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federal provisions but extending to a defendant who offers a counterclaim. With the enactment of such a rule, it is conceivable that a greater volume of out-of-court settlements without the necessity for trial would be possible and, in those cases where trial might still be required, the issues could be narrowed with the facts being impartially presented for speedy decision.

H. R. Winton, Jr.

THE LEGAL ASPECTS OF MUNICIPAL FLUORIDATION OF WATER

It has been some eleven years since artificial fluoridation of water was first utilized in any municipality in this country but the extent of the progress made in the use of this method for combatting tooth decay may be seen in the fact that, according to a recent report, there are now 1,437 communities with a combined population of more than thirty million people using artificially fluoridated water. During the ensuing years there has been a goodly amount of scientific and political as well as legal argument both for and against fluoridation. The scientific history of the subject has been well documented and the general press has covered the political developments. It is the purpose of this note, therefore, to discuss the legal problems which have been raised, to point out how they have been resolved elsewhere, and to consider how such legal problems might be treated by an Illinois court.

Opinions have been published passing upon the legality of fluoridation programs in seven jurisdictions to date with the United States Supreme Court denying certiorari in four instances, and at least one other case

34 See, in that connection, the case of Beach v. Beach, 114 F. (2d) 479 (1940).

35 If more should be needed, particularly in relation to the matter of obtaining impartial medical testimony, attention should be given to an experiment developed in New York and described in Marlen and Wright, Impartial Medical Testimony (The Macmillan Co., New York, 1956).

1 The first pilot study of a national research program was set up in 1945 at Grand Rapids, Michigan, according to Heustis, "Working Together To Save Teeth in Michigan," 32 Today's Health 13 (1954).

2 Newsweek, March 18, 1957, p. 112.


is now pending in still another state.\(^5\) All of the published cases which have been carried to final decision have found in favor of the legality of fluoridation and each decision, subsequent to the first, has quoted from and utilized, as authority, the prior determinations. In addition, it would appear that courts at the trial level in at least three other states have also sustained the validity of the fluoridation ordinances there exposed to attack.\(^6\)

Opponents of fluoridation have relied upon four basic arguments. The first contention has been that the enactment of a fluoridation ordinance exceeds the power of the municipality but the courts have found little difficulty in holding the fluoridation of drinking water to be an appropriate exercise of the police power in order to promote public health. In *Chapman v. City of Shreveport*,\(^7\) for example, the court answered a trial judge's conclusion that fluoridation of water was not an exercise of the police power by saying that the health and physical well-being of the children of the community was a matter "of great concern to all people, and any legislation to retard or reduce disease in their midst cannot and should not be opposed on the ground that it has no reasonable relation to the general health and welfare."\(^8\) The authority to exercise the police power depends, of course, on local law, so where the courts have not found sufficient power granted in municipal charters they have looked to state legislation setting up state boards of health or establishing boards of inspection and standards.

The second argument has been that state laws relating to the practice of medicine, dentistry or pharmacy, as well as state and federal pure food and drug laws, have been violated by such ordinances. The first part of this argument was neatly disposed of by the Supreme Court of Oklahoma in the case of *Dowell v. City of Tulsa*\(^9\) where the court pointed out that the city was "no more practicing medicine or dentistry or manufacturing,

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\(^5\) Teeter v. City of LaPorte, Ind., 139 N. E. (2d) 157 (1957), wherein an order sustaining a demurrer was overruled and the cause was remanded for further proceedings.  
\(^7\) 225 La. 859, 74 So. (2d) 142 (1954).  
\(^8\) 225 La. 859 at 870, 74 So. (2d) 142 at 145.  
preparing, compounding or selling a drug, than a mother would be who furnishes her children a well balanced diet, including foods containing vitamin D and calcium to harden bones and prevent rickets, or lean meat and milk to prevent pellagra.” The purported violation of state pure food laws has been answered by finding the presence of some state authority which inspects and approves the drinking water supply, thereby apparently removing fluoridated water from the operation of these laws. Any alleged theory that a violation of the federal Food, Drug and Cosmetic Act would occur has been repudiated by the agency charged with the enforcement of that statute.

The third argument proceeds on the basis that fluoridation ordinances violate Section 1 of the Fourteenth Amendment to the United States Constitution in that they represent an unreasonable, arbitrary, oppressive and discriminatory exercise of the police power. It has been contended, specifically, that fluoridation violates the right of the individual to protect his health as he sees fit. That argument might be said to be met by the doctrine stated in the case of Jacobson v. Commonwealth of Massachusetts, a leading case in relation to the public health police power of a state over an individual. The defendant there, who had been convicted for refusal to be vaccinated pursuant to a compulsory vaccination law, argued that the state’s action was unreasonable because respectable medical opinion opposed it; because vaccination would have a harmful effect on the minority of the population; would not effect all groups equally; and would introduce harmful germs into the bodies of the people. The court nevertheless upheld the statute, stating: “Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members... The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times, and in all circumstances, wholly freed from restraint.”

Arguments offered by fluoridation opponents could be said to be analogous to the one just suggested but subsequent decisions which have upheld chlorination of water, the exclusion from public schools of unvac-

10 —Okla.—at—. 273 P. (2d) 859 at 864.
11 The cases of DeAryan v. Butler, 119 Cal. App. (2d) 674, 260 P. (2d) 98 (1953), and Dowell v. City of Tulsa, Okla., 273 P. (2d) 859 (1954), appear to have disposed of the problem on the basis of local law.
cinated pupils,\(^\text{16}\) compulsory x-rays for students of a state university,\(^\text{17}\) and compulsory blood tests for handlers of certain types of foods\(^\text{18}\) have provided further refutation for these arguments. For this reason, the opponents of fluoridation have been forced to attempt to distinguish their situation from the ones found in these cases.

An example of such an attempt, and the answer thereto, may be found in the case of *Kraus v. City of Cleveland.*\(^\text{19}\) The court there noted that the plaintiff, while admitting that personal liberties were not wholly free from restraint, contended that, for a valid exercise of the police power on the basis of public health, the subject matter of the regulation had to relate to a contagious or infectious disease, and that there had to be an overriding necessity. By way of reply in regard to this, the court said that it was "sufficient to say there is no foundation in law for such a premise. An examination shows that laws relating to child labor, minimum wages for women and minors have all been upheld on the basis of the police power in relation to public health. Regulations relating to control of venereal disease, blood tests for marriage licenses, sterilization, pasteurization of milk, chlorination of water and vaccination have all been held valid as based on police power exercised in regard to public health."\(^\text{20}\)

Courts of review, thus far, unanimously held that fluoridation bears a reasonable relation to the goal of reducing dental caries. The object being considered to be a legitimate one, it would follow therefrom that no violation of any right of liberty would be present in an ordinance of this character.

The fourth contention arises from the claim that guarantees with respect to religious freedom, incorporated in the First and Fourteenth Amendments, are violated by the fluoridation process. It has been argued that if a minority is forced to submit to medication with drugs, the minority would be compelled to indulge in a practice prohibited by its religious beliefs. Admitting that religious freedom is not absolute in character, the opponents of fluoridation insist that this freedom can be validly abridged only where a clear and present danger to the community can be found present. They would distinguish the practice of chlorinating water on the ground that the medicinal effect thereof is spent in killing bacteria in the water whereas the process of fluoridation treats the person of the consumer directly. No clear and present danger could be said to exist, they say,

\(^{17}\) *State v. Armstrong*, 39 Wash. (2d) 860, 239 P. (2d) 545 (1952).
\(^{18}\) *Ex parte Vaughan*, 93 Tex. 112, 246 S. W. 373 (1922).
\(^{19}\) 163 Ohio St. 559, 127 N. E. (2d) 609 (1955).
\(^{20}\) 163 Ohio St. 559 at 562, 127 N. E. (2d) 609 at 611.
because the matter of dental caries is not a form of communicable complaint.

Despite this, the courts have held that fluoridation regulates not religious belief but conduct and, as such, does not derogate against freedom of religion. These courts find no difference in the purported distinction between chlorination and fluoridation and one of the latest decisions on the subject discusses the "clear and present" danger argument by saying that the incorporation of the First Amendment into the Fourteenth "has not rendered the states and their political subdivisions impotent to enact reasonable laws for the protection of the public health... The "clear and present danger"... in this case... is a children's disease of serious proportions." But what of fluoridation in Illinois? Certainly the practice of fluoridating water is not a novelty here for the City of Evanston, in 1947, became one of the first in the nation to add fluorides to the drinking water supplied its residents. For that matter, the City of Chicago is, at present, the largest city in the country to adopt this health measure, having enacted an ordinance on the point as early as 1954 with operation thereunder becoming effective about a year ago. It does not appear that, to date, any case designed to test the validity of fluoridation legislation has been commenced in Illinois. However, given the legislative power concerning public health which has already been delegated to municipalities in the state, the prior interpretations placed on this power by the Illinois Supreme Court, and such authority as is afforded by the cases decided before high courts in other states, there would seem to be little doubt as to whether such legislation is valid.

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21 See, for purpose of the distinction between belief and conduct, the cases of Prince v. Commonwealth, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944); Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905); Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244 (1879).

22 The opinion in Dowell v. City of Tulsa—Okla— at—, 273 P. (2d) 859 at 863 (1954), for example, states: "To us it seems ridiculous and of no consequence in considering the public health phase of the case that the substance to be added to the water may be classed as a mineral rather than a drug, antiseptic or germ killer; just as it is of little, if any, consequence whether fluoridation accomplishes its beneficial result to the public health by killing germs in the water or by hardening the teeth or building up immunity in them to the bacteria that causes caries or tooth decay."

23 Baer v. City of Bend, 206 Ore. 221 at 234, 292 P. (2d) 134 at 140 (1956).

24 Report of Subcommittee on Health of the City Council of Chicago, dated April


26 The ordinance appears in Council Journal, Chicago, June 16, 1954, pp. 7713-14. The delay in putting the ordinance into operation arose from the necessity of installing essential equipment to make the process effective.
to what the holding of an Illinois court should be in the event such a case were to be brought.

In the first place, all Illinois municipalities are, by statute, authorized to do "all acts and make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease." If consideration is given to the fact that any fluoridation program is intended to promote the health of the inhabitants of a given community, whether done by the suppression of disease or otherwise, the essential predicate for any ordinance would seem to be clearly present. Even if it were not so obvious, the Illinois Supreme Court, when constructing this statute, has often referred to the fact that, as the most important police power of the municipality is that of caring for the safety and health of the community, all ordinances for that purpose should be liberally construed.

Of significance in that connection is the 1944 holding of the Illinois Supreme Court in the case of People ex rel. Baker v. Strautz wherein the validity of an ordinance based on the police power relating to public health was challenged on the ground that it violated not only the Fourteenth Amendment to the United States Constitution but also Section 2 of Article II of the state constitution. In essence, the ordinance there concerned authorized a judge, having a person before him on a criminal charge, to order the person detained without bond and referred to a hospital director or other designated authority when, in the judge's opinion, the person might be believed to have a communicable venereal disease. The criminal charge was one for prostitution and the defendant, after refusal to submit to a physical examination, was ordered confined. The case came up as an original action for a writ of habeas corpus which was denied when the court upheld the validity of the ordinance, saying that it had "almost universally been held in this country that constitutional guarantees must yield to the enforcement of the statutes and ordinances designed to promote the public health as a part of the police powers of the State."

It would appear, therefore, that the Illinois Supreme Court should have no greater difficulty than other high courts have experienced when ruling on the fluoridation question at least with respect to a finding that any distinction between contagious diseases and the problem presented by dental caries was an immaterial one, particularly since the deprivation of

28 See, for example, Biffer v. City of Chicago, 278 Ill. 562, 116 N. E. 182 (1917).
29 386 Ill. 360, 54 N. E. (2d) 441 (1944).
30 386 Ill. 360 at 365, 54 N. E. (2d) 441 at 443.
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liberty caused by fluoridation would be one much smaller than that involved in the cited case.

It is true that, in the later case of *Ambassador East, Inc. v. City of Chicago*, the court held that, in addition to being reasonable in character, a health ordinance had to rest on the ground that it was a "necessary means of preserving the public health" but, as concerns fluoridation, there would seem to be ample authority in the decided cases for finding the presence of such reasonable regulation. In fact, according to scientific report, the method provides not only an effective but some would insist the only effective method for achieving the desired end. It would appear, therefore, that those who would contest fluoridation in Illinois would be unlikely to do so successfully on legal grounds, hence would be obliged to restrict their arguments to the arenas of science and politics.

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31 399 Ill. 359, 77 N. E. (2d) 803 (1948). In that case, an ordinance purporting to regulate hotel rates was said not to be supported by the health power as the possible result of increased hotel rates upon the public health was considered to be too remote to show a reasonable causal connection between the ordinance and the conservation of public health.