were thinking of the days of their youth (mostly quite a few years ago), because most people today view modern youngsters as not nearly as peaceable as the court thinks. . .
>
> With all respect for the learned judges, one must wonder if they read the daily newspapers. Mass brawls by youths are everyday items, hardly classed as news anymore. Mass fights seem to occur at dances, sports events, political, and civic gatherings, or for no reason at all. The kids often seem to brawl just out of sheer boredom.[7]

Behavioral Traits of Contemporary Youth

The mass media and appropriate governmental, educational, and social agencies, nationally and internationally, have overflowed the well in the past decade, analyzing and reporting the multifarious activities of restive youth. These reports have appeared in the form of books, monographs, newspaper and periodical articles, radio and television news

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[5] *Id.* at 806.

[6] *Id.* at 805-808. The action was begun on November 3, 1964, for Jody Howard, by her next friend, her father, to recover damages for personal injuries and to recover for medical expenses, in the Common Pleas Court of Hamilton County, Ohio. The jury returned a verdict of $2,650 for the plaintiff and $200 for her father. The Court of Appeals reversed the judgment entered on the verdict and remanded the cause for a new trial. The case was brought before the Ohio Supreme Court on appeal from the judgment of the Court of Appeals pursuant, to the allowance of a motion and of a cross-motion to certify the record.

[7] Cleveland *Plain Dealer,* October 19, 1968, § F at 10/1.

commentaries and documentaries, and specials, educational, socio-political, sociological, psychological, and psychiatric symposia, studies, and evaluations; crime enforcement statistics from juvenile courts, police departments, the FBI, and various other official and quasi-official agencies, including the United Nations.

The conclusion is inescapable that contemporary youth is waging a revolution—an unprecedented occurrence in the history of man. It exists in endemic proportions throughout the world, recognizing no national boundaries, politics, ethnic behavioral characteristics, educational levels, nor religion. While the symptoms may vary from nation to nation, the basic pattern is the same. The problem is little understood, disturbing, and frightening. Ignoring it, as did the Ohio Supreme Court, will not make it disappear.

A cursory examination of recent issues of the *New York Times Index* affirms Professor Oleck's contention of modern youth's propensity for instant overreaction. Among pertinent entries catching the reader's eye were: "500 Teen-agers Rampage thru Streets, Jamaica, New York, after Being Turned away from Overcrowded Dance at a Social Club"; [8] "Over 1000 Teen-agers Fight Police, Zurich, Switzerland, over Site Sought as Youth Center"; [9] "Passaic, N. J. City Council Imposes Curfew on Youths under 18 to Combat Recent Incidents"; [10] "Youth Clashes with Police, Cheyenne, Wyoming, during Rodeo Festival: Over 75 Arrested"; [11] "Youths Rampage after Concert in Palm Springs, California"; [12] "Pravda Article Discusses Problems with Teen-agers"; [13] "Disorders in Dance Hall, Randolph Township and Park Irvington, N. J."; [14] "Izvestia Article Scores Youth Conduct; Urges Return to Morals of Earlier Generation." [15]

Hidden, adjacent to the classified section of a Cleveland, Ohio, daily was the following relevant item, headed "Principal Slashed":

> BRANDYWINE, Md. (AP)—The vice principal of a high school had his throat cut by a youth at a school dance Saturday night, it was disclosed yesterday. The wound required 50 stitches to close.[16]

Eight months before the *Howard* decision, expressing the profound concern of her country over the seemingly irreconcilable and uncontrollable vagaries of youth, United States Representative, Mrs. Jean

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[8] New York *Times*, May 12, 1968, at 47/1.

[9] *Id.*, June 30, 1968, at 2/7; July 2, 1968, at 21/3.

[10] *Id.*, July 3, 1968, at 28/1.

[11] *Id.*, July 29, 1968, at 3/1.

[12] *Id.*, April 3, 1968, at 21/1; April 4, 1968, at 34/3.

[13] *Id.*, June 3, 1968, at 4/4.

[14] *Id.*, July 27, 1969, at 26/1.

[15] *Id.*, November 17, 1968, at 10/1.

[16] *Supra*, n. 7, October 15, 1969, § D at 1/4.

Pecker, addressing the 126 member Social Committee of the United Nations General Assembly, "suggested that the United Nations look into the causes of worldwide rebellion by young people against society and 'the Establishment,' " describing this "revolt of youth" as an "ominous and sometimes tragic phenomenon." [17]

The World Health Organization recently devoted an entire issue of its periodical *World Health* to adolescence—which it termed the "boiling-over period"—and its problems in the United States, India, Holland, Great Britain, Scandinavia, Italy, France, and Switzerland. Among topics covered were drug addiction, runaways, mental illness, sexual licentiousness, *rioting,* acne, and venereal disease.[18]

At the July, 1969, Stockholm Conference on Mental Health of Adolescents and Young People, convened by the WHO Regional Office of Europe, the common denominator of problems facing young people between 12 and 25, everywhere, was difficulty in adapting to the demands of society. As one writer noted, most countries have neither a "clear-cut definition of a young person, nor any commonly accepted view of youth's role in society." There are varying and inconsistent legal age limits for voting, criminal responsibility, marrying, liability for military service, permission to secure a work permit, a driver's license, and liability for compulsory education. Youths in the age group between 12 and 25 were described as "social illiterates," whom the "modern industrial society keeps dependent and economically nonproductive." Yet statistics show that they are a potent force seriously to be reckoned with. Today there are more than 600 million within their ranks. By the year 2000, the estimate is that their number will have risen into the billions.[19]

The probes into the causes of this "revolt of youth" have been many and of varying depth.[20]

Dr. Fred Brown, Chief Psychologist at Mt. Sinai Hospital in New York City, remarked at a symposium held there in May, 1968, that the worldwide rebellions reveal no single cause or explanation for their existence; that young people are confused by the values offered them; that "we put men on the moon, but we don't know what kind of men we want there"; that we give lip service to peace, but we conduct a heinous war. He maintained that the medium of television renders it impossible to shelter children from harsh reality, for they are quick to

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[17] *Supra,* n. 8, November 17, 1968, at 76/4.

[18] July-August, 1969.

[19] *Id.* at 46.

[20] For excellent scholarly bibliographies and reference notes to books, monographs, and periodical articles on the subject, see Keniston, Young Radicals 341-368 (1968), and his, The Uncommitted: Alienated Youth in America 479-500 (1965). For comprehensive national and international coverage of the subject, see the New York *Times* Index for the year desired, under the subject heading Children and Youth—Behavior and Training.

penetrate the veil of hypocrisy, corruption, and propaganda in every facet of life today.[21]

C. L. Sulzberger, correspondent for the New York *Times,* visited numerous countries on several continents in 1968, interviewing youthful insurgents. He drew the conclusion that Che Guevara, Mao Tse-tung, Ho Chi Minh, Rousseau, Thoreau, and Robin Hood generally are the emulated heroes. Similarities in student uprisings in these countries he attributed to an "international youth grapevine." He considered the most important unifying force of the rebellions, the comparative ineffectuality of police to suppress them. He found that "the silent majority" often welcomes these students as the "daring vanguard in the fight . . . [they] would, if . . . [they] had the courage, like to join." [22]

Two dominant themes prevail in the United States as a basis for the unrest. A study by the American Council on Education, in 1968, showed that 68 of 71 incidents of campus disturbances were directly related to issues of racial injustice and the Vietnamese War.[23]

Edward J. Stroben, Director of the Commission on Academic Affairs of the American Council on Education, in an unpublished position paper, observed that "persuasive evidence" indicates that young people have been maturing faster, probably as a result of better diet and medical care; that mass communications provide them with a storehouse of information; and that Rousseau's romanticism, extolling the basic goodness of man, Thoreau's belief in benevolent anarchy, and the guerilla form of permanent revolution of Mao and Che Guevara serve as a catalyst to goad them to action. Mr. Stroben noted further that although Russia complains about the conduct of her youth, she has thus far escaped major uprisings similar to those of the Red Guard in the rigid traditionalist society of Communist China. He attributes this to "subtle punitive measures" and granting students considerable power over their own disciplinary and social affairs—a democratic practice still comparatively novel in the United States.[24]

Correspondent Michael Stern of the New York *Times* conducted a survey the latter part of 1968 on the subject of today's rebellious youth, in and around New York City. Among some Westchester high school students interviewed, he found one 16-year-old "organizing a revolution against American society, in high schools, with the skill of a little Lenin." Another boy was a week-end marijuana smoker who "got turned on in summer camp" and was in the business of selling pot to his classmates. A 15-year-old girl admitted having "marriage tryouts" with boys, protecting herself with "bootlegged supplies of pills bought

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[21] *Supra,* n. 8, May 12, 1968, at 52/3.

[22] *Id.,* May 30, 1968, at 11/7.

[23] *Id.*

[24] *Id.*

with piggy-bank savings." As Stern pointed out, all 3 had advantages of comfortable homes, loving parents, good schools, intelligence, good health, and unlimited opportunities for self-development. An unidentified principal called these youngsters "the adventurous minority," who are profoundly uncomfortable: some revolting against parental values; some in flight from their own lives; others worrying about what the future holds for them and their American society. He saw them acting with sophistication their parents often did not achieve until after college graduation.[25]

Dr. William V. Lewit, Associate Clinical Professor of Psychiatry and Pediatrics at Albert Einstein College of Medicine, with a private practice in Westchester, attributed some adolescent problems to the present early onset of puberty (The average for girls is 11 and for boys, 12), which is due to better health. He also observed that children are being "pushed" by their parents to mature earlier, and "their bodies as well as their minds may be responding to the impetus." [26]

Donald Barr, Headmaster of Dalton Schools, in New York City, remarked:

> Many urban and suburban mothers are encouraging the earliest possible social and sexual maturity . . . [they] . . . arrange boy-girl parties for 11-year-olds. These kids dance, they hold hands, and they play kissing games.
>
> These mothers are pushing their children into a social-sexual rat race. They want them to be popular, to develop social prowess. But if the kids are playing kissing games at 11, what do you think they will be doing when they are 15 or 16?

By comparison, Barr commented, in his days in school in the '30's and '40's, most of the kids couldn't afford to go to jail; and if they got thrown out of school, it was a disaster. Education was their way out of poverty.[27]

Dr. Benjamin Wolman, Professor of Psychology at Long Island University, attributed the impatience of young people to their late start for social and economic independence in a middle class milieu, contrasted with their biological and intellectual maturity. Whereas in Biblical times a boy was admitted to manhood at the age of 13, ready to take a wife and assume adult responsibilities, nowadays he can't even get a work permit until he's 16. He noted further that as the moral fiber of parents deteriorates, disciplinary restraint upon their children weakens; for today's youth is quick to penetrate the deception of "Don't do as I do, do as I say." [28]

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[25] *Id.*, October 7, 1968, 2t 49/4.

[26] *Id.*

[27] *Id.*

[28] *Id.*

Abraham Lass, Principal of Abraham Lincoln High School, in Brooklyn, New York, also placed much of the blame on changing standards in adult conduct:

> High school radicals . . . see manifestations of violence all around them . . . It is almost a form of approved social behavior. Look at teachers, policemen, firemen, sanitationmen, nurses, doctors, social workers. . . They were the embodiment of the ideal of settling differences peacefully. But now they strike and withold their labor for their own ends in defiance of law. Is there any wonder that students see nothing wrong in using lawless methods for what they want? [29]

One of the leading researchers in the area of disenchantment of American youth is Dr. Kenneth Keniston, now Associate Professor of Psychology at Yale Medical School. His major published study, thus far, on what he terms "alienated youth or American Ishmaels" living in an anomy, was based on an in-depth 3-year study of 3 control groups of Harvard students, selected from an original group of several thousand sophomores.[30]

The objective of the study was to isolate major themes of the "alienation syndrome" and to determine why the "new alienation" is being increasingly chosen by individuals in the upper strata of society as their "dominant response" to that society, in sharp contrast to the alienation historically imposed *on* men by an unjust economic system.[31]

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[29] *Id.*

[30] Keniston, *supra,* n. 20, The Uncommitted, at 4, and, Young Radicals, at 327-8. This study begun in the late '50's, parts of which were separately published at various stages in scholarly journals, was only a portion of more comprehensive research encompassing over 2,000 students, to be eventually reported in a monograph entitled The Alienated Student. The 3 control groups consisted of 12 "extremely alienated" youths, 12 "extremely non-alienated" ones, and 12 who were not extreme either way, for comparison. All the students wrote a lengthy autobiography and a statement of their basic values and philosophy of life. All 36 took the Thematic Apperception Test. All participated in a wide variety of psychological experiments and interviews for 3 academic years, averaging 2 hours a week, conducted in a comfortable "unscientific" private house. All students were paid for their time. They allegedly responded favorably to their psychologist interviewers, seeking them out frequently when no research was involved. The latter tried to maintain an attitude of scientific neutrality.

The above 3 groups were selected from among Harvard sophomores given the following series of "highly intercorrelated attitude scales," constituting an "operational definition of the 'alienation syndrome' ": (1) Distrust ("Expect the worst of others and you will avoid disappointment"); (2) Pessimism ("There is little chance of ever finding real happiness"); (3) Avowed Hostility ("At times, some people make you feel like killing them"); (4) Interpersonal Alienation ("Emotional commitments to others are usually the prelude to disappointment"); (5) Social Alienation ("The idea of trying to adjust to society as it is now constituted fills me with horror"); (7) Self-Contempt ("Any man who really knows himself has good cause to be horrified"); (2) Vacillation ("I make few commitments without some reservations about the wisdom of undertaking them"); (9) Subspection ("First impressions cannot be relied upon; what lies beneath the surface is often utterly different"); (10) Outsider ("I feel strongly how different I am from other people"); (11) Unstructured Universe ("The notion that man and nature are governed by regular laws is an illusion").

[31] Keniston, *supra,* n. 20, The Uncommitted, 1, 6-7.

Limitations of space imposed upon this paper, permit the inclusion of only the more trenchant conclusions reached by Dr. Keniston: (1) that modern youths' alienation is due to social and personal factors intertwined, as summarized by the awkward adjectival phrase "psycho-socio-cultural-historical";[32] (2) that the realities of American society are overwhelmingly important to them; they view the existing social order as "an apparently closed room with a rat-race going on in the middle," offering them little in the way of future personal fulfillment, growth, or creativity, and resulting in their cultivation of a cult of the present, which is a search for sentience as expressed in its most extreme forms in "speed," sex, and stimulation; [33] (3) that toward their parents most youths show a "lack of conscious or articulate involvement"; that between them exists such a distance in generational if not affectional terms as to effect a tacit understanding that neither will interfere with the other;[34] (4) that central to American society is the unquestioned primacy of technology permeating every facet of our existence, displacing virtuous human values with utilitarian measures of worth, the inevitable consequence being a decay of the total moral fiber; [35] (5) that alienation is important because it shows us what is "intolerable, frustrating, and malign" in individual life and in the social process and suggests need for reformation, particularly when a significant proportion of a country's citizenry does not fit into the social order.[36]

With deference to the learned judges of the Ohio Supreme Court, the aforegoing presentation would tend to indicate that the "great tide and current" of contemporary youth in revolt "engulf[ing] the rest of men" has indeed passed them by, to paraphrase the esteemed Cardozo.[37]

The Role of Judicial Notice in the Legal Process

Judicial notice—an extremely useful procedural device designed to expedite trials—has been defined by one lexicographer as:

> The act by which a court in conducting a trial or framing its decision, will, of its own motion, and without the production of evidence, recognizing the existence and truth of certain facts, having a bearing on the controversy at bar, which, from their nature, are not properly the subject of testimony, or which are *universally regarded* as established by *common notoriety.*[38]

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[32] *Id.* at 383.

[33] *Id.* at 385-6; 396-8.

[34] *Id.* at 397.

[35] *Id.* at 422-3.

[36] *Id.* at 387-8, 420.

[37] *Supra,* n. 1.

[38] Black's Law Dictionary 986 (4th ed. 1951).

Creditable discussions of the various aspects of judicial notice have appeared in legal periodicals,[39] in treatises,[40] and in other legal sources.[41] The concept itself is thought to have emerged in medieval times, when the judge was venerated as a "learned man," well-versed in each of the 7 areas knowledge was then divided into. Thus, in taking judicial notice, the judge merely reminded himself of what he presumably already knew.[42] According to McNaughton, in 1222 Bracton inscribed in the margin of one of his works: "*Ea que manifest sunt, non indignent probacione*" (sic) (Those facts which are apparent do not need proof).[43] A yearbook dating to 1302 illustrates that the courts were even then conscious of expediting cases by applying the principle to fact situations.[44]

However, it was not until the early 19th century that an attempt was made to establish some guidelines within which a judge could rule on questions of fact without hearing evidence on the issue. Either party could move the court to assume as proved any matter of general knowledge. Unless the opposing party demanded proof and avowed in good faith that he himself doubted the veracity of the fact, the motion was sustained and the necessity for laborious evidentiary introductions was obviated.[45]

Courts may take judicial notice of both fact and law, the latter of which is not within the purview of this paper. Two tests are presently employed to determine the degree of certainty of facts to be noticed. The traditional one is the "common knowledge test" whereby a court may, *sua sponte,* or upon motion of either party, judicially notice facts that are so well known "within the territorial jurisdiction of the court

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[39] Davis, Official Notice, 62 Harv. L. Rev. 537 (1940); Keeffe, Landis, and Shadd, Sense and Nonsense about Judicial Notice, 57 Harv. L. Rev. 269 (1944); Strahorn, The Process of Judicial Notice, 14 Va. L. Rev. 544 (1928); York, Unjudicial Notes on Judicial Notice, 13 Rocky Mt. L. Rev. 374 (1941); McCormick, Judicial Notice, 5 Vand. L. Rev. 296 (1952); McNaughton, Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy, 14 Vand. L. Rev. 779 (1961); Slovenko, Judicial Notice and Indisputables, 10 Clev-Mar. L. Rev. 170 (1961); McLaughlin, Judicial Notice, 40 Minn. L. Rev. 365 (1956).

[40] 9 Holdsworth, A History of English Law 135 (1926); Maguire, Evidence—Common Sense and Common Law 167 (1947); Thayer, A Preliminary Treatise on Evidence at Common Law 277 (1898); 4 Wigmore, Evidence, § 2565-2583 (McNaughton ed. 1961).

[41] Uniform Rules of Evidence 9-12 (1953); Model Code of Evidence 801-806 (1942); 31 C.J.S., *Evidence,* § 6-102 (1964); 29 Am. Jur. 2d, *Evidence,* § 14-27 (1967); 5 Am. Jur. 2d, *Appeal and Error,* § 739-43 (1962); 21 Ohio Jur. 2d, Evidence, § 15-96 (1956); 113 A.L.R. 258.

[42] Comment, The Presently Expanding Concept of Judicial Notice, 13 Vill. L. Rev. 528, 530 (1968).

[43] Comment, 13 Vill. L. Rev. 530, citing McNaughton, *supra,* n. 39, at 783, in turn, citing 2 Bracton's N.B., case 194 (1222).

[44] Comment, 13 Vill. L. Rev. 530, citing McNaughton, *supra,* n. 39, *loc. cit.,* in turn, citing Y.B. 30 & 31 Edw. I (R.S.) 256-59 (1302).

[45] Comment, 13 Vill. L. Rev. 530, citing Bentham, Rationale of Judicial Evidence 256-57 (1827).

that they cannot reasonably be the subject of dispute." [46] The conclusion drawn in the *Howard* opinion[47] would tend to indicate that the Ohio Supreme Court was relying on a narrow application of this test, although Chief Justice Taft's statement, quoted above at footnote 3, did not limit the non-noticeable fact of fighting at teen-age dances to either Warren County or the State of Ohio.[48]

Using the more modern test—of "verifiable certainty"—a court may take judicial notice of "specific facts and propositions of general knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." [49] Clearly, the propensity of modern youth for fighting at gatherings falls within the "propositions of general knowledge" classification, and the many reliable sources cited above *capable* of *determining* this fact *immediately* and *accurately* were *easily accessible* to the Ohio Supreme Court, if not in its own library, through the medium of inter-library loan from the Ohio State University Libraries.[50]

This writer's position is further strengthened in that the fact at issue was a *general* adjudicative one,[51] which courts more readily take notice of because of comparative ease of verification. Moreover, as Professor McCormick has noted,

> . . . the decisions of the upper courts manifest a willingness to extend the bounds of judicial notice for the purpose of sustaining a just judgment in the lower courts. . . .[52]

Apparently the Ohio Supreme Court does not adhere to this practice.

Duty of Care Required Toward Invitees

Chief Justice Taft bottomed the Court's decision in *Howard* upon the conclusion that there was "no evidence from which reasonable minds could find that defendants knew or in the exercise of ordinary care should have known of the likelihood of a fight such as occurred at this

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[46] Comment, 13 Vill. L. Rev. 530, 532; McCormick, *supra,* n. 39, at 298; 21 Ohio Jur. 2d, *supra,* n. 41, § 16, 22; Uniform Rule of Evidence 9 (2) c, *supra,* n. 41.

[47] *Supra,* n. 3.

[48] *Id.* at 807. See 21 Ohio Jur. 2d, *supra,* n. 41, § 16, for the requisites regarding the rule for judicial notice of facts in Ohio, i.e., (1) it must be a matter of common and general knowledge, (2) it must be well-established and authoritatively settled, and not doubtful or uncertain, (3) it must be shown within the limits of the jurisdiction of the court.

[49] Uniform Rule of Evidence 9 (2) d, *supra,* n. 41; Comment, 13 Vill. L. Rev. *supra,* n. 43, at 532; McCormick, *supra,* n. 39, at 296; 29 Am. Jur. 2d, *supra,* n. 41, § 25.

[50] See McCormick, *supra,* n. 39, at 301, fn. 36, for cases listing "safe and proper" sources of information courts may consult in order to take judicial notice.

[51] Courts may take notice of 2 types of facts: (1) *legislative*—those which discover and develop the law itself, as when a judge interprets a statute, rules on its constitutionality, creates new law to bridge gaps between doctrines, etc., and (2) *adjudicative*—those which pertain to the particular parties of the controversy and their specific interests and transactions. Adjudicative facts may be subdivided into (a) general or indisputable, and (b) specific.

[52] McCormick, *supra,* n. 39, at 298, citing Note, 45 Harv. L. Rev. 190 (1931).

dance." [53] We have shown, however, that contemporary "reasonable minds" the world over are oriented to the fact of life that almost *any* gathering of youth, for any purpose whatsoever, has a foreseeable potential for volatile activity. We submit that the Court's construction of applicable law was narrow, outdated, and unjust.

The *Restatement of Torts* 2d, provides that an occupier of premises for business purposes is subject to liability for injury accidentally, negligently, or intentionally inflicted upon invitees by third persons. He is under a duty to exercise reasonable care in discovering that such acts are *likely* to be done; to give adequate *warning* to invitees to enable them to attempt to avoid the harm; and to *protect* them against it.[54]

While the occupier of business premises, under the *Restatement,* is not an insurer of the safety of his invitees, as the Court noted, it neglected to mention that the ensuing sentences of the comment it cited require him to exercise reasonable care in providing available means of protection, because of the *likelihood* that persons may so conduct themselves as to endanger the safety of his invitees.[55]

Finally, the Court relied on a portion of Comment *f* of the *Restatement,* which says that since an occupier of premises "is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know" that they are in danger. Again, the Court neglected to mention qualifications within the same comment; namely, that if "the place or character of his business is such . . . that he should reasonably anticipate careless . . . conduct. . . he may be under a duty to provide a reasonably sufficient number of servants to afford a reasonable protection." [56]

That brawls are likely to occur at dances was recognized by local communities throughout the United States decades before our present youth rebellion. Ordinances often required at least one policeman to be in attendance, as a prerequisite to issuance of a permit for the dance to take place.

The evidence in *Howard* indicated that defendants provided their patrons with police protection only when the law demanded it.[57] At all other times—the Court also neglected to mention—they were more preoccupied with pocketing profits than in spending a few dollars to take proper precautions, preferring instead to rely upon "volunteer" adult chaperones, no doubt provided through the courtesy of local PTA's and other service-minded organizations, who were hardly trained or

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[53] *Supra,* n. 3, at 807.

[54] § 344, at 223-4 (1965).

[55] *Id.* at 225, Comment d.

[56] *Id.* at 225-6.

[57] *Supra,* n. 3, at 806.

equipped "to properly conduct" a teen-age dance, as contended by the Court.[58]

The facts further show that a disturbance did occur outside the gymnasium a short time before the brawl inside, which injured the plaintiff. Although one of the defendants called the police, he apparently made no effort to warn the teen-agers inside that trouble was brewing; nor did he instruct the other 5 adults present to attempt to prevent the recurrence of a similar fracas inside, thus raising a serious issue of reasonable care.[59]

The alleged paucity of evidence in regard to both disturbances likewise raises some suspicious questions as to the lack of an adequate investigation into the matter. A conspiracy of silence and total ignorance among teen-agers seem incredible.

Sufficient case law exists to support the plaintiffs' position in *Howard*.[60] Sufficient evidence was also introduced, in our opinion, to be presented to a jury on the question of negligence, as appropriately summarized in a 1938 Ohio opinion:

> In this day and age when managers and proprietors of places of amusement, and other places, invite the public and thereby cause great crowds of people to be amassed together, it would be violative of the common rules of humanity to say that no duty is imposed upon those proprietors and managers, who, for their profit, bring crowds together, to exercise ordinary care to protect and guard these people from the "crowd spirit" which always prevails. Since they owe such duty, it clearly becomes a jury question, under a proper charge of the court, as to whether the proximate cause of an injury to a person did or did not arise through a breach of duty.[61]

The trial court in *Howard* did not err in overruling a motion for a directed verdict for the defendants, but it appears that court-made law in Ohio is suffering from retrogression syndrome.

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[58] *Id.* at 807.

[59] *Id.* at 806; see *supra*, n. 54, § 344 a & b.

[60] For cases on liability of proprietor for injury to customer or patron caused by pushing, crowding, etc. of other patrons, see 20 A.L.R. 2d 8. For cases on liability of owner or operator of theater or other amusement for assault on patron by another patron, see 29 A.L.R. 2d 911. For additional cases favorable to plaintiffs in the instant case, see Campbell v. Hughes Provision Co., 153 Ohio St. 9, 90 N.E. 2d 694 (1950) (75-year-old woman shopper injured by inward-swinging door, forcefully pushed by another customer); Holdshoe v. Whinery, 14 Ohio St. 2d 134, 237 N.E. 2d 127 (1965) (Paying patron struck by another patron's runaway car on picnic grounds); Adamson v. Hand, 93 Ga. App. 5, 90 S.E. 2d 669 (1955) (Innocent bystander leaving beer parlor to escape a brawl, accidentally shot in the arm by a brawler); Rawson v. Massachusetts Operating Co., 105 N.E. 2d 220 (Mass. 1952) (Patron struck in the face by rowdy teen-agers, whom he asked to leave the theater, after putting up with their rowdyism for several hours); Stockwell v. Board of Trustees of Leland Stanford Junior Univ., 148 P. 2d 405 (1st D. Ct. App. Cal. 1944) (Student, on campus, loses eye when accidentally struck by a BB gun shot); Mears v. Kelly, 59 Ohio App. 159, 17 N.E. 2d 386 (1938) (Patron, waiting in foyer to enter theater, shoved against seats by car behind her); Sims v. Strand Theater, 150 Pa. Super. 627, 29 A. 2d 208 (1942) (Fact situation like Mears).

[61] Mears v. Kelly, *supra*, n. 60, at 388.

Conclusion

One of the greatest crises in American courts at all levels is the failure, if not downright refusal, of the judiciary to keep abreast of the times in their law-making capacity. This flagrant miscarriage of justice can be largely attributed to popular and partisan election and selection of mediocre judges.[62]

A recent example of such blindness was *Howard v. Rogers,* wherein the Ohio Supreme Court declared that it could not *yet* take judicial notice of modern youths' propensity for rebellion—an ominous phenomenon preoccupying parents, educators, police, social workers, psychiatrists, and even the youths themselves, for well over a decade. The Court's decision deprived an apparently innocent plaintiff bystander, injured at an inadequately supervised school dance, sponsored by professional promoters, of her rightful remedy at law. Sufficient evidence of negligence was introduced at the trial to be properly submitted by the judge to a jury, from which the jury returned a reasonable verdict of $2,850 in damages against the defendants.

The chief Ohio tribunal chose to usurp the traditional function of the jury. By ignoring this contemporary problem, self-evident to most "ordinary prudent" men, both here and abroad, it overturned the originally entered judgment, through a narrow and outmoded construction of the law in regard to occupiers of business premises toward their invitees.

The *Howard* decision brought no solace or peace of mind to the inhabitants of Franklin and probably increased their distrust of courts. Ohio youth has been put on guard: they attend professionally sponsored functions at their peril. Their parents are faced with the dilemma of attempting to prevent them from attending such functions or suffering apprehension if they do.

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[62] See generally James, Crisis in the Courts (1968).