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Kentucky Law Survey: Administrative and Constitutional Law

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Administrative and Constitutional Law

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INTRODUCTION

This Survey covers significant developments in Kentucky's public law, that general classification of law concerned with the state in its political or sovereign capacity, including constitutional and administrative law. The section on administrative law first discusses the rule of delegation, which is followed by an analysis of administrative procedure in academe. The discussion of constitutional law focuses on three subject areas: adult entertainment activities, electroshock therapy and school expulsions.

I. ADMINISTRATIVE LAW

A. *Delegating Powers—Legislative and Judicial*

The last Survey dealing with administrative law[1] in Kentucky was devoted largely to recounting the development of the rule against delegation. It started with a discussion of the "adequate standards" test of the 1930s and the adoption of Professor Davis' "safeguards" principle in the 1960s[2] and thence to the current muddle. Davis states the essence of his safeguards approach as follows:

> For the requirement of *statutory* standards, the courts should substitute a requirement of *administrative* standards, so that an administrator will be forbidden to exercise discretionary power in an individual case unless he has done what he reasonably can do to formulate, through rule making or otherwise, standards to guide his determination.[3]

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[1] Rogers & Sims, *Administrative Law*, 69 KY. L.J. 489 (1980-81).

[2] *See, e.g.*, Commonwealth v. Associated Indus. of Ky., Inc., 370 S.W.2d 584 (Ky. 1963); Butler v. United Cerebral Palsy of N. Ky., 352 S.W.2d 203 (Ky. 1961).

[3] K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, SUPPLEMENTING ADMINISTRATIVE LAW TREATISE 20 (1976).

This approach does not invalidate the statutory delegation, but may invalidate particular administrative action.

In the 1976 case of *Miller v. Covington Development Authority*,[4] the Kentucky Supreme Court stated that it was relying on the safeguards test but invalidated the statute delegating power to administrative development authorities for want of an adequate standard in the *statute* for defining "economically significant area" and because the Court found the delegation unnecessary.[5] The rule against delegation was further confounded at all court levels last year in two cases involving a statute specifically authorizing the Kentucky Human Rights Commission to impose monetary damages for embarrassment and humiliation. In *Kentucky Commission on Human Rights v. Barbour*,[6] a case concerning housing discrimination based on race, the Franklin Circuit Court ruled the statute was void as an unconstitutional delegation of power because the act contained no "standards or guidelines for the exercise of the discretion" and no "monetary ceiling" on awards.[7] On appeal, the Kentucky Court of Appeals held that the rule against delegation had been expressly rejected in 1961 and applied a five-pronged "safeguards" test, one prong of which was whether "the agency is required to establish criteria for its decisions by issuing regulations."[8] It did not hold the statute unconstitutional. Instead, the case was remanded to the Commission for "detailed written findings" to justify the damages originally awarded. The issuance of regulations establishing criteria for Commission decisions was not required by the court.[9] The second case to consider the statute was *Kentucky Commission on Human Rights v. Fraser*,[10] a sex discrimination action

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[4] 539 S.W.2d 1 (Ky. 1976).

[5] *Id.* at 4-5.

[6] 587 S.W.2d 849 (Ky. Ct. App. 1979), *rev'd*, 625 S.W.2d 860 (Ky. 1981).

[7] 587 S.W.2d at 850.

[8] *Id.* at 851. *See* Butler v. United Cerebral Palsy of N. Ky., Inc., 352 S.W.2d at 203.

[9] 587 S.W.2d at 852 (In declining to reach the constitutionality of KRS § 344.230(3)(h), the court relied upon the absence of fact findings by the Commission to support its decision to remand the case)..

[10] No. 80-CA-258-MR (Ky. Ct. App. Aug. 22, 1980) 27 KY. L. SUMM. 11, at 4 [hereinafter cited as KLS], *rev'd*, 625 S.W.2d 852 (Ky. 1981). *Barbour* and *Fraser* were companion cases. *Fraser* contains the significant discussion while *Barbour* basically adopted the reasoning and holding of *Fraser*.

arising out of the dismissal of a female employee who became pregnant. The Madison Circuit Court, like the Franklin Circuit Court, held the statute unconstitutional, inter alia, for lack of legislative standards for determining embarrassment and humiliation.

The Kentucky Supreme Court reversed both cases in 1981.[11] The statute was upheld against the non-delegation attacks on the ground that the *statute* adequately defined the prohibited conduct. A previous Survey article concluded that in *Barbour* and *Fraser* the Court had reaffirmed the "safeguards" test as the proper test in applying the nondelegation doctrine.[12] However, a more recent Kentucky Supreme Court decision indicates that the "adequate standards" test is still all too alive and well and available for use in invalidating legislative delegations. Moreover, the Court emphasized another new rule from *Miller v. Covington Development Authority*[13] enabling courts to invalidate delegations which the legislature believed necessary, if the courts conclude the delegations were not necessary in light of "the practical needs of effective government."[14]

The issue in a recent Kentucky Supreme Court decision in this area, *City of Covington v. Covington Lodge No. 1, F.O.P.*,[15] was the legality of a binding arbitration clause in a collective bargaining agreement between the city and a police union. The clause was held to violate the rule against delegation. The Kentucky Supreme Court's opinion cited a 1903 case[16] for the rule prohibiting all delegations of legislative powers and then cited *Miller v. Covington Development Authority* for the proposition that legislative powers may not be delegated except in cases of "clear necessity,"[17] thus avoiding any mention of either "adequate standards" or "safeguards." Therefore, the Court appar-

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[11] Kentucky Comm'n on Human Rights v. Barbour, 625 S.W.2d 860 (Ky. 1981); Kentucky Comm'n on Human Rights v. Fraser, 625 S.W.2d 852 (Ky. 1981).

[12] Rogers & Sims, *supra* note 1, at 516.

[13] 539 S.W.2d at 1.

[14] *Id.* at 4.

[15] 622 S.W.2d 221 (Ky. 1981).

[16] Lowery v. City of Lexington, 75 S.W. 202 (Ky. 1903). The Court also cited City of Bowling Green v. Gaines, 96 S.W. 852 (Ky. 1906).

[17] 622 S.W.2d at 222.

ently has, at least for cases with facts similar to those in *Covington Lodge*, embraced a different test than the "safeguards" test supposedly settled on in *Barbour* and *Fraser*.

The rule that judicial powers may not be conferred upon or exercised by the political branches is an associated but distinct proposition from the non-delegation rule. It has long been conceded that administrative agencies may exercise "quasi-judicial" powers when hearing disputes and making decisions.[18] In *Barbour* and *Fraser*, a second line of attack was that the imposition of a monetary penalty in racial or sex discrimination cases for embarrassment and humiliation was an "unconstitutional usurpation of judicial power."[19] While the circuit court in *Barbour* seemed to believe that legislative imposition of a monetary ceiling on damages for embarrassment and humiliation would somehow avoid the usurpation,[20] the *Fraser* circuit court implied that only judges could ever constitutionally impose variable penalties, a peculiarly judicial function.[21]

The Kentucky Supreme Court opinion in both *Barbour* and *Fraser* laid the matter to rest by pointing out in *Fraser* that "[a]dministrative agencies are frequently involved in the adjudication of disputes"[22] and that "[t]he substantial trend of authority extends administrative powers of adjudiction to encompass the award of damages."[23] The Court further stated: "We find nothing unconstitutional in the administrative award of damages under this statute where due process procedural rights have been protected, where prohibited conduct has been well defined by the governing statute, and where judicial review is available."[24]

The Court in *Fraser* also expressly held that the Kentucky Constitution does not require a monetary ceiling to be set for the award of damages for humiliation or embarrassment.[25] Since

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[18] *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3:10 (2d ed. 1978 & Supp. 1982).

[19] 625 S.W.2d at 855.

[20] 587 S.W.2d at 850.

[21] No. 80-CA-258-MR, slip op. at 15.

[22] 625 S.W.2d at 854.

[23] *Id.* at 855.

[24] *Id.*

[25] *Id.*

there is no dollar limit and the concepts of humiliation and embarrassment are not easy to quantify, an administrative body is just as qualified as a jury in "assessing similarly intangible elements of injury, such as pain and suffering and loss of consortium, without dollar limits. As long as judicial review is available there is no inherent evil in committing the same fact-finding function to an administrative body."[26] The Court found two advantages in conferring this power to impose monetary penalties without dollar limits: "In such cases a specific limit could itself be arbitrary, and the agency's experience in gauging similar cases gives it a range of reasonable awards which may help to make the agency less susceptible to an unreasonable finding than an inexperienced jury might be."[27]

B. *Administrative Procedure in Academe*

State universities are no doubt public agencies, but with differences—they are not headed by commissioners or staffed by bureaucracy. Indeed, in order to insulate them as far as possible from the day to day pressures of the political branches, universities have been equipped like private institutions with independent boards of trustees or regents[28] and staffed with a president, administration, faculty and employees. They operate under general statutory powers, pieced together to some extent by governing regulations, administrative regulations and Senate Rules. Through the years, much university administration has been passed by fiat, resulting in little attention being paid to due process procedures.

More recently, the United States Constitution has come to the campus.[29] Courts have imposed procedural due process re-

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[26] *Id.*

[27] *Id.*

[28] Trustees and regents are appointed by the Governor, but are given fixed terms and can be removed only for cause. KY. REV. STAT. § 164.320 (Bobbs-Merrill Cum. Supp. 1982) [hereinafter cited as KRS]. Terms were increased from four to six years in 1980 and are staggered to encourage stability and to further discourage influence from the political branches. Some trustees may influence policy over the years, but characteristically the boards are dominated by strong presidents, who make most university policy under delegation from the boards.

[29] See Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

quirements in cases of student expulsions[30] and faculty dismissals,[31] but the question of proper procedures for the dismissal of a university president during a term of office had never arisen in Kentucky until February of 1981,[32] at Murray State University. Not surprisingly, there was a lack of clear-cut regulations and precedents. A fierce battled erupted, and the dispute went three times to the Kentucky Court of Appeals and twice to the Kentucky Supreme Court. The only published opinion, however, is a brief one by the court of appeals, which reversed the circuit court decision ordering a hearing and voided the hearing on the ground of failure to exhaust administrative remedies.[33] The case does deserve full reporting, because it may well be a milestone on the path from arbitrary procedures to an era of creeping legalism in the universities.

Murray State University President Curris was midway through his third four-year term of office when on February 22, 1981, the Board of Regents[34] voted six to four to consider his removal for cause[35] and set a hearing for March 28. The Board appointed the University attorney[36] to investigate and formulate

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Wright discusses Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

[30] *See* Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978). For a discussion of a recent Kentucky decision concerning due process in student expulsion cases, see text accompanying notes 109-133 *infra*.

[31] *Compare* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (nontenured teacher has no constitutional right to a hearing before nonrenewal of contract absent a showing that liberty was deprived or that a property interest existed in continued employment) *with* Perry v. Sinderman, 408 U.S. 593 (1972) (proof of implied tenure from an institution's policies and practices would be sufficient property interest in continued employment to require a hearing).

[32] The Louisville Courier-Journal, Feb. 23, 1981, at A1, col. 5 (Kentucky edition). The Curris-Board of Regents saga is chronicled in the *Courier-Journal* from 1981-83.

[33] Board of Regents of Murray State Univ. v. Curris, 620 S.W.2d 322 (Ky. Ct. App. 1981).

[34] The board of regents consists of 10 regents, eight appointed by the governor for six-year terms and one each elected by the faculty for a three-year term and by the students for a one-year term. KRS § 164.320 (Cum. Supp. 1982).

[35] KRS § 164.360(3) (1980) provides that "no president or faculty member shall be removed except for incompetency, neglect of or refusal to perform his duty, or for immoral conduct." Provision is made for a 10-day written notice of the nature of the charges, a hearing before the Board by counsel or otherwise and introduction of testimony. *See* The Louisville Courier-Journal, Feb. 23, 1981, at A1, col. 5 (Kentucky Edition).

[36] KRS § 164.360(3) (1980) provides in part: "Charges against a president shall be

charges and suspended the president from all but ceremonial functions. Curris promptly brought suit in the Calloway Circuit Court to enjoin five of the six regents who had voted for the hearing from participating in it on the grounds of prejudice.[37] The presiding circuit judge disqualified himself and Judge J. Paul Keith of Jefferson County was appointed Special Judge.

On March 23, Judge Keith began a hearing on the Curris injunction action. After all ten regents testified, he ruled on March 24 that four of the five regents who had been sued, including the one student and one faculty regent, should be barred from the Board hearing because of their bias against Curris. The six remaining regents (the chairperson, the one other regent who had voted for the hearing, and the four regents opposing the hearing) were left to constitute a quorum for the March 28 hearing.[38] Last ditch efforts by the Board's attorney to block the Board hearing, on the grounds of Curris' failure to exhaust his administrative remedies before seeking judicial relief, were denied on March 27 by both the court of appeals and the Supreme Court on the ground that the hearing before the six-member Board did not threaten irreparable injury to the University.[39] However, the press reported that Chief Justice Palmore had suggested in the course of the argument before the Kentucky Supreme Court that "'the orderly thing' for the Board to do was to delay the hearing, because the courts might later 'come along and say it was all for naught.'"[40]

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preferred by the chairman of the board upon written information furnished to him." The chairperson at the time, Ron Christopher, was a practicing attorney in Murray, Kentucky. The Board voted to employ an independent Murray law firm and a Bowling Green accounting firm to investigate and present the charges. Fourteen charges were originally submitted to Curris on Feb. 22, 1981; eight were dropped and three were added at a March 14 meeting of the Board. The use of outside investigators was attacked as an unlawful expense, but offered the advantage of some "separation of functions" which has been a frequent goal in administrative hearings.

[37] The chairperson, who also had voted for the hearing, was not sued. The Louisville Courier-Journal, Mar. 26, 1981, at B1, col. 1 (Kentucky Late Edition).

[38] *Id.*

[39] Board of Regents of Murray State Univ. v. Honorable J. Paul Keith, Jr., No. 81-SC-382-MR, slip. op., (Ky. June 16, 1981).

[40] The Louisville Courier-Journal, Mar. 28, 1981, at B1, col. 1 (Kentucky Late Edition).

Nonetheless, the hearing began the next day before the bobtailed board of six regents. At the outset, Curris' attorney tried unsuccessfully to unseat the chairperson and the Board's attorney made similar unsuccessful attempts to unseat three of the pro-Curris regents. Later, six charges were withdrawn;[41] the remaining three were dismissed at the end of the hearing by the not surprising vote of 4-2. Thereupon, the full Board met and promptly voted 10-0 to restore Curris to his duties.

This was not, however, the end of the legal battle. On July 3, the court of appeals held that Judge Keith's judgment barring four Board members for bias was an abuse of discretion and reversed his decision on the ground of failure to exhaust administrative remedies.[42] The appellate court held that the claims of bias did not justify premature resort to the court, since adequate relief for bias, if necessary, could be provided *following* proceedings before the Board.[43] On August 27, the Kentucky Supreme Court denied a motion to vacate the court of appeals ruling; the three-day hearing by the bobtailed Board was indeed "for naught," as Chief Justice Palmore had earlier suggested.[44]

The *Curris* decision, of course, is a victory for the principle of exhaustion of administrative remedies. As the court of appeals pointed out, exhaustion is not required if no adequate relief can be afforded following the administrative proceedings. However, the court concluded that judicial review of the bias claim following an administrative hearing would afford adequate relief. Surely the record of the administrative hearing would afford a firmer basis for a judicial decision on impartiality than speculation before the event about possible bias of regents. An additional reason for the decision may have been the subject matter. Courts are reluctant to intervene in the affairs of educational institutions if intervention can be avoided.

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[41] The reason given by the University's attorney for withdrawal of the charges was that "some key witnesses would not testify unless they were quaranteed [sic] no retaliation by the board." The Louisville Courier-Journal, Mar. 31, 1981, at B1, col. 6 (Late Kentucky Edition).

[42] Board of Regents of Murray State Univ. v. Curris, 620 S.W.2d at 322.

[43] *Id.*

[44] A new hearing before the full Board was obviously in order, but a temporary peace had set in. The six to four majority in favor of the hearing was reduced to a five to five split by the election of a pro-Curris student. In the face of a possible deadlock, no new hearing was scheduled.

The more important administrative law issue decided by the Kentucky Court of Appeals in *Curris* was the issue of disqualification of hearing officers for lack of impartiality. The law recognizes three types of disqualifying taint: interest, pre-judgment and personal bias.[45] "Interest" must involve the prospect of personal gain or loss—either pecuniary[46] or otherwise resulting from having played the role of advocate in the same case.[47] Disqualifying "pre-judgment" involves predetermination of adjudicative facts involved. In *Curris*, neither "interest" nor "pre-judgment" were found to be in issue, even though the Board which heard the charges was the same Board which had preferred them.[48] Finally, "bias," to be disqualifying, must involve partiality—an inclination to favor one party more than another strongly enough to cause unfairness.[49]

The trial court reached the strange conclusion that four of the five regents proposing to hear charges were biased while all of those who opposed a hearing were not. The Kentucky Court of Appeals on review pointed out that each enjoined regent testified in court that he had not prejudged the case and would vote on removal based solely on evidence presented at the hearing. The court further found that the determination of bias by Judge Keith was a conjectural finding of potential bias made in advance of the hearing, and that there is a presumption of honesty and integrity of members of state administrative agencies.[50]

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[45] K. DAVIS, ADMINISTRATIVE LAW TREATISE SUPPLEMENT §§ 19:4-:6 (1980).

[46] *Id.* § 19:6. Tumey v. Ohio, 273 U.S. 510 (1927), is the classic case on disqualifying "interest." In the more recent case of Gibson v. Berryhill, 411 U.S. 564 (1973), the United States Supreme Court voided a decision of the Alabama Board of Optometrists, composed entirely of independent practitioners, which suspended all optometrists engaged in corporate practice for unprofessional conduct. The practice of optometry in the state was almost evenly split between independent and corporate optometrists and the independents would have fallen heir to the entire practice of the corporate optometrists had the suspension been upheld.

[47] Here it is not money, but personal pride involved. One who has prosecuted is presumed to persist in the role of advocate.

[48] "Multiplicity of functions" is frequently attacked, but, as Professor Davis points out, "[a]lthough at least eleven United States Supreme Court opinions have dealt with problems about separation of functions, the Court has never held a system of combined functions to be a violation of due process." 3 K. DAVIS, *supra* note 18, at § 18:2 (2d ed. 1980).

[49] K. DAVIS, *supra* note 45, at § 19:5.

[50] 620 S.W.2d at 323. Judge Keith apparently gave great weight to a breakfast meet-

In May of 1982, the Board at Murray State University voted five to four to notify Curris that his contract would not be renewed upon its expiration date in 1983 and to begin a nationwide search for a new president.[51] After a new dispute between the Board and the president in late July of 1982 concerning certain appointments, the Governor requested the resignation of the seven appointed regents so that he might appoint eight new regents who could work in harmony. Four regents did resign, but the chairperson and two regents declined the Governor's invitation.[52] The Governor finally appointed five new regents on August 30.[53] The reconstituted Board promptly affirmed the decision to search for a new president. President Curris announced first that he would not "seek" reappointment and finally that he would not accept a reappointment if it were tendered.

The Governor's request for resignations raised the new and different question of balance between gubernatorial executive power and university board independence. The chairperson and director of the Council on Higher Education approved the Governor's call for resignations, as did the chairperson of the Committee on the Future of Higher Education in Kentucky. The faculty trustees and regents of the seven other Kentucky universities and the Executive Committee of the Kentucky Conference of American Association of University Professors chapters endorsed the position of the regents who refused the invitation to resign. Again, the underlying issue was one of university independence, this time in the face of the call for efficient administration.

It was reported that the Board at Murray State University had no by-laws and operated on ad hoc rulings by the chairperson subject to appeal to the entire Board. Perhaps one of the prin-

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ing of several regents at "Granny's Porch" restaurant on the morning of Feb. 7, 1981, preceding the Board meeting. Similarly, at the Board's March 28 hearing, the special attorney of the Board sought removal of three regents who had opposed the hearing on the ground that they had talked with Curris or met with him and among themselves to discuss the charges.

[51] In April of 1982, the five to five deadlock on the Board was broken by the resignation of Regent Settle. He was succeeded by George N. King on April 30. At the May 23 Board meeting, Regent King did not vote. He resigned in late June of 1982.

[52] The Louisville Courier-Journal, Aug. 12, 1982, at A1, col. 2 (Kentucky Late Edition).

[53] The Louisville Courier-Journal, Aug. 31, 1982, at A1, col. 5 (Metro Edition).

cipal points to be made in this Survey is not the importance of exhaustion of administrative remedies, nor analysis of the requirement of an impartial hearing examiner, nor even the importance of saving the independence of state universities from inroads by legislatures, administrative bodies and courts. Rather, it is that in a Commonwealth which has no general code of administrative procedure,[54] each institution should enact full and fair by-laws or regulations governing the procedures of its boards and administration and faculty so that resort to legal remedies—legislative, judicial or administrative—can be avoided as much as possible.

II. CONSTITUTIONAL LAW

A. *Adult Entertainment Activities*

In *Mr. B's Bar and Lounge, Inc. v. City of Louisville,*[55] the Kentucky Court of Appeals held valid a city ordinance which provided for modest regulation of adult entertainment activities.[56] The Louisville Board of Aldermen had enacted a municipal ordinance regulating outdoor signs which advertised certain "adult entertainment activities" and which required licens-

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[54] In federal administrative law, there is a general code of administrative procedure—the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1976 & Supp. II 1978). Following the lead of the federal system, more than 30 states have adopted a state Administrative Procedure Act. *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT (National Conference of Commissioners on Uniform State Laws 1961), 14 U.L.A. 357 (1980). *See also id.* at prefatory note.

Kentucky does not have a general code of administrative procedures for rulemaking, judicial review of administrative decisions, exhaustive review of administrative agency decisions, adjudicatory powers of administrative agencies and investigatory powers of agencies. Rather, KRS chapter 13, KRS §§ 13.075-.125 (1980 & Cum. Supp. 1982) describes only the rulemaking procedures for administrative agencies.

For an excellent discussion of administrative law in the states, see Bonfield, *The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act,* 63 IOWA L. REV. 285 (1977); Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process,* 60 IOWA L. REV. 731 (1975); Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo,* 61 TEX. L. REV. 95 (1982).

[55] 630 S.W.2d 564 (Ky. Ct. App. 1981), *discretionary review denied,* 29 KLS 4, at 9 (Ky. Apr. 13, 1982).

[56] Louisville, Ky., Ordinance 69 (1977) gives the Director of the Public Health and Safety Cabinet power to license and regulate "adult entertainment activities." *Id.* at 565.

ing of seven types of adult entertainment at a small fee.[57] The ordinance does not prohibit adult entertainment activities,[58] nor zone them.[59] Mr. B's Bar and Lounge, along with several other "topless go-go bars,"[60] filed suit against Louisville and the Director of Public Health and Safety Cabinet challenging the classification of these business activities as "cabarets,"[61] which are among the regulated adult activities.

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[57] Louisville, Ky., Ordinance 69, § 1(e) (1977) requires that seven classifications of adult entertainment activities be licensed and the signs advertising the businesses be strictly regulated. The seven classifications are:

1. Adult book store.
2. Adult motion picture theatre.
3. Adult vending motion picture theatre.
4. Adult stage show theatre.
5. Cabaret.
6. Adult amusement arcade.
7. Commercial sexual entertainment center.

630 S.W.2d at 565. The fee charged for the license is $250. *Id.* at 568.

[58] *See* Louisville, Ky. Ordinance 69, § 1(e). In contrast, the Newport, Kentucky, City Council recently passed an ordinance banning nude dancing. The ordinance requires the strippers to wear G-strings or pasties as well as submit to picture taking and fingerprinting. Local club owners in Newport have filed suit in the United States District Court for the Eastern District of Kentucky.

[59] Several United States Supreme Court decisions permit state regulation through zoning of adult entertainment activities. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. at 50; Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). The Court in *Young v. American Mini Theatres, Inc.* permitted Detroit to zone 10 different kinds of adult entertainment even though the "adult materials" presented were not considered obscene under Miller v. California, 413 U.S. 15 (1973) and Roth v. United States, 354 U.S. 476 (1957).

The *Young* Court emphasized that "[e]ven though the First Amendment protects communication in this area from total suppression, we hold that the state may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." 427 U.S. at 70-71. Although limited first amendment protection may be extended to nude dancing itself, since nude dancing may be only "symbolic speech," there is no absolute first amendment protection. *See* United States v. O'Brien, 391 U.S. 367 (1968) (burning a draft card is "symbolic speech" and conduct is not absolutely protected by the first amendment). In *O'Brien*, the Court held that "symbolic speech" or other expressive conduct receives no absolute first amendment protection, thus any "important or substantial governmental interest" for regulation of such speech would not infringe on first amendment rights. *Id.* at 376-77. For a discussion of regulation or prohibition of topless dancing, see Comment, *Topless Dancing and the Constitution: A New York Town's Experience*, 25 BUFFALO L. REV. 753 (1976). *See generally* Edelstein & Mott, *Collateral Problems in Obscenity Regulation: A Uniform Approach to Prior Restraints, Community Standards, and Judgment Preclusion*, 7 SETON HALL L. REV. 543 (1976); Marcus, *Zoning Obscenity: or, the Moral Politics of Porn*, 27 BUFFALO L. REV. 1 (1978).

[60] 630 S.W.2d at 565.

[61] *Id.* The Director of the Public Health and Safety Cabinet of Louisville placed the

The Jefferson County Circuit Court entered a summary judgment in favor of the city.[62] The Kentucky Court of Appeals affirmed the summary judgment and sustained the ordinance against numerous constitutional attacks.[63] The bars first alleged that the ordinance was overly broad as applied to them since it "arbitrarily and discriminatorily placed [them] in a classification of pornography dealers."[64] The court of appeals rejected this argument, noting that the ordinance only regulates "adult entertainment activities" and not "pornography as such."[65] The court explained that, whether or not topless go-go dancing is considered pornographic, the city has a legitimate interest in regulating cabarets and the other businesses covered by the ordinance since they all have a common thread: they are "clearly

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plaintiffs' businesses under the ordinance's § 1(e)(5) definition of "cabaret," thereby activating the license fee and the regulation of advertising signs.

[62] *Id.* at 565.

[63] *Id.* at 568. The bars claimed that the ordinance was invalid because the findings on which it was based were erroneous. *Id.* at 565. The preamble to the ordinance included findings that "certain adult entertainment activities have contributed to an increased incidence of crime and juvenile delinquency." *Id.* The court of appeals rejected this argument, stating that since the quoted language appears in the preamble to the ordinance, the bars could not challenge the findings. "The preamble to a piece of legislation is generally held not to be an essential part of the legislation." *Id.* The court further stated that the challenge to the findings "basically consists of a questioning of the public policy on which the Board of Aldermen based its action." As such, the proper forum for challenging the policy was the legislature and not the court. *See* Fann v. McGuffey, 435 S.W.2d 770 (Ky. 1975); Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964); Louisville Memorial Gardens, Inc. v. Carpenter, 261 S.W.2d 627 (Ky. 1953).

The plaintiffs also alleged that the Kentucky Alcoholic Beverage Control Board's regulation of alcohol-serving establishments preempted any city regulations. The court of appeals rejected this argument, stating that although alcohol is a state regulated matter, the city's ordinance did not regulate the establishments for serving alcohol; rather, the ordinance regulated the bars only for the aspect of "adult entertainment activities." 630 S.W.2d at 566. Interestingly, the twenty-first amendment provides the Kentucky Alcoholic Beverage Control Board with plenary power to regulate or even prohibit adult sexual entertainment activities at these bars. *See* California v. LaRue, 409 U.S. 109 (1973) (twenty-first amendment, which grants the states plenary power over alcohol, also grants broad discretion to the states in regulating liquor establishments—including the total prohibition of adult sexual entertainment activities within these liquor establishments).

For an excellent discussion of *California v. LaRue*, see Comment, *Nude Dancing Protected Under Limited Circumstances in Establishments Serving Alcoholic Beverages—* Commonwealth v. Sees, *78 Mass. Adv. Sh. 536, 373 N.E.2d 1151 (1978)*, 13 SUFFOLK U.L. REV. 162 (1979).

[64] 630 S.W.2d at 566.

[65] *Id.*

sexually-oriented entertainments . . . and as such, they involve similar problems of regulation."[66] The city's interests are the protection of children from juvenile delinquency and the control of crime.[67] Because the "classification has a rational basis, that is, the unique problems involved in advertising adult entertainment activities,"[68] nothing prevents the city from regulating these businesses.

The court rejected another argument made by the bars relating to their classification as "cabarets." The bars argued that placing them in a classification different from other businesses which sell alcoholic beverages was discriminatory and violated the equal protection clause; the court again noted that the classification had a rational basis—the special problems of regulating adult entertainment activities—and thus was not an unconstitutional discrimination.[69]

The bars further contended that an ordinance that tells them what types of signs may be used in front of their adult entertainment establishments constitutes a taking of property without due process of law.[70] The ordinance prohibits businesses in the adult entertainment classification from using signs with "lettering, wording, pictorial or representational matter characterized by emphasis on matter relating to sexual activities."[71] The court summarily rejected this due process argument by stating that the ordinance did not require a physical transfer of any existing signs to the local government; therefore, there was no "taking."[72]

Although the court is correct in denying a "taking" argument, the court's view of the "taking" issue fails to consider the affect of land use regulation on property. The court of appeals opinion is consistent with early United States Supreme Court cases which held that only a physical appropriation by the state

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[66] *Id.*

[67] *Id.* at 565.

[68] *Id.* at 567.

[69] *Id.*

[70] *Id.* U.S. CONST. amend. XIV, § 1 provides: "No state shall deprive any person of life, liberty or property without due process of law."

[71] 630 S.W.2d at 567. The thrust of the ordinance is regulation of the signs advertising adult entertainment activities.

[72] *Id.*

equalled a "taking" requiring the state to pay the landowner just compensation.[73] However, this view was rejected in 1922 by the Supreme Court in *Pennsylvania Coal Co. v. Mahon.*[74] That case involved a state mining statute which prohibited mining of coal in a manner causing subsidence[75] of certain types of improved property. Justice Holmes, writting for the majority, stated that "when [regulation] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[76] The state can regulate and provide for land use controls. However, if the regulation or prohibition goes so far that there is a taking, then the injured landowner must be compensated.[77] The sign regulation involved in *Mr. B's* is consistent with holding no compensation is due under property use regulations where the state has a substantial interest in public health, safety, morals or general welfare.[78]

Another ground of attack by the bars was that the use of signs in front of the businesses constituted speech within the protection of the first amendment.[79] In recent years, the United States Supreme Court has denominated advertising as "commercial speech."[80] The bars in *Mr. B's* alleged that the regulation of their

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[73] *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887).

[74] 260 U.S. 393 (1922).

[75] Subsidence means ground sinking.

[76] 260 U.S. at 413.

[77] *Id.* at 414. For a recent discussion of the "taking" issue in a zoning context, see Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978).

[78] *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[79] 630 S.W.2d at 567.

[80] *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978); National Society of Professional Eng'r v. United States, 435 U.S. 679 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rights, 413 U.S. 376 (1973); New York Times v. Sullivan, 376 U.S. 254 (1964); Breard v. City of Alexandria, 341 U.S. 622 (1951); Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Valentine v. Chrestensen, 316 U.S. 52 (1942); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd without opinion sub nom.*, Capital Broadcasting Co. v. Acting Attorney Gen. Kleindienst, 405 U.S. 1000 (1971). *See also* Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953); Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965).

signs violated their first amendment right of free speech. Relying on the United States Supreme Court's holding in *Young v. American Mini Theatres* that "reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment," the Kentucky court held

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The Court in *Valentine v. Chrestensen* first delineated the scope of what became known as the "commercial speech" doctrine. It interpreted the first amendment as excluding commercial speech from any protection:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.

316 U.S. at 54.

More recently, the Supreme Court has extended first amendment protection to what *Valentine v. Chrestensen* termed "commercial speech." In a series of three decisions made in the mid-1970s, the Court reinterpreted *Chrestensen* and rejected the commercial speech doctrine, thus allowing some first amendment protection for advertising. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. at 748; Bigelow v. Virginia, 421 U.S. at 809; Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rights, 413 U.S. at 376. In *Pittsburgh Press*, for example, the Court noted that "the exchange of information is as important in the commercial realm as in any other." 413 U.S. at 388. The states cannot prohibit such speech when the underlying commercial activity is legal. Bigelow v. Virginia, 421 U.S. at 822 (referring to advertisements for abortion clinics). The Court, however, allows states to regulate the time, manner and place of protected speech. *See* Young v. American Mini Theatres, 427 U.S. 50 (1976).

States may totally prohibit speech "when the commercial activity itself is illegal." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rights, 413 U.S. at 389. Thus, the state may *regulate* "speech," such as the signs involved in *Mr. B's Bar & Lounge v. City of Louisville*, but cannot prohibit such speech unless it is illegal.

Another attack made by the bars was that the advertising sign ordinance was an improperly enacted zoning ordinance. In the context of land and zoning regulations, the United States Supreme Court has granted cities wide discretion. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. at 365. In *Ambler Realty*, the Supreme Court recognized zoning as a valid method of land use planning. Arising out of this case was a line of cases permitting regulation of signs and billboards for business advertising purposes under the guise of community interests and rational exercise of state police powers (as in *Mr. B's*, the reasons were to prevent crime and juvenile delinquency). *See* P. ROHAN, ZONING AND LAND USE CONTROLS § 16.01 (1981); Masotti & Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URBAN L. 773 (1969).

The United States Supreme Court's decision in Young v. American Mini Theatres, Inc., 427 U.S. at 50, relates to both the first amendment and the zoning issues. This case adopts the view that the state and city can have sufficient interests to restrict the time, place and manner of protected speech. Therefore, the Kentucky Court of Appeals correct-

the regulation did not violate the first amendment.[81] The court did not expressly state the interests which were sufficient for first amendment purposes. It did note, in another portion of the opinion, that among the city's purposes were the prevention of crime and juvenile delinquency.[82]

B. *Electroshock Therapy and Privacy Rights*

To what extent may an involuntarily committed mental patient refuse electro-convulsive therapy (ECT)?[83] The Kentucky Court of Appeals faced this question in *Gundy v. Pauley*.[84] Dessie Gundy had been involuntarily committed to a state mental hospital, but had not been judged incompetent to act on her own behalf. The doctors at the mental institution asked Gundy to voluntarily submit to an ECT. Upon her refusal, the doctors filed suit in Fayette County Circuit Court alleging that the ECT would be in her "best interests." The trial court ordered Gundy to submit to the ECT under a Department for Human Resources regulation[85] which authorizes ECT after a judicial determination that "such treatment is in the *best interest* of the patient."[86]

Gundy appealed to the Kentucky Court of Appeals, alleging that the Department for Human Resources regulation is ultra vires because Kentucky Revised Statutes (KRS) section 202A.180(7)[87] confers an absolute right to refuse such treatment.

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ly relied upon these federal decisions for its opinion in *Mr. B's*. Louisville has the power to license and regulate advertising of the "sexually-oriented" adult entertainment activities, since the content of such advertising falls outside absolute first amendment free speech protections. *See generally* Walker v. City of Birmingham, 388 U.S. 307 (1978) (recognizing the power of city and local governments to regulate public places as a basis for sustaining a temporary injunction prohibiting street demonstrations without a parade permit.); Poulos v. New Hampshire, 345 U.S. 395 (1953) (holding as constitutional a city ordinance which forbade religious meetings in a public park without a license.).

[81] 630 S.W.2d at 567.

[82] *See id.*

[83] Electro-convulsive therapy (ECT) is commonly referred to as electroshock therapy. See 3 R. KAPLAN, W. FREEDMAN & R. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY ch. 31.5 (1980).

[84] 619 S.W.2d 730 (Ky. Ct. App. 1981). For a discussion of how this decision was codified by the 1982 General Assembly, see text accompanying notes 103-08 *infra*.

[85] 902 KY. ADMIN. REGS. 12:020 (1981).

[86] 619 S.W.2d at 731 (emphasis added).

[87] KRS § 202A.180(7) (repealed 1982).

Further, Gundy complained that her constitutional right to privacy was violated by an order to submit to an ECT. The court of appeals agreed with Gundy on the constitutional issue and dismissed the trial court's order of a forced ECT.[88]

The court in *Gundy* recognized a constitutionally-protected right of privacy for a mental patient to "decide for himself whether to submit to serious and potentially harmful medical treatment."[89] Although the court does not cite any specific state or federal constitutional provisions, the opinion relies on three recent decisions from other jurisdictions dealing with the rights of mental patients in cases involving the forced administration of mind-altering drugs.[90] This constitutional right of refusal ap-

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[88] 619 S.W.2d at 731-32.

[89] *Id.* at 731.

[90] *Id.* (citing Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom.* Mills v. Rogers, 102 S. Ct. 2442 (1982); Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978), *modified and remanded* 653 F.2d 836 (3d Cir. 1981); *In re* K.K.B., 609 P.2d 747 (Okla. 1980). *See generally Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

In *Okin*, a class which consisted of both voluntary and involuntary mental hospital patients in Massachusetts sued the various defendants (mental hospital staff members) over the forcible administration of mind-altering drugs. The First Circuit found a fourteenth amendment due process right of privacy for the patients in refusing to submit to the antipsychotic drugs. *Id.* at 653. The court in *Okin* asserts the "most likely" source for the fourteenth amendment due process protection of the interest to make treatment decisions is the penumbral right to privacy, bodily integrity or personal security. For support, the court cites Parham v. J.R., 442 U.S. 584, 626 (1979), Ingraham v. Wright, 430 U.S. 651 (1977); Breithaupt v. Abram, 352 U.S. 432 (1957); Rennie v. Klein, 462 F. Supp. at 1131; Superintendent of Belchertown v. Saikewicz, 370 N.E.2d 417 (Mass. 1977).

The court held this "right" of privacy is not absolute, however, and the state may order the treatment in either of two cases: where patients pose a threat to themselves or others; or where patients have been declared incompetent and therefore cannot make a decision on whether or not to refuse treatment. On the other hand, the state may choose to recognize a privacy interest broader than that protected directly by the federal constitution. The United States Supreme Court, in vacating and remanding *Okin*, stated in Mills v. Rogers, 102 S. Ct. at 2449 "[s]tate law may recognize liberty interests more extensive than those independently protected by the Federal Constitution."

At present, *Okin* has been remanded for reconsideration in light of the decision in the Matter of Guardianship of Richard Roe, III, 421 N.E.2d 40 (Mass. 1981). The Supreme Judicial Court of Massachusetts held in *Roe III* that a noninstitutionalized incompetent person has a protected liberty interest in "deciding for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the admission of antipsychotic drugs." 421 N.E.2d at 51 n.9. It may well be possible that upon reconsideration of *Okin*, the First Circuit will expand the privacy right rather than limit it. For a discussion of limitations on the constitutional right to refuse treatment, see text accompanying notes 91-100 *infra*.

peared to be embodied in KRS section 202A.180(7), which recognized unspecified "rights of [mental] patients to refuse intrusive treatments, *including electroshock therapy.*"[91] This statute, since repealed,[92] grants the Secretary of the Department for Human Resources the power to make regulations for enforcement of the unspecified right to refuse treatment; the regulation at issue in Gundy was adopted under this authority.[93]

The Kentucky Court of Appeals in *Gundy* noted, however, that the rights embodied in KRS section 202A.180(7), are subject to exceptions. The state has a compelling interest that outweighs the individual mental patient's rights in two instances.[94] First, the Kentucky court recognized the state's police power interest in protecting other citizens or patients themselves from "immediate danger" or "threat" of harm.[95] Second, the state has an interest in acting as *parens patriae* for those who are declared incompetent and cannot care for themselves.[96]

Because the Department for Human Resources regulation provides for required submission to an ECT upon a court order that "such treatment is in the best interest of the patient,"[97] the court of appeals invalidated this regulation.[98] The court stated that an involuntarily-committed mental patient could not be compelled to undergo ECT "simply because it is considered to be

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[91] KRS § 202A.180(7) (1977) (emphasis added) (repealed 1982).

[92] *See* notes 103-08 *infra* and accompanying text for a discussion of the 1982 legislation.

[93] 619 S.W.2d at 731.

[94] These are the same two exceptions listed by the First Circuit Court in *Okin*. 634 F.2d at 654-58.

[95] 619 S.W.2d at 731.

[96] *Id.* In *Okin*, the First Circuit discussed the state's interests in more depth. *Parens patriae* powers are powers of the sovereign to act as "the general guardian of all infants, idiots, and lunatics." Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972) (quoting 3 W. BLACKSTONE, COMMENTARIES *47). *See* Addington v. Texas, 441 U.S. 418, 426 (1979) ("state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves"). For the state to activate the *parens patriae* power, "the individual himself must be incapable of making a competent decision concerning treatment on his own." 634 F.2d at 657. The Kentucky Court of Appeals in *Gundy* likewise requires a prior determination that the involuntarily-committed patient is incompetent, i.e., cannot act on his or her own volition. 619 S.W.2d at 731.

[97] 902 KY. ADMIN. REGS. 12:020(8) (1981).

[98] 619 S.W.2d at 731.

in the best interest of the patient."[99] Thus, the constitutional right of privacy implicit in KRS section 202A.180(7) can be superseded only upon showing of a compelling state interest. Only upon a judicially-determined finding of incompetency or an emergency (such as threat of violence or harm to self or others)[100] can involuntarily-committed mental patients be subjected against their will to an ECT.

The Kentucky Court of Appeals in *Gundy* echoes the sentiment of a few other jurisdictions[101] in holding that involuntarily-committed mental patients have a constitutional right of privacy to refuse ECT or mind-altering drugs supposedly provided for their best interests. Even though involuntarily committed, the patient has a right to "decide for himself whether to submit to electroshock therapy."[102] The court clearly struck a victory for the rights of mental patients in *Gundy v. Pauley.*

In its 1982 session, the Kentucky General Assembly codified the *Gundy* decision. The legislators repealed KRS section 202A.180[103] and rewrote this section, deleting some material, but leaving the "right to refuse intrusive treatment" in new KRS section 202A.191.[104] In addition, KRS section 202A.196[105] was enacted to provide for hospital review committees in mental institutions. The purpose of these committees is to review an involuntarily-committed patient's refusal to undergo intrusive treat-

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[99] *Id.* at 731-32.

[100] *Id.* at 731. See Rogers v. Okin, 634 F.2d at 650, for a discussion of when violent propensities of a patient amount to an "emergency," thus allowing forcible administration of drugs or ECT.

[101] See the list of cases dealing with these privacy rights of mental patients in note 90 *supra.* In *Gundy,* Judge McDonald concurred specially to emphasize the "horrors" of ECT. 619 S.W.2d at 732 (McDonald, J., concurring). The concurring opinion graphically describes the ECT procedure and the potentially harmful physical side-effects. Judge McDonald further states that the intrusiveness of ECT is so great as to require a strong state interest, such as incompetency of the patient (thereby invoking the *parens patriae* powers) or violent propensities towards self or others (thereby invoking the police powers). *Id.*

[102] *Id.* at 732 (McDonald, J., concurring).

[103] KRS § 202A.180, *repealed* Act of Apr. 2, 1982, ch. 445, § 44, 1982 Ky. Acts 1648. In fact, the General Assembly overhauled and reorganized KRS chapter 202A. *See* Act of Apr. 2, 1982, ch. 445, §§ 1-45, 1982 Ky. Acts 1629-48.

[104] Act of Apr. 2, 1982, ch. 445, § 27, 1982 Ky. Acts 1638 (*codified as* KRS § 202A.191 (1983)).

[105] Act of Apr. 2, 1982, ch. 445, § 28, 1982 Ky. Acts 1639.

ments, such as ECT.[106] If the committee approves such a treatment plan and the patient refuses to follow it, then the committee meets with and counsels the patient.[107] If the patient still refuses to participate in the treatment plan, the hospital may file a petition in district court for a hearing on the appropriateness of the plan. The victory for patient's rights in *Gundy* has been codified in the new KRS section 202A.196(3) which requires the court to consider, among other factors, the competence of the patient to consent to treatment and the threat posed by the patient if he or she is not treated.[108] The review committees in the hospital, along with the open door of the courts, should provide effective review of intrusive treatment plans.

C. *Due Process and School Expulsions*

1. *Substantive Due Process*

The Kentucky Court of Appeals was faced with a due process[109] challenge to school expulsions in *Clark County Board of Education v. Jones.*[110] The appellees, all members of the George Rogers Clark High School Band, were found to have consumed alcoholic beverages while on a school-sponsored trip to Murray, Kentucky. Following a conference between the students and the

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[106] KRS § 202A.196(1) (1983).

[107] *Id.* § 202A.196(2) (1983).

[108] *Id.* § 202A.196(3) (1983). Further, this section gives the district courts certain guidelines for conducting a hearing:

> Within seven (7) days, the court shall conduct a hearing, consistent with the patient's rights to due process of law, and shall utilize the following factors in reaching its determination:
>
> (a) Whether the treatment is necessary to protect other patients or the patient himself from harm;
>
> (b) Whether the patient is incapable of giving informed consent to the proposed treatment;
>
> (c) Whether any less restrictive alternative treatment exists; and
>
> (d) Whether the proposed treatment carries any risk of permanent side effects.

[109] For the text of the fourteenth amendment due process clause, see note 70 *supra.* For excellent discussions of deprivation of liberty in a school setting, see Davis, *The* Goss *Principle*, 16 SAN DIEGO L. REV. 289 (1979); Wilkinson, Goss v. Lopez: *The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25.

[110] 625 S.W.2d 586 (Ky. Ct. App. 1981).

school's assistant principals, the students were suspended from school and informed that a recommendation would be issued to the superintendent that they should be expelled for the remainder of the school year.[111] Upon the superintendent's recommendation, the Clark County Board of Education conducted a hearing and decided to expel the students for the rest of the semester.[112] Two of these students filed separate actions in the Clark County Circuit Court, seeking injunctive relief against the Board.[113]

The trial court voided the high school regulation providing that "suspension shall be mandatory for the first offense for the use of . . . alcoholic beverages."[114] Further, the trial court found the Board's subsequent expulsion of the students was "arbitrary"[115] under the grounds and procedures for expulsion found in KRS section 158.150[116] because the Board failed to consider cer-

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[111] *Id.* at 588.

[112] *Id.* Pursuant to KRS § 158.150(3) (Cum. Supp. 1982), the superintendent, principal or head teacher may suspend students for violating certain disciplinary standards. The Board of Education may expel a student, but only after opportunities for a hearing. *Id.* For a discussion of the difference between expulsion and suspension, see text accompanying notes 128-29 *infra.*

[113] 625 S.W.2d at 587. The actions were consolidated for purposes of trial and appeal. *Id.*

[114] *Id.* at 588-89. The full Board regulation reads:

> Suspension shall be mandatory on the first offense for the use of, possession of, or trafficking in drugs or alcoholic beverages on school property, in transit to or from school, or at school functions, whether on or off school property. Superintendent may recommend to the board of education that offenders be expelled from school under the provisions of KRS 158.150.

Id. The trial court held that this regulation exceeded the suspension authority granted high schools under KRS § 158.150 (Cum. Supp. 1982). *Id.* at 588. For the full text of KRS § 158.150, see note 116 *infra.*

[115] 625 S.W.2d at 588.

[116] KRS § 158.150 (Cum. Supp. 1982) provides:

> (1) All pupils admitted to the common schools shall comply with the lawful regulations for the government of the schools. Wilful disobedience or defiance of the authority of the teachers or administrators, use of profanity or vulgarity, assault or battery or abuse of other students, or school personnel, the threat of force or violence, the use or possession of alcohol or drugs, stealing or destruction or defacing of school property or personal property, the carrying or use of weapons or dangerous instruments, or other incorrigible bad conduct on school property as well as off school property at school sponsored activities constitutes cause for suspension or expulsion from school.
>
> (2) A pupil shall not be suspended from the common schools until after at

tain "factors" the court thought important.[117] The court ordered the Board to readmit the students to the school and to provide another hearing in which the students could introduce additional proof.[118] The Board refused to readmit the students and appealed the adverse rulings to the Kentucky Court of Appeals.

The court of appeals reversed the trial court's voiding of the Board's regulation.[119] KRS section 158.150(1) provides the same causes for suspension as does the regulation, and the mandatory suspension under the regulation did not exceed the authority granted by the statute.[120] However, the court of appeals upheld

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least the following due process procedures have been provided:
(a) The pupil has been given oral or written notice of the charge or charges against him which constitute cause for suspension;
(b) The pupil has been given an explanation of the evidence of the charge or charges if the pupil denies them; and
(c) The pupil has been given an opportunity to present his own version of the facts relating to the charge or charges. These due process procedures shall precede any suspension from the common schools unless immediate suspension is essential to protect persons or property or to avoid disruption of the ongoing academic process. In such cases, the due process procedures outlined above shall follow the suspension as soon as practicable, but no later than three (3) school days after the suspension.
(3) The superintendent, principal, assistant principle or head teacher of any school may suspend a pupil but shall report such action in writing immediately to the superintendent and to the parent, guardian or other person having legal custody or control of the pupil. The board of education of any school district may expel any pupil for misconduct as defined in subsection (1), but such action shall not be taken until the parent, guardian or other person having legal custody or control of the pupil has had an opportunity to have a hearing before the board. The decision of the board shall be final.

[117] The factors are: "the previous general conduct of the students involved; the academic standing of the students; the probability of a recurring violation; and the consideration of alternative punishment or restrictions." 625 S.W.2d at 588.

[118] *Id.*

[119] *Id.* at 589.

[120] For the text of KRS § 158.150, see note 116 *supra*. The court of appeals held that the Board's regulation requiring mandatory suspension for one of the statutorily-provided offenses was valid. The court stated that since the regulation only provided that "suspension, not expulsion, shall be mandatory for the first offense," it was a proper exercise of the power to suspend under this regulation. 625 S.W.2d at 589. The Board has exclusive power over the long-term expulsion process. No mandatory expulsions are provided, but expulsion may be imposed only after the "hearing" as required under KRS § 158.150(3). Since the controversy addressed in *Jones* concerns the substantive grounds of expulsion, it is reasonable to assume that the court permits high school officials to exercise wide discretion in the shorter-term suspension process.

the trial court's finding that the Board acted arbitrarily in expelling these students as a "finding of fact" supported by substantial evidence.[121] In upholding the trial court's findings of "arbitrariness," the court of appeals seems to have judicially amended KRS section 158.150(1), which provides that consumption of alcoholic beverages on school trips shall be grounds for expulsion.[122]

2. *Procedural Due Process*

KRS section 158.150 was enacted in 1978, no doubt in response to the United States Supreme Court's decision in *Goss v. Lopez.*[123] In *Goss*, more than seventy-five students were suspended during widespread student protests.[124] Although the students were suspended for different reasons, the suspensions all occurred without a hearing. The Supreme Court held that students have a procedural due process right[125] to protect their property interest in a public education. The Court in *Goss* established the following procedural due process guidelines for the suspension of a public high school student:

> [T]he student [shall] be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The [due process] Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from the school.[126]

The *Goss* due process prerequisites for suspension have been characterized as "an informal give and take between student and disciplinarian."[127] All that *Goss* and KRS sections 158.150(2) and (3) provide are minimal "fair" procedures prior to suspension of the student. This minimal due process, as codified in KRS section

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[121] 625 S.W.2d at 588.

[122] For the full text of KRS § 158.150, see note 116 *supra.*

[123] 419 U.S. 565 (1975).

[124] *Id.* at 569.

[125] *Id.* at 572-76.

[126] *Id.* at 581.

[127] Ingraham v. Wright, 430 U.S. at 695-96 (White, J., dissenting) (quoting Goss v. Lopez, 419 U.S. at 583-84).

158.150(2), provides protections in cases of suspension from high schools. The parties did not question the suspension of the students in *Jones*, possibly because the "conference" between the students and principals was thought to satisfy the *Goss* requirement of a minimal hearing.

Suspension is a short-term exclusion from school, usually one to ten days;[128] expulsion is a long-term dismissal from school, more than ten days.[129] Only the Board of Education may expel under KRS section 158.150(3). Neither *Goss* nor KRS section 158.150(3) specify what procedural due process is due in expulsion cases. Answers are found in several federal cases[130] and even in the Board's practice in *Jones*.[131] Thus, procedural due process in expulsion cases is "more" due process—similar to trial procedures.

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[128] The suspension-expulsion dichotomy appears in *Goss*. The suspension in *Goss* was for 10 days and the Court considered it "a short suspension . . . a far milder deprivation than expulsion." 419 U.S. at 576. The *Goss* Court discussed the importance of education and stated that "the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child." *Id.* Further, in a footnote the Court discussed the holdings of the various federal circuits concerning suspension and expulsions. Prior to *Goss*, several circuits held that due process protections applied to expulsions (more than 10 days). *Id.* at 576-78 n.8. *See, e.g.*, Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972); Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967). The reason the due process clause applies to public education is that it is considered "property." *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

[129] *See* Goss v. Lopez, 419 U.S. at 576. Expulsions are longer-term deprivations of property and therefore "more due process" attaches to this disciplinary process. In dictum, the *Goss* Court rejected the use, in suspensions of 10 days or less, of counsel "to confront and cross-examine witnesses supporting the charge, or to call [the student's] own witnesses to verify his version of the incident . . . . To impose in each case even truncated trial-type procedures might well overwhelm administrative facilities . . . [and] cost more than it would save in educational effectiveness." *Id.* at 583. These procedures may be required for the longer-term *expulsions*.

[130] *See* the cases listed in *Goss* at 576-78 n.8, *e.g.*, Hagopian v. Knowlton, 470 F.2d 201, 211 (2d Cir. 1972); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967). Indeed, *Goss* was specifically limited to a "short" 10 day suspension: "We should also make it clear that we have addressed ourselves solely to the short expulsion, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." 419 U.S. 584.

[131] 625 S.W.2d at 588. Consistent with the dictum of *Goss* "more due process," was afforded the students at the expulsion hearing—witnesses were presented and counsel represented them. The statute merely requires "opportunity to have a hearing" for the parent or guardian. See note 116 *supra*.

The due process defect found by the Kentucky Court of Appeals in *Jones* was not the want of procedural due process afforded the students in the expulsion, but rather the substantive grounds for the expulsion. In KRS section 158.150(1), the Kentucky General Assembly provides the substantive grounds for both suspension and expulsion.[132] The causes include alcohol use, drug use or willful disobedience to school authority. The statute does not, however, provide any guidelines for the school Board to use in determining expulsions. By affirming the trial court's finding that the Board acted "arbitrarily" in expelling the students, the court of appeals judicially amended KRS section 158.150(1) to include additional substantive considerations in determining expulsions.

It is submitted that the grounds and evidence necessary to suspend or expel a student, however, have been left by the legislature to the local board's discretion. In *Jones*, the Kentucky Court of Appeals acted in a quasi-legislative role when it construed the statute to provide that school Boards in expulsion proceedings must consider "the previous general conduct of the students involved; the academic standing of the students; the probability of a recurring violation; and the consideration of alternative punishment or restrictions."[133]

The Kentucky Court of Appeals in *Clark County Board of Education v. Jones* unfortunately failed to delineate the procedural due process distinctions between suspensions and expul-

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[132] For the full text of KRS § 158.150, see note 116 *supra*. The first interpretation of the constitutionality of the substantive grounds of the statute was Petrey v. Flaugher, 505 F. Supp. 1087 (E.D. Ky. 1981). In *Petrey*, the plaintiff was suspended and then expelled pursuant to the statute for smoking marijuana at school. The plaintiff alleged substantive due process violations in that expulsion "for the balance of the school year is a punishment . . . excessive when weighed against his offense of smoking marijuana." *Id.* at 1088. The court held that expulsion under KRS § 158.150 did not violate the student's substantive due process rights in that "[t]here is no constitutional right, fundamental or otherwise, to smoke marijuana in school. Nor, is there anything unconstitutional about having discipline in a high school—even strict discipline." *Id.* at 1091. KRS § 158.150's punishments are merely a part of the "traditions of our culture [to] recognize that due discipline in the rearing of the young is necessary and wholesome, rather than a violation of personal rights." 505 F. Supp. at 1091. Since the plaintiffs in *Jones* challenged only the "factors" used in determining whether or not to order expulsion, the court of appeals does not cite *Petrey*.

[133] 625 S.W.2d at 588.

sions and to clarify just how informal or formal each must be. The court erred in the other direction, however, when it supplied new substantive guidelines to be considered by the Kentucky boards of education in expulsion cases.