domestic relations investigator. An attorney is probably the best suited for representing the child since he understands the rules of evidence and other courtroom procedures. Lawyers have usually enthusiastically accepted the responsibility of representing the child,[96] and it would be unreasonable to believe that Iowa lawyers will react any differently.

VI. Conclusion

Child custody cases are indeed a delicate problem and the courts lend a needed calmness and rationality to highly emotional, and often irrational, family disputes. Suggestions that urge courts to utilize testimony of sociologists, psychiatrists, and other professionals in the area of family relations to assist in the disposition of custody cases have merit; however, they should never be the only factor considered. In the past when the professional skills of the behavorial scientists were offered to the court, they were presented by one or both of the contesting lawyers. The contesting lawyers were usually able to find a professional favorable to his client's view. This is due not to dishonesty or unethical factors, but to the fact that the behavorial sciences are inexact by their own admission.[97] The child's lawyer would be expected to present both favorable and unfavorable information about the parents, in order for the court to reach the best possible decision regarding custody.

The Iowa legislature has taken a desirable step by authorizing a child to have an attorney represent him at the divorce proceeding. Whether a child will have an attorney to represent his best interests, and just how often, is up to the lawyers and judges of this state. The appointment of an attorney for the child hopefully will be the general rule in contested custody cases rather than the exception.

Since the law specifically applies only to divorce proceedings, perhaps it would be wise for the legislature in the future to authorize attorneys for the child in custody disputes between a parent and a third party.[98] These cases are just as difficult and important as divorce cases.

Patrick H. Payton

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[96] Syman, *Forward Wisconsin: The Bill of Rights of Children in Divorce Actions*, 39 Wis. Bar Bull. 38, 46 (1966).

[97] *See generally* H. Ross, Perspectives on the Social Order, Ch. 1 (1963). For a more complete discussion of the use of social science in legal problems, *see* Fahr & Ojemann, *The Use of Social and Behavorial Science Knowledge in Law*, 48 Iowa L. Rev. 59 (1962).

[98] *See* Des Moines Sunday Register, July 12, 1970, at 6-T, col. 1-2 for an editorial calling for "mandatory" representation and not simply "authorization."

CASE NOTES

Carriers—A Civil Action May Be Maintained Against an Airline Carrier Under the Criminal Anti-Discrimination Provisions of the Federal Aviation Act—*Mortimer v. Delta Air Lines* (N.D. Ill. 1969).

Plaintiff held a confirmed reservation and ticket with defendant airline, but was barred from boarding the oversold flight. In a civil action against the defendant, plaintiff alleged that he had been unjustly discriminated against and subjected to undue prejudice which is prohibited by the Federal Aviation Act.[1] Defendant moved to dismiss the complaint for lack of jurisdiction. *Held*, motion denied. Basing jurisdiction on the fact that a federal question[2] was presented as well as an issue relating to interstate commerce,[3] the trial court held that a right to maintain a cause of action would be implied from the Federal Aviation Act. Although no facts were presented as to the nature of the discrimination allegedly involved, the court further held that plaintiff could seek to recover compensatory damages. *Mortimer v. Delta Air Lines*, 302 F. Supp. 276 (N.D. Ill. 1969).

The primary issue presented in the principal case is whether an individual, who alleges a violation of the criminal section of the anti-discrimination provision of the Federal Aviation Act, can maintain a cause of action for appropriate relief. The anti-discrimination provision of the Federal Aviation Act, section 1374(b), provides:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[4]

However, the statutory remedy provided by the Federal Aviation Act for violation of this anti-discrimination provision is not civil but is criminal in nature. Section 1472(a) of the Federal Aviation Act provides: "Any person who knowingly and willfully violates any provision of this chapter . . . for which no penalty is otherwise provided . . . shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more

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[1] 49 U.S.C. § 1374(b) (1958).

[2] 28 U.S.C. § 1331(a) (1958), provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter . . . arises under the . . . laws . . . of the United States."

[3] 28 U.S.C. § 1337 (1948), provides: "The district courts shall have original jurisdiction of any civil action . . . arising under any Act of Congress regulating commerce. . . ."

[4] 49 U.S.C. § 1374(b) (1958).

than $500 and for any subsequent offense to a fine of not more than $2000 . . . ."[5]

In the instant case, the district court implied that the defendant's conduct violated section 1374(b) of the Federal Aviation Act. Yet, since section 1472(a) does not provide for the maintenance of a civil action, but is criminal in nature, the right of an individual to maintain a cause of action under section 1374(b) is questionable. It is arguable that had Congress intended that a violation of the Federal Aviation Act serve as the basis for a federal cause of action, it would have expressly provided civil relief.[6] However, in most cases where a federal regulatory statute exists[7] to protect public rights[8] from violation, the courts have created[9] or implied a private cause of action.[10]

In the principal case, the court implied a civil remedy from a criminal statute. Implication of a remedy from a regulatory statute is well established in the law.[11] The leading case in which a private claim has been implied from a regulatory statute is *Reitmeister v. Reitmeister*,[12] wherein a civil action was allowed to be maintained under the criminal provisions of the Communication Act of 1934. Furthermore, adequate precedent exists in which a civil remedy has been implied from the provisions of the Federal Aviation Act. The first case which established precedent in this area was *Fitzgerald v. Pan American World Airways, Inc.*,[13] a case dealing with racial discrimination. *Wills v. Trans World Airlines, Inc.*,[14] a case dealing with economic discrimination, soon followed. In both of these cases, the implication of a civil remedy from the anti-discrimination provision of the Federal Aviation Act was utilized so as to provide proper relief to the complaining party. In *Wills*, the court found that "specific statutory authority is not an essential prerequisite to the existence of power in the Federal courts to grant relief in damages to enforce the object or purposes of a particular statute. . . ."[15] Also, the courts in *Wills* and in *Fitzgerald* emphasized that the administrative relief provided by the Federal Aviation Act[16] was

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5 49 U.S.C. § 1472(a) (1958).

6 W. PROSSER, TORTS § 35 (3d ed. 1964).

7 *See* Note, *Federal Jurisdiction in Suits for Damages Under Statutes Not Affording Such Remedy*, 48 COLUM. L. REV. 1090 (1948).

8 49 U.S.C. § 1304 (1958), provides: "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

9 *See, e.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944); Roosevelt Field, Inc. v. Town of North Hempstead, 84 F. Supp. 456 (E.D.N.Y. 1949).

10 *See* Bell v. Hood, 327 U.S. 678, 684 (1946), wherein it was stated: "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to . . . grant the necessary relief."

11 *See* cases cited note 9 *supra*.

12 162 F.2d 691, 694 (2d Cir. 1947). The court stated: "Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal."

13 229 F.2d 499 (2d Cir. 1956).

14 200 F. Supp. 360 (S.D. Cal. 1961).

15 *Id.* at 364.

16 49 U.S.C. § 1482(c) (1958), provides: "If the Administrator or the Board

inadequate since the relief afforded was prospective in nature and the Act did not make provisions for proper restitution of past wrongs.

Since *Fitzgerald* and *Wills*, regulations[17] have been enacted by the Civil Aeronautics Board which provide for the payment of denied boarding compensation in cases similar to the one presented here. However, these regulations provide redress as an alternative to an action based on breach of contract. Thus, the problem raised is whether the allowance of a civil action under section 1374(b) would in fact frustrate the purpose of the Civil Aeronautics Board regulation which provides for denied boarding compensation. In the principal case, the court held that it would not frustrate the purpose of the regulation.[18] The court found that the remedy plaintiff sought was not for denied boarding compensation as a substitute for a breach of contract action, but for injury caused by discrimination which is prohibited by criminal sanctions of the Federal Aviation Act.[19] In referring to section 1374(b), the court stated that "[i]t provides redress for injury caused by discrimination, disadvantage or undue preference whether racially, religiously or economically motivated or that results from the carrier's disregard for its own priority rules or from the fact that those rules are in themselves discriminatory."[20] Moreover, by the very wording[21] of the regulations which make available the award of denied boarding compensation, it is evident that this was not intended as the only means of relief available to an injured party.

As in *Fitzgerald* and *Wills*, the principal case has the effect of making discriminatory action on the part of airlines the basis of a civil action, notwithstanding the new denied boarding regulation. The final issue raised is to determine what type of action constitutes "unjust discrimination" within the meaning of the Act. Although discriminatory practices have been outlawed by section 1374(b) of the Federal Aviation Act, it is not necessary that the treatment

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finds, after notice and hearing . . . that any person has failed to comply with any provision of this chapter . . . the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith."

17 14 C.F.R. § 250.4 (1967), states:

> [E]very carrier shall file tariffs providing compensation to a passenger holding confirmed reserved space who presents himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, checkin and reconfirmation procedures and being acceptable for transportation under the carrier's tariff, and the flight for which the passenger holds confirmed reserved space is unable to accommodate the passenger and departs without him.

18 Mortimer v. Delta Air Lines, 302 F. Supp. 276, 281 (N.D. Ill. 1969). The court stated: "[T]he basis of this action is not breach of contract of carriage, which is the basis of denied boarding compensation, but rather violation of the anti-discrimination and preference section of the Federal Aviation Act. Denied boarding compensation is payable to a passenger . . . regardless of whether he has been the victim of discrimination or undue preference."

19 49 U.S.C. § 1472(a) (1958).

20 Mortimer v. Delta Air Lines, 302 F. Supp. 276, 281 (N.D. Ill. 1969).

21 14 C.F.R. § 250.7 (1967), states: "The tariffs . . . shall specify that the carrier will tender, on the day and place the denied boarding occurs, compensation in the amount specified above, which, *if accepted* by the passenger, shall constitute liquidated damages for all damages incurred by the passenger as a result of the carrier's failure to provide the passenger with confirmed space" (emphasis added).

given all passengers be identical. Certain situations warrant special treatment in relation to specific passengers. For example, a carrier can refuse to transport a passenger whenever such action is deemed necessary or advisable because of adverse weather conditions.[22] Also, certain regulations are pertinent which relate to exceptions to eligibility for denied boarding compensation.[23] This compensation will not be awarded to a passenger if an airline is unable to accommodate him because of a government requisition of space or a substitution of equipment of lesser capacity when required by operational or safety reasons.[24] Finally, ill or incapacitated passengers may be afforded special treatment.[25]

Although the principal case adds to the confusion with regard to the question of damages[26] for causes of action based on violations of the Federal Aviation Act, positive effects will result from this decision. By allowing federal court jurisdiction[27] in matters arising under the act in question and by recognizing an implied remedy, uniform patterns of relief have been established. Although express legislative provisions which afford civil relief would help to eliminate burdensome and unnecessary litigation, recognition of an implied remedy provides a means to supplement[28] already existing remedies which may at times be inapplicable and inadequate to provide a complaining party with restitution.[29]

The Civil Aeronautics Board regulations regarding denied boarding compensation help to eliminate and cope with conflicts created by the "oversell" problem.[30] However, these regulations do little to offer an effective remedy to a passenger who has suffered unjust discrimination. In the *Wills* case it was stated, "[w]ithout judicial intervention to redress past violations of the statute, the rights of air passengers, as declared in the Act, to travel without undue pref-

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[22] Stough v. North Central Airlines, Inc., 55 Ill. App. 2d 338, 204 N.E.2d 792 (1965).

[23] 14 C.F.R. § 250.6 (1967), states:

> A passenger shall not be eligible for denied boarding compensation if:
>
> (a) The flight for which the passenger holds confirmed reserved space is unable to accommodate him because of: (1) Government requisition of space; or (2) substitution of equipment of lesser capacity when required by operational and/or safety reasons; or
>
> (b) The carrier arranges for comparable ar transportation or for other transportation accepted (i.e. used) by the passenger, which, at the time either such arrangement is made, is planned to arrive at the airport of the passenger's next stopover or, if none, at the airport of his destination earlier than, or not later than 2 hours after, the time the direct or connecting flight, on which confirmed reserved space is held, is planned to arrive in the case of interstate and overseas air transportation. . . .

[24] *Id.*

[25] Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 365 (S.D. Cal. 1961).

[26] *Compare* Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 499 (2d Cir. 1956) *with* Mortimer v. Delta Air Lines, 302 F. Supp. 276 (N.D. Ill. 1969) *and* Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961).

[27] 28 U.S.C. § 1331(a) (1958); 28 U.S.C. § 1337 (1948).

[28] Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 368 (S.D. Cal. 1961), states: "Bear in mind . . . the purpose in granting aggrieved airline passengers a Federal cause of action is to supplement the criminal and *in futuro* remedial provisions of the Act . . . ."

[29] *See* 49 U.S.C.§ 1482(c) (1958).

[30] *See* 60 MICH. L. REV. 798 (1962).

erence or unjust discrimination would be robbed of vitality and the purposes of the Act substantially thwarted."[31] For this reason, a federal cause of action must continue to be recognized in order to offer proper relief to a complaining party. Also, recognition of this remedy will tend to discourage[32] similar displays of discrimination and to give the civil rights movement vitality and credibility with respect to the actions of airline carriers.

THOMAS J. BICE

Constitutional Law—PUBLIC NUDITY IS NOT PRIVILEGED AS AN EXERCISE OF FREE SPEECH WHEN IT IS IN OPPOSITION TO A COMPELLING GOVERNMENTAL STATUTE—*State v. Nelson* (Iowa 1970).

Defendants[1] disrobed at a public meeting in a college student residence hall. The featured speaker at the meeting was a representative of a "men's" magazine. Defendants admitted that their action was a protest against the sexual commercialism in that magazine. The defendants were found guilty of indecent exposure.[2] On appeal to the Supreme Court of Iowa, the defendants asserted that the district court erred in holding that public nudity alone constitutes the crime of indecent exposure, and that the defendants' conduct was not privileged as an exercise of free speech. *Held*, affirmed, three justices dissenting. Freedom of speech is not an absolute right when it is in opposition to a compelling governmental statute. *State v. Nelson,* 178 N.W.2d 434 (Iowa 1970).

A primary question involved in the present case is whether the indictment under the "indecent exposure" statute[3] infringed upon the defendants' freedom of speech protected by the first amendment of the Constitution of the United States. Although the right of free speech *implies* a right to say whatever one may please, it is well settled that freedom of speech is not "unlimited"[4] nor

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[31] 200 F. Supp. 360, 364 (S.D. Cal. 1961).

[32] *See* Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 42 (1916), wherein the Court stated: "[L]iability to private suit is or may be as potent a deterrent as liability to public prosecution . . . ."

[1] There were eight defendant-appellants, but their cases were consolidated.

[2] IOWA CODE § 725.1 (1966) provides:

> If any man and woman not being married to each other, lewdly and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness, and designedly makes an open and indecent or obscene exposure of his or her person, or of the person of another, every such person shall be imprisoned in the county jail not exceeding six months, or be fined not exceeding two hundred dollars.

[3] *Id.*

[4] State v. Elliston, 159 N.W.2d 503, 507 (Iowa 1968), states: "Scores of opinions have been written on the question of whether a particular statute infringes upon the constitutionally protected rights of free speech and assembly guaranteed under the First Amendment to the United States Constitution. These rights are not unlimited."