ARTICLES

THE PRESIDENT, THE MEDIA AND THE FIRST AMENDMENT
Honorable George Edwards ........................................ 375

JURIDICAL ONTOLOGY AND SOURCES OF LAW
Chaim Perelman ....................................................... 387

THE BATTERED SPOUSE DEFENSE IN KENTUCKY
Elizabeth Vaughn and Maureen Moore ......................... 399

COMMENTS

WORKERS' RIGHT TO KNOW ABOUT CHEMICAL HAZARDS IN
THE WORKPLACE: A PROPOSED MODEL UNIFORM RIGHT-TO-
KNOW ACT AND A CRITICAL LOOK AT CINCINNATI'S RIGHT-TO-
KNOW ORDINANCE ............................................. 427

NOTES

SECURITIES REGULATION—KENTUCKY TAKE-OVER BIDS ACT
DECLARED UNCONSTITUTIONAL—Esmark, Inc. v. Strode .... 461

TORTS—PRODUCTS LIABILITY—SHOULD CONTRACT OR TORT
PROVIDE THE CAUSE OF ACTION WHEN A PLAINIFF SEeks
RECOVERY ONLY FOR DAMAGE TO THE DEFECTIVE PRODUCT
ITSELF—C&S Fuel, Inc. v. Clark Equip. Co. .................... 489

TORTS—WRONGFUL DISCHARGE—A LIMITATION UPON THE
"AT WILL" EMPLOYEE'S VULNERABILITY IN KENTUCKY—
Firestone Textile v. Meadows .................................... 513

WORKER'S COMPENSATION—MARITAL PROPERTY—Johnson v.
Johnson ............................................................ 531
THE PRESIDENT, THE MEDIA AND
THE FIRST AMENDMENT*

by
Hon. George Edwards†

In February of 1776, when Edward Gibbon was writing *The Decline and Fall of the Roman Empire*, he observed during a review of all recorded history to that date that, except for the brief reign of two obscure Roman Emperors, never in the history of the world had there existed a government which was organized for the welfare of the governed.¹

July 4 of that same year, fifty six individuals signed a Declaration of Independence from England which announced to the world the intention to create just such a government—a government, to borrow President Lincoln's words, "of the people, by the people and for the people."²

No one can truly understand the structure of the government of the United States unless he or she understands first that this government was formed by persons who had experienced tyranny in its most bitter forms. They were determined to avoid its repetition in their new government. In the background of the United States Constitution and Bill of Rights were at least these aspects of the British experience.

There was the case of Sir Algernon Sidney, who was beheaded in 1683 during the reign of Charles II.³ His crime, as proved at trial, was that, when kings men broke into Sidney's house and searched his desk, they found notes alleged to be in his handwriting which were critical of the monarchy. Sidney was executed under the English law of seditious libel which prohibited any written censure upon the conduct of public figures, particularly the King and the Parliament. This doctrine, as described by Blackstone, held it to be "immaterial to the essence of libel,

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† Chief Judge, U.S. Court of Appeals, Sixth Circuit.
1. E. Gibbon, *The Decline and Fall of the Roman Empire* (London 1776).
3. 4 W. BLACKSTONE, *Commentaries* *80*, note a (1780).
whether it be true or false," and English courts generally held that "the greater the truth, the greater the libel."

In a case renowned in the American Colonies before the Revolutionary War, a printer named Peter Zenger was tried in 1735 for hostile comment printed in his newspaper concerning the rule of a new governor of the New York Colony, William Cosby. Zenger, an impoverished printer, was defended by Andrew Hamilton of Philadelphia, perhaps the finest lawyer of the American colonies. He sought successfully to persuade the jury that what Zenger had printed was true and that they, the jury, could make truth a defense simply by finding Zenger not guilty, English law to the contrary notwithstanding. This the jury promptly did.

In general, the colonists were more successful in maintaining some semblance of freedom than their fellow countrymen who lived in closer proximity to royal power. It was not only the King's governors who sought to establish that power to its fullest. So did the royal judges who were sent to the Colonies—many times with specific orders as to how to limit expressions of speech.

In the trial of William Penn, the royal judge, addressing an obviously reluctant jury, said to the jury, "I will have a positive verdict from you, or you shall starve for it." From the bench the King's judge observed that the jury's obstinacy made him "wish for the Spanish inquisition in England." Many cases like these lay in the background and memories of those American patriots who insisted on the adoption of the First Amendment's free speech and press provisions. It seems to me impossible to understand the formation of the American Constitution and Bill of Rights without understanding pre-Revolutionary history. James Madison, for example, who drafted the first ten amendments to the Constitution in pre-Revolutionary War days, had been a leader in resistance to laws "establishing" the Church of England. In later life he recalled his experience as a boy in seeing a Baptist preacher preaching through the bars of a jail window

4. Id.
5. Id.
8. Id. at 103.
9. Id. at 54.
to a small congregation of stubborn Baptists who would not accept the edicts of the established English church.\textsuperscript{10}

The colonists were particularly incensed in pre-Revolutionary periods by "writs of assistance" which empowered the King's revenue officers at their discretion to break into houses and search for contraband. The heated debate over royal writs of assistance in Boston in February of 1761 led to James Otis saying, "Such writs placed the liberty of every man in the hands of every petty officer."\textsuperscript{11} To John Adams this dispute marked the time "when the child Independence was born."\textsuperscript{12}

The examples of direct connection between acts of royal tyranny in Great Britain and in the colonies, with direct impact upon the structure and content of the Constitution and the Bill of Rights could be illustrated almost ad infinitum. My reason, of course, in employing these illustrations to introduce the topic of this speech "The President, Media and the First Amendment," is to make the point that those who signed the Declaration of Independence, participated in writing the Constitution at Philadelphia, and joined in the heated debate over its adoption in the ratifying conventions which formed the background for the Federalists' promise of the first ten amendments to the Constitution, had much bitter experience with kings and royal judges and Parliament. When the Revolution which they wrought was militarily successful, they sought to make the fundamental compact of their new county one designed primarily to prevent the excesses of tyranny. I suggest it is impossible to understand the Constitution of the United States, with its separation of powers, much less the Bill of Rights and its charter of liberty to each individual citizen, unless we first understand the colonial experience.

With this in mind, let us turn to the Constitution itself and see how our forefathers went about constructing the government. The Constitution is not a lengthy document, albeit it took many months of debate before it was adopted by the convention in original form and two years of conflict in the ratifying conventions before it was finally ratified, with many demands for amendment being made in the process. The original Constitution, as printed in

\textsuperscript{10} Id. at 91.
\textsuperscript{11} Boyd v. United States, 116 U.S. 616, 625 (1886).
\textsuperscript{12} Id.; see also P. Shaw, American Patriots and the Rituals of Revolution 84 (1981).
the official copy, deals in Article I with the powers of the Congress and extends for eight pages. Article II describes the executive power to be vested in a president and it extends for three and one-third pages. The constitutionally enumerated powers of Congress number nineteen. The powers enumerated for the presidency number twelve, and four of those deal with his right to inform and recommend matters to the Congress, and under certain circumstances, to convene or adjourn it. The judiciary article is even briefer. Barely one and one-third pages in type, it is drafted in broad language, beginning with, "The judicial Power of the United States, shall be vested in one supreme Court, it in such inferior Courts as the Congress may from time to time ordain and establish."

It seems obvious that those who drafted the fundamental compact of our country established three coordinate branches of government and that they did so with deliberate intent of requiring the concurrence of all three for the full exercise of the sovereign power of the nation. At this point I think it worthwhile to read in full those sentences which establish presidential power:

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows...

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have the Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other

17. U.S. Const. art. II, § 3.
Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.\(^{19}\)

Through the ebb and flow of American history, the personalities of those who held office in all three branches have mightily affected the exercise of power. In some presidencies we have had strong presidents whose recommendations were carried quickly into effect in Congress by loyal majorities of the president's own party. In some presidencies, where those conditions were lacking, we have had a Congress which dominated the political scene. At some points in history, under specific Chief Justices, the Supreme Court has played a major role in the history of the land. There are many points at which the power of the presidency, the power of Congress, and the power of the Supreme Court of the United States interface, without there being any bright line of separation. Much past experience seems to suggest that each of the branches should seek to avoid clashes over how the sovereign power should be divided.

Perhaps the most famous confrontation between two coordinate branches occurred when Chief Justice John Marshall's court ordered release of a prisoner who had been sentenced in the state courts of Georgia to four years in prison for serving as a missionary to an Indian tribe, in violation of a Georgia statute.\(^{20}\) President Andrew Jackson is said to have commented, "John Marshall

\(^{19}\) U.S. Const. art. II, § 1-3.

\(^{20}\) Worcester v. Georgia, 6 Peters 515 (1832).
has made his decision. Now let him enforce it." The missionary was not released until pardoned by state authority.

Perhaps the most noteworthy case of the executive following the Constitution in enforcing a court order alien to the desires of the president occurred when President Eisenhower sent the United States Army to Little Rock to effectuate the desegregation of Central High School against the wishes of Governor Faubus. He did so under the specific command of the Constitution which says as to the President: "he shall take Care that the Laws be faithfully executed. . . ."24

The greatest single power of the presidency is undoubtedly that which he exercises as Commander in Chief of the armed forces. Those powers are expressed in a single sentence: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the Several States, when called into the actual Service of the United States; . . ."25

Constitutionally his powers in this regard are, however, specifically limited by the delegation to Congress

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, . . . To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel Invasions.26

Many vivid memories in this room will recall instances when this allocation of power between the President and the Congress has not been followed as the makers of the Constitution clearly intended.

Rarely, indeed, has the Supreme Court exercised its full power to interfere with the actions of the Chief Executive.27 Certainly it did in Marbury v. Madison and in more recent times when President Truman, without an act of Congress authorizing him to do so, seized the Youngstown Sheet Steel and Tube plants in 1952.28

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22. Id.
Supreme Court struck down that seizure. In that case Mr. Justice Black, writing for all members of the court except one, said:

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that 'The executive Power shall be vested in a President...'; that 'he shall take Care that the Laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.'

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.29

No other claim of inherent power in the presidency absent specific constitutional support may be found until the 1970s during the presidency of President Nixon when the issue of secret wiretapping without court authorization came before first a District Court in the Eastern District of Michigan,30 then the United States Court of Appeals for the Sixth Circuit,31 and then the Supreme Court.32 In that case the Supreme Court unanimously ruled that the constitutional mandate of the Fourth Amendment requiring seizures to be based on judicially issued warrants had to be followed.33

The power of the presidency was also limited when the Constitution provided in Section 2, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution,

29. Id. at 584.
31. United States v. United States District Court, 444 F.2d 651 (6th Cir. 1971).
33. Id.
the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . ."34 If the Philadelphia convention left doubt as to the meaning of this phrase, it was removed early in the history of the new nation by John Marshall's opinion in *Marbury v. Madison*,35 the famous case of the midnight judges.

Through all the history of this country, the Supreme Court's authority as the final interpreter of the Constitution has never been successfully challenged. If we go back to the history that preceded the writing of the Constitution, it is clear that those who had the most to do with drafting that document intended it to be final law subject to final interpretation only by an independent Supreme Court secure in lifetime tenure. Concerning this issue James Madison—generally considered the most active drafter of the Philadelphia Constitution and the initiator of the Bill of Rights—said: "... independent tribunals of justice will be an impenetrable bulwark against every assumption of power in the legislative or executive."36

Finally, the presidency was further limited by the adoption of the first ten amendments to the United States Constitution preeminent upon their being the first with its prohibition upon any abridgement of freedom of speech and press.37

There must be by now those in the audience who are thinking, if constitutionally the presidency is as limited as has just been described, why has the history of America been written so completely around the actions and careers of its presidents? The answer I think lies in the fact that the American presidency was designed to provide a leader for the nation—not a ruler. The Constitution's requirement that he advise Congress and propose measures to Congress gives him a leadership role in that regard. When he executes that Constitutional mandate, he speaks through his messages to the whole people of the country and may be able to garner their support. Presidential Counsellor Meese spoke eloquently last night concerning the President's role in this regard. Throughout history three factors have determined the success of presidents. They are, Personality, Program and Party. Inevitably

34. U.S. Const. art. III, § 2.
37. U.S. Const. amend I-X.
38. U.S. Const. amend I.
the leader of the country is judged by the first two and his power is greatly affected by his ability to lead his party's forces in Congress.

At this point I will leave the presidency as an institution and turn to the media and the First Amendment. The Constitutional grant of free expression is contained in a single, simple sentence: "Congress shall make no law . . . abridging the freedom of speech, or of the press." In discussing the fate of Sir Algernon Sidney and Peter Zenger, I have already pointed out that this restriction upon government was novel in the history of the world. Listen with me, if you will, to an authority on government of a quite different kind from ours talking about these rights:

Why should freedom of speech and freedom of the press be allowed? Why should a government which is doing what it believes to be right allow itself to be criticized? It would not allow opposition by lethal weapons. Ideas are much more fatal things than guns. Why should any man be allowed to buy a printing press and disseminate pernicious opinion calculated to embarrass the government?

If we find that language foreign to our notions concerning our land, we might turn to Justice Oliver Wendall Holmes' eloquence for solace:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

From Milton's Aeropagitica to the editorial comment which hailed a recent Supreme Court decision guaranteeing the press access

to the courtrooms, the First Amendment in its right to freedom of speech and press has been hailed with more eloquence than I can command. In my view, it not only guarantees every person in this land the right to speak and the right to publish his thoughts to others, it also implicates and underpins the public's right to know. From this free marketplace of ideas comes the chance in a democracy for new ideas in technology, new concepts in social affairs, new concerns and discoveries about the universe to be uttered, published, debated, dissected, accepted, or, if need be, discarded. What survives this process and achieves adoption in philosophic or religious thought, in education, in the arts or in technology and science should serve us well in the future as it has in the past.

I emphasize that I am no idolater of the media. There are examples in recent times which come close to matching the comment of a Chicago newspaper concerning a short speech delivered by a long-dead president. The Chicago Times said: "Readers will not have failed to observe the exceeding bad taste which characterized the remarks of the President. . . . The cheek of every American must tingle with shame as he reads the silly, flat, and dishwatery utterances of the man who has to be pointed out into intelligent foreigners as the President of the United States." It was "an offensive exhibition of boorishness and vulgarity." You may not recognize the President or the address from that description, but it was printed in the Chicago Times about President Abraham Lincoln's Gettysberg Address which has come to be regarded as one of the fundamental documents of this nation in describing the purposes for which it was founded.

No American president was, I believe, ever as unjustly criticized by a hostile press as was Lincoln. And every American president has had occasion to feel the sting of criticism which he felt to be false or completely unjustified.

My point in referring to such abuses (and they continue today) is, of course, that the good derived from freedom of speech, press and all forms of the media is infinitely to be preferred to any form of control of thought or expression. Liberty as we know it in America would perish without the First Amendment.

Eighteen years ago, when I became a federal judge, I took the

41. The Chicago Times, Nov. 23, 1863, at 8.
42. Id.
oath to support the Constitution of the United States with great sincerity. I then believed, as I do now, that never in the history of man had there been a government as wisely conceived and constructed as the one I swore to serve. In the years since I took the oath until now, I have come to believe far more deeply than I ever did before, that those who served at the constitutional convention in Philadelphia and those who fought for and wrote the first ten amendments were inspired by the history—the events and the necessities of their times, and perhaps by a power exceeding all of those.

One of the greatest contributors to the formation of our union, albeit far from the best known, was George Mason. His draft of the Declaration of Rights for the State of Virginia in May of 1776 contains within its compass almost every important concept and idea that may be found in the Declaration of Independence, the Constitution of the United States and the first ten amendments thereto. 43 Although plagued by frequent illness in his lifetime, Mason lived a long and productive life. Toward its end, with his work in place, in talking about the months in Philadelphia and the later battle for the Bill of Rights, he said that he felt that we were "walking on enchanted ground." 44 George Mason's comment now seems to this federal judge to have proved to be astonishingly true.

43. G. Mason, Declaration of Rights for the State of Virginia (1776).
JURIDICAL ONTOLOGY AND SOURCES OF LAW

by Chaim Perelman*

as translated by David W. Aemmer†

The problem sources of law presents is twofold: first, it is necessary to agree on the very idea of law, and, second, to reflect upon the adequacy of the metaphor "source of law."

One may avoid the first difficulty right away by adopting the stance of a particular legal system, such as French or Belgian law, at a certain point in its evolution. That stance provides a consensus which obviates the need for a definition. But then one runs the risk of not treating the subject philosophically; in other words, in all its generality. That is why, setting aside the inevitably controversial questions concerning the definition of law, I propose to summarily examine not only one, but three systems of law: Jewish law, Anglo-American law and continental law, which are sufficiently different that the conclusions to be drawn from them will be general enough in scope.

As for the metaphor "source of law," it poses methodological problems. Is it necessary to limit the examination to formal sources of law, such as statutory law, custom and case-law, i.e., texts that furnish, like the sources of the historian, documents serving as a basis for research; or is it necessary that the source furnish a normative foundation, which permits a response to the question: Why is it necessary to obey the rule of law? On what is its authority based?

In this regard, one should note the remarkable lecture that Alexandre Giuliani, professor at the University of Perugia, presented to the Conference of Brussels on "Le raisonnement juridique et la logique déontique" (Juridical Reasoning and Deontological Logic), entitled "Nouvelle rhétorique et logique du

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langage normatif" (New Rhetoric and Logic of Normative Language).\textsuperscript{1} There he convincingly develops the thesis that normative language is expressed in law in a metaphysical fashion and in that regard, is intermediate between the explanatory metaphors of science and the expressive metaphors of poetry.

Without going into the details of his proof, his thesis illustrated by an example taken from the Belgian Constitution. The twenty-fifth article of the Constitution proclaims: "All the powers emanate from the people. They are exercised in the manner established by the Constitution." Note that this metaphorical emanation is compatible with the most varied electoral systems, resulting as much from constitutional reforms as from those of the Electoral Code. It is in this manner that the people, from which the legislative power emanates, have been represented successively by the "suffrage censitaire"\textsuperscript{2}, then by the plural vote, and finally by universal egalitarian suffrage reserved to men, and subsequently extended to women in 1948. The metaphorical wording is carried over in all the juridical systems influenced by the French Revolution, corresponding, however, to essential variations due to its context within the constitutional work, each reform claiming to represent more and more the will of the people to a greater degree.

From the perspective of one who conceives of the sources of law as determining the authority of law in question apart from its nature, which I call juridical ontology, let us examine successively traditional Jewish law, Anglo-American law dominated by the common law, and finally, the system of French law.

According to Jewish law, such as it is known through the Pentateuch and the Talmud, it is God, the incarnation of justice and mercy, who revealed the Torah, the law, to Moses at Mount Sinai. God appears as the only source of law and Moses is the only prophet legislator, if one takes literally the first two verses of the fourth chapter of Deuteronomy:

And now, Israel, listen to the statutes and ordinances which I teach you, to put them into practice, so that you may live and go in and possess the land which Jehovah, the God of your fathers, is giving you. You shall not add to what I command you and you shall

\textsuperscript{1} Published in 4 ETUDES DE LOGIQUE JURIDIQUE 65-90 (Bruxelles, Bruylant, 1970).

\textsuperscript{2} Suffrage Censitaire: System in which the exercise of the right to vote is reserved to the taxpayers who have satisfied a payment of a graduated, direct tax. See PETIT LAROUSSE ILLUSTRE 180 (1980).
not subtract from it, but keep the commandments of Jehovah, your God, which I command you.

As a result, the prophets and the sages, after Moses, are only able to comment on the texts and urge obedience to them, but may not modify the divine legislation revealed to Moses.

The ontology which provides for the basis of Anglo-American common law is very different. According to it, judges do not make the law, rather they discover it. As Blackstone said it in his Commentaries, "[The judges] are bound by an oath to decide according to the law of the land... these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law." Hence there exists a preliminary law, a kind of natural law, recognized throughout the land, on which judges rely for rendering justice.

Post-revolutionary French law is based upon the ideology of the social contract theory developed by Rousseau. According to it, the will of the whole people identifies itself with the general will which is always in the right. Hence the reverence for the law, an expression of the general will: this source of law justifies obedience to the laws of the land.

Three systems, three juridical ontologies, three different conceptions of the sources of law—if another vision of law emerges from each of these ontologies, these systems will nonetheless have in common the fact that each will endeavor to obviate resulting inconveniences, in the practice of the accepted ontology, through a group of techniques of reasoning that characterize the juridical logic. This logic comports with the methods put to use for adapting the juridical ontology each time the need for an acceptable application of law.

The inconvenience presented by Jewish law and its ontology is that the law of Moses imposes upon the Hebrew people an unvarying, divine legislation which they must obey throughout the most varied conditions of their history. How can the prohibition against

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changing the letter of the law be reconciled with the necessities of life?

Flavius Josephus relates, in his Antiquités Ju đaïques, a conflict between, in this instance, the Pharisees and the Sadducees.

[The Pharisees have delivered to the people a great many observances by succession from their fathers, which are not written in the law of Moses and for that reason the Sadducees reject them, say that we are to esteem those observances to be obligatory which are in the written law, but are not to observe what are derived from the tradition of our forefathers...]

In this conflict regarding the obligatory character of custom, the position of the Pharisee who have prevailed. But in order to remain faithful to the concept in which God appeared as the only source of law in the books of Moses, a distinction, now traditional in Judaism, was made between the written law and the oral law.

By a stroke of genius, the greatest interpreter of the Bible, Rabbi Akiba, who lived in the first century of the Christian era, found a reply to the Sadducees. According to him, the oral law, which is only an interpretation, a repetition (Michna) of the written law, was received by Moses on Mount Sinai at the same time as the written law, and was handed down orally, in an uninterrupted manner, by generations of interpreters. The Michna, containing the oral commentary of the Bible, was drafted in the second century, and both the Palestinian and the Babylonian Talmuds, drafted respectively in the fifth and sixth centuries, contain the discussions of scholarly rabbis respecting the text of the Michna.

What do you do when the interpreters do not agree as to which, between the oral and the written law, expresses the divine will? It is not a theoretical question, since the Michna already reports the differences between the more conservative school of Shammai, and the more liberal school of Hillel. When Rabbi Samuel asked which interpretation was the best, the Babylonian Talmud related "that a voice from above responded that the two interpretations expressed the word of the living God." (Erubin, 13b). But then which is the law?

The Babylonian Talmud, in a celebrated text (Baba Metzia, 59b), relates the following story. During a controversy concerning the purity of a ritual oven, Rabbi Eliezer, who was of an opinion contrary to that of the other sages, called God as witness, as a kind of legislative referee. God manifested himself through several miracles, but the majority challenged them, saying it is not through miracles that one interprets the law. Then, in response to the pleadings of Rabbi Eliezer, a voice from above made itself understood and declared Rabbi Eliezer right. Thereupon Rabbi Josué, spokesman for the majority, affirmed that the “Torah is not located in heaven,” and commented that “[t]his signifies that the Torah was already given at Sinai, and that we do not trust a celestial voice, because the Torah was already prescribed at Mount Sinai (Exodus XXIII, 2). That is in accordance with the majority which interprets the law.”

If various interpretations depart from the oral law and have, as such, a divine origin, nevertheless the choice between them is not the affair of God, but of men.

The criteria used to choose the authoritative interpretation are numerous and varied. Besides majority rule, operative within a tribunal, there are six other rules. When two authorities of the past are opposed, one will follow the scholar having the greatest authority, e.g., the opinion of Hillel prevails over that of Shammai, that of Rabbi Akiba over that of all his adversaries. A rule of reason prevails over that which is without reason, unless the latter is based on a tradition which goes back to Moses and the prophets. One should give preeminence to the authority which is the latest in date. According to the fifth rule, it is necessary to conform to practice and acknowledged custom. The sixth rule states that for rules inspired by the written law, one should adopt the strictest interpretation, and for rules of rabbinical origin, the most liberal interpretation. Finally, the last rule, and the foundation of all post-talmudic authority, is based on a passage from Deuteronomy which prescribes that, in difficult matters, “one shall turn towards the priests, the Levites, the judges who shall be in office at that time . . . according to the law they show you and the judgment they tell you, you shall act, and you shall not turn aside from the word they have expounded to you neither to the right nor to the left” (Deuteronomy XVII, 8-11).

Next to the law of Moses, which is immutable, Jewish law enjoins obedience to regulations of power, as represented by the law
of the country in which the Jews lived in exile. As a matter of interpretation, a modification will only be admitted if it emanates from a moral authority which prevails "in wisdom and in number." That is why, when confronted by difficult problems, the judge consulted the greatest authorities of his time and milieu. The responses of Talmudic authorities, which span several centuries, corresponds to what we call doctrine. The Institute of Jewish Law at the Hebrew University in Jerusalem has gathered together 300,000 of these responses.

Next to usual techniques of interpretation, the rabbis have been able to add flexibility to the texts by resorting to general principles and even to fictions.

This can be seen in Deuteronomy (IV, 1) which provides that the regulations had been given by God "so that you might live." One may extract from this the general rule that it is permissible to break the most imperative rules when human life is at stake. In relying on the passage of Proverbs (XXII, 28): "Do not move an ancient boundary stone set up by your forefathers;" one may extract the general rule of respect for customs. In order to get around the formal rule regarding matters of proof, which requires the admission of attested facts by two agreeing witnesses, the judge who senses collusion by those two witnesses should refuse to judge, in reliance upon the precept of Leviticus (XIX, 15), "with justice you shall judge your neighbor." This refusal to judge by the first judge is equivalent to a forclusion, because no other rabbi will act as a judge in that matter, once the reasons for that refusal are known.

When the prescribed rules of law did not admit of an acceptable interpretation, certain sages had recourse to fiction. The best known are those of Hillel. In order to get around the prescription of Deuteronomy (XV, 1-2) regarding the release of debts at the end of the Sabbatical year, and therefore every seven years, Hillel invented the fiction which allowed the tribunals to become imaginary creditors and the true creditors to become the agents of the tribunal, thereby avoiding the obligation of release (Makkot, 3a). Other fictions have allowed one to circumvent the prohibition against loan bearing interest, from establishing the testamentary succession unknown in the Bible, and much more.

7. Forclusion: Loss of the right to bring an action at law because the legal time has expired. See Petit Larousse Illustré 441 (1980).
Moreover, Jewish law authorizes the creation of actions which are tailored to the needs of the moment. For example, Rabbi Gershom of Mayence decreed, at the end of the tenth century, the excommunication of all Jews living among the Christians who practiced bigamy, yet this prohibition, limited to a span of 1000 years, was not applicable to the Jews of Muslim countries.

We have seen that, according to the ideology of the common law, the law preexists. It is attested to by judicial decisions, which expose the rationale for the rule of decision, the \textit{ratio decidendi}. This provides the rule of law, or precedent, to which analogous cases must conform. But because it is possible for this rule to have been poorly formulated by the first judge, a later judge may either limit its scope due to a distinction that the first judge failed to recognize, or, to expand the scope by analogy. In most cases, these techniques suffice to render satisfactory justice, while adhering to judicial precedents. It is only occasionally that a tribunal will reverse a previous decision in asserting that it is wrong. In effect a reversal in jurisprudence creates instability because the rule of law formulated by the previous judge theoretically never existed. This manner of annulling the previous decisions is reserved to the hierarchically superior tribunals. Between 1894 and 1966, the House of Lords considered itself bound by its prior decisions; only Parliament was able to modify them. The doctrine of \textit{stare decisis} affirms the obligatory character of precedents.

Occasionally, however, strict conformity to precedents led to an iniquitous decision. Is it possible to remedy this inconvenience? The royal power made a provision for this by creating courts of equity which were able to circumvent the effects of such iniquitous decisions. Later, with the predominance of Parliament, jurisprudential rules were able to be modified through legislative channels by the introduction of new statutes.

But English judges distrusted all legislative intervention which, in principle, derogated from the way in which rules of law were supposed to be formulated solely through judicial decisions. Accordingly, the judges administered the statutes in a restrictive manner.

The inconveniencies of the juridical ontology of the common law were especially manifested in the United States. In effect each of the states, having their own judicial organization, were free to apply the common law in their own fashion. That led to a certain diversity of the laws among the states, having a detrimental effect on commerce. In
addition, under the Constitution of the United States the federal courts are competent to decide not only cases which raise questions of constitutional interpretation or federal law, but also common law cases where the litigants are from different states. In identical kinds of cases the federal judge was able to interpret the common law one way, the local judge another. Was it necessary, in the absence of federal legislation, that commercial transactions be regulated by rules which vary from state to state, or was it necessary to unify the jurisprudence on this subject? Indeed, do not forget that each state is able to legislate in all matters which are neither regulated by the Constitution or the federal laws. Is it necessary to give to the courts of each state the right to interpret the common law in their own manner?

In this manner Justice Holmes offered a more practical theory to the English conception of the common law:

Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. 8

Following this thesis, the rules of law of jurisprudential origin will be treated analogously to the rules of legislative origin, which is explained clearly in a decision by Justice Brandeis in 1938:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal common law. 9

Given that there is the possibility of a plurality of interpretations of the common law, each having its scope of applicability within a specific interval of time, it is no longer necessary to admit the retroactive character of every jurisprudential innovation. Thus the Supreme Court of the United States, under the influence of Justice Benjamin Cardozo, decided that a rule of law, based on judicial precedents and recognized as valid in the past, no longer would be followed for the future. Consequently the concepts

which govern the rules of the common law approximate legislative enactments texts which normally are not retroactive. This change in the ontological rule of the common law will equally have the effect that American judges will not share the traditional mistrust held by English judges toward the enactments of the legislature. In order to account for the demands of an institutional pluralism, one must give up the idea that the common law is the same everywhere and always, and admit that all law presupposes an authority that makes it obligatory. Because of this, it is possible for the decisions of several authorities not to coincide.

The positivist ontology which is the basis of continental law, part socialist and part legalist, results from the combination of the ideas of Montesquieu and Rousseau.

The doctrine of separation of powers grants the legislative power the sole right to elaborate rules of law, and one therefore identifies the legislature with laws: the judges, however, are like those in the writing of Montesquieu, "the mouth which pronounces the words of the law, are inanimate which are not able to regulate either the force or the severity of them (the law)." These laws, having to abide by the equity reports prior to the positive law which establishes them are rather the expression of the reason of a sovereign will. In his SOCIAL CONTRACT, Rousseau sees in the laws the expression of the sovereign will—the people. Legislation thus will be enacted precisely when general will indicates a need for change. The Constituents of 1790 held a plurality of reverence for the law coupled with a great distrust of judges. That is why Article 12 of the Decree of August 16-24, 1790, provided for the legislative injunction: "They (the tribunals) address the legislative body each time they believe it to be necessary to interpret a law to make a new one for them." The tribunals must justify their judgments by reference to the law and the Constituents instituted a Supreme Court of Appeal "charged to oversee that the judges do not transgress the law that they are bound to apply." The Supreme Court of Appeal was considered as the policeman, designated by the legislative power, to watch over the judiciary. The Supreme Court of Appeal must make an accounting periodically to the legislative power concerning the manner in which it accomplished its mission.¹⁰

The concept that all the law is derived from the natural law led certain professors of the first half of the nineteenth century to proclaim that they taught not the civil law, but the Code Napoleon. And they knew the statement of Dean Aubry who said in 1957: "The mission of professors called to dispense, in the name of the State, the judicial education is to protest, no doubt with moderation, but also with steadfastness, against all innovation which tended to substitute a foreign will to that of the legislature."

In 1846, Mourlen published RÉPÉTITIONS ECRITES SUR LE CODE CIVIL where he endeavored to instill in his students a sacred respect for the law:

A good judge respects the reasoning of the law over that of his own; because the law is established in order to judge according to it and not in order to judge it. Nothing is above the law and it is to depart from justice to evade the law's dispositions under the pretext that equity requires it. In jurisprudence, there isn't a reason more reasonable, an equity more equitable, than the reason or the equity of the law (loi).

It is easy to see that the disadvantages of the legislative injunction compelled the drafters of the Code Napoleon to introduce the famous Article 4 which considers as guilty of a denial of justice, the judge who will refuse to judge, under the pretext of legislative silence, obscurity or insufficiency of the law. That article compels the judge to actively intervene each time the law presents, in his eyes, a gap, a paradox, or an ambiguity. It was necessary, in this case, that the judge prevent the insufficiencies of the law: his decision, although it may not follow the letter of the law, can interpret the will of the legislature, and endeavor to conform to the spirit of the law. But a decision signifies a choice. It is such choices which judges are now making by treating statutes in a more flexible manner, a technique first advocated in 1904 by President Ballot-Beaupre, in his discourse celebrating the centenary of the Civil Code. Accordingly, the magistrates have enlarged their power of interpretation. Then, under the influence of the historical school and of current sociological trends, judges have given preference more and more to the teleological interpretation. Finally, more recently they have had greater recourse to the juridical topics and to the general principles of the law.

12. Id. at 150-51.
All this effort is apparent in the modern view of the role of the judge as the one who reconciles the respect for the law with the exigencies of equity, so that judicial decisions, integrating all of them in the system of law, are acceptable to the enlightened public opinion. Consequently, if the judicial power emanates from the nation, as does all other power, it is necessary that this one be likewise supervised by the spokesman of the legislative power. It is the will of the legislature in function to which the judge should conform.

The manner which function plays in each of these systems that we have briefly examined shows clearly that beside sources of law provided for by ontology, it is just as important to examine the source of the authority charged with pronouncing the law, normally the judicial power.

Whether it is the will of God or the people which is the source of law, that same will will also be the source of all authority. Thus it is not of them in the common law system where it is not evidently the law which is able to appoint the judges: it is essential to appeal to the sovereign, likewise the source of legislative and executive power. From that, in that system, there is a duality of sources, which poses the problem of the relations which they maintain between them.

The analysis of the practice of the law proves to us that the theory of the sources of law does not suffice to explain its function because the texts by themselves rarely furnish the unequivocal answer regarding the manner with which they should be applied. The solution which is found will have to take into account equally the consequences which result from its application: the solution must be equitable, conform to the general interest, rational in a word acceptable.

The juridical logic thus presents itself as the comprehensive techniques of reasoning which allow the judge to reconcile, in each specific case, the respect for the law with the acceptability of the found solution. The source of law, such as it is recognized in each system, will serve as a point of departure for the reasoning of jurists, who will strive to adapt juridical texts to the needs and aspirations of a living society.
THE BATTERED SPOUSE DEFENSE IN KENTUCKY

by Elizabeth Vaughn* and Maureen L. Moore†

No lions rage against the lioness:
The tiger to the tigress is not fierce:
No eagles do their fellow birds oppress:
The hawk does not the hawk with talons pierce:
All couples live in love by nature's law,
Why should not man and wife do this and more?1

I. THE BATTERED WOMAN-A CASE HISTORY

The defense of battered women who kill their mates is slowly developing a distinct style or technique called the abused spouse defense. This defense emerges as akin to, but separate from, the more familiar and established defenses of self-defense and diminished capacity.

This article, which is in two parts, first relates the story of one battered wife who killed her husband. It is a true story told in detail to acquaint the reader with facts which are typical of thousands of battered women, the problems and characteristics they share and prejudices they meet in the legal system. The names of the victims have been changed, however. The second part of the article discusses the defense of battered women who kill their mates.

The reader may wish to study the list of common characteristics of battered women and list of myths at footnotes 15 and 18 respectively prior to reading the narrative account in part one.

Important to any defense is an understanding of the client's life history - a biography. This history is especially relevant in the abused spouse defense and should be built into the trial structure.

Helen Jones, a young female coal miner, shot and killed her

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1. M. Roy, BATTERED WOMAN, A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE i-iii (1977) (quoting William Heale, an English clergyman who published “An Apologie for Women, or An Opposition to Mr. Dr. G. his assertion, who held in the Act at Oxforde Anno 1608 that it was lawful for husbands to beat their wives,” in 1609).
estranged husband Harold. Helen insisted that the shooting occurred during an altercation and that she did not intend to kill Harold, but only to defend herself. The prosecution contended that Helen went to his apartment, was enraged over finding her husband with a "younger, and in his eyes, prettier woman," and killed him in cold blood. She was charged with murder.

Helen Jones' story is compelling. It is not unusual. Helen was a battered woman.

Helen's father died when she was six years old. Social Security benefits provided a comfortable living for Helen and her siblings until her mother remarried. The new husband was regularly unemployed, a fanatic self-proclaimed preacher who destroyed all photographs of the deceased husband and sold the family home. He bought an old school bus for the new permanent family residence. Two wide "bunk beds" were welded to the rear of the bus as sleeping quarters. A wood burning stove sat in the middle of the bus in the winter, a refrigerator sat there in the summer. There was electricity, but no running water or indoor plumbing. A half-brother and half-sisters were born. Ultimately seven people lived in the bus. There was no income except for the Social Security survivors' benefits they received. They lived in abject poverty.

Helen was a bright student, but quickly lost interest in school. Kids teased Helen and her brother about living on a bus, going to school on a bus, coming home on a bus to a bus. "We were so poor even the poor kids wouldn't play with us. Nobody was poorer than us," Helen recalled.

Family meals were canned biscuits and water gravy except for once a month on 'check day' when they bought bologna and soft drinks. Helen and her brother worked in the school cafeteria for free lunches until the embarrassment of working in the free lunch program finally caused them to quit eating lunch altogether. Soon they quit school, too.

Helen's step-father abused her mother in many ways, and she soon lost all interest in living. Her mother would sit for hours turning pages in a catalogue; she would wander around out-of-doors; she forgot how to cook. In a bizarre incident the step-father wired Helen's mother to a bed with coat hangers.

Helen was a pretty girl. On one occasion, she spent a few nights away from home with a man several years her senior. Although her step-father and mother were aware of her whereabouts, they did nothing to bring her home. When Helen and the man first
returned nothing was said, but after the man left, her step-father beat her bloody, using a board with nails sticking out of it. The spikes tore chunks of flesh from her legs.

When he learned of the beating, her boyfriend moved Helen to a friend's home. Helen became pregnant. As soon as he learned she was pregnant, the boyfriend moved too, and was never heard from again.

Only fourteen, she had planned to give the child up for adoption, and lived for a while with the proposed adopting parents. When they separated, she decided to keep the baby girl, Lana, and moved back with her mother and step-father. Life had not improved for any of them.

Then she met Harold. In her eyes, Harold was handsome and loving. He represented security. He drove a new car and worked in the mines. Harold bought her nice clothes, clothes for her baby and took her out to eat. He was good to Helen's mother. Although he was still married, he asked Helen to live with him pending his divorce.

Helen and the baby moved into a small mobile home with Harold. They had a home. The first year of their life together was happy. Harold worked regularly and every pay day he bought Helen and Lana new clothes. Then one night at suppertime Helen set aside a bowl of spaghetti to cool for her daughter before serving her husband. He became enraged, accused her of always "putting that damned kid first," threw the spaghetti across the room and began beating her. The next morning she announced she was going home to her mother. Harold told her she wasn't going anywhere. He took all their clothes, locked the clothes in the car, and left her alone, naked, without a phone, several miles from the nearest neighbor. She was stuck. When he came home from work that afternoon, he was sorry, in a good mood and it seemed that everything would be all right. He bought presents. Everything was alright . . . for a while.

This episode soon repeated itself. Then the episodes repeated themselves, at first several months apart, and finally growing closer together and more severe.

Helen tried to leave on several occasions. When she made her first attempt to get away and go home to her mother, Harold followed her. Harold stood outside pounding on the door, begging Helen to come home. Even though she had black eyes and bruises, her mother reasoned she should go home with him. Although she
might have to take a beating once in a while, at least she had plenty to eat. This was more than her mother had, and better than Helen had had before.

After another beating, Helen left again. This time she found a job at a fast food restaurant, making enough money to feed herself and Lana. An aunt was helping her buy an old car.

One afternoon Helen saw Harold outside the restaurant. Frightened, she ran to the kitchen. Harold came in with a shotgun and laid it across the counter. Helen’s boss said, “Helen, get out here. You have a customer. You have to wait on him.” Helen came out of the kitchen, but ran past Harold and locked herself in the bathroom. He went outside and beat the windows out of her car. After Harold left, the boss called the police. The police told her nothing could be done because they hadn’t seen it. Helen lost her job, and went back to Harold.

Helen was very close to her mother. While she was separated from Harold, she came home one evening and learned her mother had died. Harold accused her of killing her mother, saying “It’s your fault the old bitch is dead.” Helen begged him to leave her alone. Harold showed up at the funeral home and chased Helen through the aisles of chairs. Her brother finally stopped him. Of course, another reconciliation eventually followed.

Helen had decided to attend church after her mother’s death, because it would have pleased her. Easter Sunday came and Helen and Lana were late getting home from church. There was another beating. There were numerous periods of beatings, separation, beatings, and reconciliation. During one reconciliatory period Harold promised he’d never beat her again, if she’d just marry him. Then, out of work, she married him. Helen’s life was being lived like a stuck record, but he had never yet hurt Lana.

Then Lana started school. Helen wanted her to have school friends, nice clothes and all the other things she had not had. Lana wanted to be a Brownie. Helen was working in the mines, at Harold’s suggestion, but volunteered to be a helper so the girls could have a Brownie troop. When Harold found out, he was furious. He beat Helen and threw Lana against the wall. Lana’s arm was broken. For this Helen was able to get a warrant, but no indictment was ever returned. Harold was never punished.

Soon there was another beating, and they separated. During this separation, Harold waited for her where she met her car pool. When she transferred to her own car, a shotgun blast scattered
shot on the driver's side window. Still another reconciliation followed.

After every beating or violent incident, Harold would be loving and apologetic. He would force Helen to have sex, even though her face might be bleeding and she was aching from black eyes and bruises. Then he would demand a meal.

On occasions, Harold dragged Helen's few friends and family into his scheme to hold on to her. Once a friend tricked Helen into stopping at Harold's parents' home when he was there. He insisted he only wanted to talk to her, forced his way in the car, and began stabbing Helen, screaming, "I love you, goddamn it. I love you, goddamn it." He inflicted nine stab wounds. She had to promise to return home when she was released from the hospital. But she did not go home.

This time Helen moved out of state. Harold followed her. When she awakened one day, he was sitting on her bed. She was beaten, taken to his sister's home, and held captive by him for several weeks before she was allowed outside alone.

During yet another separation, another friend had arranged with Harold to stop on the highway so that Harold could see Helen 'because he loved her so much.' This time, he pistol whipped her and fired his pistol through her hair grazing the top of her scalp. By the time of Helen's trial, this "friend" had conveniently forgotten the entire episode.

Helen finally reasoned that it was easier to live with Harold than not. But there was a change taking place. Helen's daughter, Lana, looked to him as her father. He had always spoiled her, bought clothes and toys. Now she began to annoy him. He called her dumb and harassed her when she tried to do her school work. He verbally abused her and she became frightened of him. She begged her mother, "Please, let's leave." Helen knew she had to try to leave again. One Saturday morning she rented a U-Haul, packed and left as soon as Harold went to work.

They moved to a rural town in another county, not far from the coal mine where Helen worked. Helen chose a babysitter with great care and explained her situation to the sitter and to her landlord. They agreed to help her keep her whereabouts secret. She didn't let family members know where she was.

Harold was looking for her. He drove the streets of nearby towns. Friends warned her he was looking for her, but he hadn't looked in the right town - yet.
One morning in September, Helen stopped to visit a co-worker, who'd been off sick for several months. Helen invited her to ride with her about 50 miles to a town that had some pawn shops. She had just gotten two weeks pay and needed another couple hundred dollars to make several car payments her husband had not made. She had to have the cash to the Motor Credit office that day to avoid repossession of their two vehicles.

After pawning a small T.V., the two women went to a local bar and started drinking. Helen's friend, Patty, was taking several nerve medications in large doses. They kept drinking. Helen called work and took a float day; she knew she'd miss her shift of work. Late afternoon had come and she called the sitter to tell her she wasn't working and would be home soon. She talked to her daughter. Lana told her that school pictures were being taken the next day and begged her to go back to their hometown and get her new outfit out of lay-away for her to wear for the picture. Helen finally agreed.

She and Patty headed back to the department store, just a few hundred yards from the apartment she and Lana had shared with Harold. Long before their arrival, Patty had passed out from the combination of medication and liquor.

Helen parked in the shopping center parking lot and left Patty asleep with the motor running. She planned to take only a few minutes to pay for the lay-away package and leave town before Harold spotted her car. The few minutes were too long. Harold grabbed her as she came out of the store and shoved her into the car. Patty did not waken. He told her she was coming home to stay.

He drove up the hill to the parking lot of the apartment complex where they'd lived. Then he took Helen's billfold away from her. In it was nearly $1,000 cash. He also grabbed a two shot .38 calibre Derringer pistol from between the car seats. He had bought the gun for Helen several months earlier because she worked late and had a long drive home from the mine on dark back roads.

They were arguing loudly enough to attract the attention of several neighbors. The argument moved from the parking lot toward their apartment building. Helen reached for her wallet. Harold dropped the gun and it discharged. Helen jumped back, then both Helen and Harold grabbed for the pistol. Helen picked
it up and continued her efforts to get her money away from Harold.

She pursued Harold up two flights of concrete stairs, still demanding her wallet, but before she reached the second landing Harold turned and knocked her down the stairs.

She got up. Harold had his arm and hand raised, coming toward her again. The gun discharged and the bullet went through Harold's forearm. Harold turned and fell. She heard him say, "Oh shit, I don't believe this." Helen ran back to her car and drove to a friend's house. She ran in excitedly and told her friend, "I've just shot the son-of-a-bitch in the arm." She did not know the bullet had also penetrated the heart and lungs and that Harold would soon be dead.

Helen returned to the apartment as quickly as she'd left. When she returned police and ambulance were there. Paramedics were working with Harold.

Helen carefully walked past them. She was afraid that Harold would reach out and grab her. She pushed her way into the apartment and pushed a young woman (Harold's new girlfriend) down on the couch. Policemen were in the apartment.

Within a few minutes she was under arrest, shouting loudly, "I shot the son-of-a-bitch and I'd do it again." She couldn't be quieted.

Helen was hysterical; there was an odor of alcohol about her and a near-empty bottle of whiskey was found in her car.

She was taken to jail and told about Harold's death. She was taken from the jail to the local hospital for a blood alcohol sample. Her doctor, familiar with the history of beatings, stabbing and shooting, admitted her to the hospital overnight. She was charged with murder, and the next day she was returned to jail.

Harold's younger brothers, whose morals and mentalities were similar to his, were incensed with his death. Even in jail, Helen needed protection from them. The police gave her a disguise to wear (a policeman's uniform and hat) when they took her from the jail to make Harold's funeral arrangements. Harold had once told her he wanted to be put away like his father had been, and she honored his request.

Helen's brother managed to raise bail money and she was released from jail pending trial.

Helen was naive and frightened about court. She was bewildered at being charged with murder. She didn't remember
pulling the trigger, although she knew Harold had been shot in the arm. She thought maybe the gun had discharged when he knocked her down the concrete stairs.

She began having nightmares, the same dream recurring night after night. Her brother suggested she start seeing a psychiatrist.

During interviews with Helen it was learned she had never thought of her mother as a victim of spouse abuse, nor herself a victim of child abuse. She began to understand that other women had similar experiences. Shortly before trial, Helen visited a spouse abuse center. Helen began asking questions about the center and women and children staying there. "Do you mean Lana and I could have stayed in a place like this and Harold couldn't have gotten to us?"

A weapons expert was consulted concerning whether it was possible, as Helen suggested, that the gun hit the concrete landing and discharged. The gun, a .38 2-shot Derringer, and the spent bullet recovered from Harold's body were examined by him. The expert carefully read the autopsy report. The result was unexpected: the expert was confident the gun had not been aimed at Harold when it was discharged. The bullet was distorted and bore certain markings which could only have been made by masonry and perhaps metal. It had hit masonry and perhaps metal before it entered the body!

The autopsy report and pathologist's testimony verified a point of entry in the arm indicative of Harold's arm being raised. The defense would argue this was an offensive movement; the prosecution, a defensive movement.

In an atmosphere of tension and worry over her fate and threats from the deceased's brothers, the trial began. Voir dire was extensive. An effort was made to learn just what the prospective jurors knew about spouse abuse and to also acquaint them with this topic. When asked if they'd ever heard of spouse abuse, only one elderly man raised his hand.

The prosecution offered a brief opening statement. The defense, however, gave a detailed opening statement, beginning with Helen's childhood story of abject poverty and abuse. It was feared these crucial details would not find their way into evidence and this was one method of informing the jury of Helen's plight and previewing her testimony. The prosecution objected to the lengthy opening statement. The judge queried what would be left for the jury to hear, but the defense argued that a detailed open-
ing was essential for the jury to understand the circumstances which led to Harold's death.

During its case the Commonwealth presented eyewitnesses to the shooting and Helen's hysterical remarks on her return to the apartment at the time of her arrest. Her act was presented as planned, deliberate and vengeful: an enraged and jealous woman who had learned of the girlfriend and sought a confrontation. The prosecution, however, did not mention Helen's intoxication, nor did it introduce the near-empty whiskey bottle, or the .17 blood alcohol results. The defense chose to introduce the blood alcohol results. This was risky, but it might mean the difference in degree of offense by mitigating intent.

Helen's friend, Patty, who was passed out in Helen's car during the kidnapping, argument and shooting, had been awakened by the police after Helen's arrest and was arrested for public intoxication. She claimed to know nothing of the parking lot kidnapping or altercation between Harold and Helen.

Helen then took the stand. Although she had anticipated being the last defense witness to testify and had not expected to be called so soon, she was the only witness who could testify regarding Harold's acts of aggression. This evidence had to be brought out before any other witness could testify about his reputation for violence, if any, or evidence of prior threats.

Helen began her saga. Her testimony included many of the specific acts of brutality committed by Harold. Her only tears came when she related the incident surrounding her mother's death.

The prosecution attempted to show she had planned the murder and that not only was she jealous about Harold's new girlfriend, but indicated she herself was living with a man. The babysitter was called as a rebuttal witness to refute this.

Numerous witnesses testified that they knew Helen was afraid of Harold and that he was violent. One witness came forth and testified that Harold had threatened to "kill the bitch" the day before his death. A co-worker testified on cross-examination that while Helen was not afraid to work in underground coal mines, she was afraid to come out and go to her car alone because she was afraid of Harold.

The defense attempted to qualify a witness from a metropolitan spouse abuse center to discuss spouse abuse, myths surrounding spouse abuse, and the battered woman syndrome. Her testimony
was disallowed, apparently because she had not published an article on the subject in any legal or medical journal.

Helen had been seeing a psychiatrist because of recurring bad dreams. It was his opinion that Harold had "killed himself." After interviewing him, the defense chose not to call him as a witness. It was felt his testimony, though well-intentioned, could be misconstrued and therefore damaging.

There were several eye and/or ear witnesses to the shooting. Each placed Helen in a different spot, but they were in basic agreement that she was pointing or waving the gun at Harold.

Instructions were requested by the defense which pointed out the physical disparity between the defendant and deceased, the history of abuse, and alternate theories of self-defense and accident. These were not given. An intoxication instruction, also requested, was given. Other instructions followed traditional self-defense guidelines.

After several hours of deliberation the jury returned a verdict of guilty of reckless homicide, fixing her punishment at one year in the penitentiary. Ironically, Helen saw this as her first step toward freedom, after years of psychological imprisonment. Probation was denied.

Thirty days after Helen's imprisonment, her motion for shock probation was denied. On the same day, however, the parole board met and granted early parole. Helen was free, at last.

II. EVIDENTIARY CONSIDERATIONS: THE BATTERED SPOUSE DEFENSE

The right of self-defense is a concept recognized by most people as the legal, and perhaps moral, right to protect themselves,

   (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.
   (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat.
3. F. SPIRAGO, THE CATECHISM EXPLAINED 388 (1961). In discussing the Ten Commandments,
   ... it is ... lawful to wound or even kill our fellowman, if he threatens to take our life by violence, or anything that is absolutely indispensable to our life, and we have no other means of defense. ... Self-defense is not wrong, because our object is not to
their loved ones' and their homes against violence or threatened violence with whatever force is reasonably necessary. They recognize that if someone is trying to harm or kill them, they have the right to kill rather than be killed. It is a fundamental, historic concept of law.

The self in self-defense is a most important word because self-defense is a subjective notion for most people and most people are prone to be subjective, rather than objective, when judging others. Each individual perceives the right to use self-defense within the framework of his or her own life, standards, ex-


(1) The use of physical force by a defendant upon another person is justifiable when:
   (a) The defendant believes that such force is necessary to protect a third person against the use or imminent use of unlawful physical force by the other person; and
   (b) Under the circumstances as the defendant believes them to be, the person whom he seeks to protect would himself have been justified under KRS 503.050 and 503.060 in using such protection.

(2) The use of deadly physical force by a defendant upon another person is justifiable when:
   (a) The defendant believes that such force is necessary to protect a third person against imminent death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat; and
   (b) Under the circumstances as they actually exist, the person whom he seeks to protect would himself have been justified under KRS 503.050 and 503.060 in using such protection.

HISTORY: 1974 H 232, § 32, eff. 1-1-75

COMMENTARY (1974)

This provision serves to provide justification for the use of physical force in protection of others. Subsection (1) accords an individual defending another the same rights he would have in defending himself and simultaneously imposes the same limitations upon him. It should be said about subsection (1) that a defendant is justified in acting under this provision only if the person he seeks to protect would have been justified under KRS 503.050 and 503.060 in using the same force had the circumstances been as the defendant believed them to be.

Subsection (2) provides additional restrictions upon the privilege to use force to protect another when that force is deadly force. The first restriction is identical to the one that exists for the privilege of self-defense, namely, that deadly force can be used only to protect against death, serious physical injury, kidnapping and forcible sexual offenses. The second restriction serves to make the privilege to use deadly force in protection of another substantially more limited than the privilege to use non-deadly force for that purpose. Under part (b) subsection (2) a defendant who uses deadly force to protect a third person is to be judged in reference to what the circumstances actually are and not in reference to what he may believe them to be. Therefore, if he kills under circumstances which he believes would have entitled the protected person to kill but which do not in fact exist, he has no defense under this section.
periences, morals, prejudices, religion, background, employment, even physical prowess and age. These things are different for each person and it may be difficult to accept another's act of self-defense as justifiable, when one is given the benefit of hindsight in judging that act.

This article deals with some of the specific problems met by women who kill in self-defense, and the growth of this defense into what is being termed the "abused spouse defense," pointing out similarities and dissimilarities between the abused spouse defense and other self-protection defenses. Women, abused spouses in particular, who kill in self-defense often do not fit the "FACTS" mold of the traditional self-defense concept.\(^5\)

The battered woman syndrome will be briefly discussed to acquaint the reader with common characteristics of the lifestyle shared by battered women. The article will then discuss use of expert testimony to acquaint the jury with this syndrome, other defense considerations, basic evidentiary points and jury instructions. Other trial procedures, such as voir dire examination and opening and closing statements are not discussed, nor are alternative "preventive procedures" such as warrants for assault and battery\(^7\) and temporary restraining orders.\(^7\)

While neither the problems of battered women\(^6\) nor the small number of women who kill their husbands is new,\(^9\) recognition of their problems by society is slow in coming.\(^10\) The use of the spouse abuse defense and the problems found in women's self-defense cases\(^11\) stand in sharp contrast to the once-legal right to

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5. L. Walker, *Beyond the Juror's Ken: Battered Women* 4, 5 (1979). (This book can be obtained from Walker & Associates, P.O. Box 38593, Denver, Co. 80238). (The key to women's self-defense lies in the definition of what would be reasonable for a female victim of violence. Self-defense may go beyond the immediate face to face time period of danger. The extension of time is important. Many battered women kill right before the violence escalates to dangerous levels. The cycle theory of violence indicates a predictable pattern to the abuse, and demonstrates the reasonableness of her perception that she is in imminent danger).


wife-beating and tendency not to prosecute women for killing their husbands.\textsuperscript{12}

Since the abused spouse defense is a relatively new concept\textsuperscript{13} and stems from the "justification"\textsuperscript{14} concept of traditional self-defense, it is often restricted by courts to traditional self-defense guidelines. However, the abused spouse defense integrates into self-defense the history of spouse abuse, psychological phenomena, physical disparity, and economic, societal, and emotional factors which result in a battered woman's syndrome.

The defense lawyer confined to the presentation of the abused woman's self-defense case within traditional self-defense boundaries often finds an inadequate framework for presentation of the abused spouse's continuing dilemma. Hers' is not the product of a one-time confrontation as is often the case with traditional self-defense.

The abused spouse defense should not be thought of as a right to kill because of past mistreatment of the spouse, but deals with the peculiar facts and background, including mistreatment, which make it impossible for her to survive without killing. She may otherwise be killed, or kill herself.\textsuperscript{15} It is not a plea for special

\begin{itemize}
\item \textsuperscript{12} L. Walker, supra note 5, at 2. In a study by Ann Jones (author of Women Who Kill (1980)) it was found that until the middle of the 20th century, it was not common for most women to be prosecuted.
\item \textsuperscript{13} Although abused spouses who kill their mates have relied upon self-defense for decades, the spouse abuse defense offspring is considered a first in most jurisdictions. See generally Bukovinsky, Till Death Do Us Part: A Battered Wife Pulls the Trigger, N.J. Monthly (1982) which discusses the first time the battered-wife defense was successfully used in a murder case in New Jersey.
\item \textsuperscript{14} Ky. Rev. Stat. ch. 503 deals with general principles of justification.
\item \textsuperscript{15} L. Walker, The Battered Woman, 18-30 (1979). Myths about the battering of women are perpetuated by the mistaken notion the victim has precipitated her own assault. It is important to refute the myths to understand why battering happens, how it affects people and how it can be stopped. Generally, the myths can be stated as follows:
\begin{itemize}
\item 1. The battered woman syndrome affects only a small percentage of the population.
\item 2. Battered women are masochistic.
\item 3. Battered women are crazy.
\item 4. Middle-class women do not get battered as frequently or as violently as do poorer women.
\item 5. Minority-group women are battered more frequently than Anglos.
\item 6. Religious beliefs will prevent battering.
\item 7. Battered women are uneducated and have few job skills.
\item 8. Batterers are violent in all their relationships.
\item 9. Batterers are unsuccessful and lack resources to cope with the world.
\item 10. Drinking causes battering behavior.
\item 11. Batterers are psychopathic personalities.
\item 12. Police can protect the battered women.
\end{itemize}
\end{itemize}
treatment, but equal and individual treatment.

The traditional self-defense case usually involves an altercation or assault in which the victim of the aggression feels it is necessary for his own protection to use force against the assailant. This is usually a one-time confrontation: the barroom brawl, defending the home, defending a business from robbery, protecting against a "madman." It is usually thought of as man against man, not woman against woman or woman against man. Women are neither taught to fight nor expected to do so. 16

The abused spouse, however, does not defend herself against a one-time assault, but is usually the object of many assaults which she has accepted without defending herself. 17 Because of her low

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13. The batterer is not a loving partner.
14. A wife batterer also beats his children.
15. Once a batterer, always a batterer.
16. Once a victim, always a victim.
17. Long-standing battering relationships can change for the better.
18. Battered women deserve to get beaten.
20. Batterers will cease their violence "when we get married."
21. Children need their father even if he is violent—or, "I'm only staying for the sake of the children."

Id. See also State v. Anaya, 438 A.2d 892 (Me. 1981). "[A] certain substrata of abused women perceive suicide and/or homicide to be the only solutions to their problems." Id. at 894.

16. State v. Wanrow, 88 Wash.2d 221, 559 P.2d 548 (1977). The defendant was 5'4", had a cast on her broken leg and was using a crutch; the assailant was a 6'2" intoxicated man. In reversing the defendant's conviction of second degree murder and first degree assault with a deadly weapon, the court stated: "In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons." Id. at 558.

Instructions given to the jury did not indicate that the relative strength and size of the persons involved may be considered; the instructions left the impression that the standard to be applied is that applicable to an altercation between two men and thus violated the defendant's right to equal protection of the law.

The respondent was entitled to have the jury consider her actions in the light of her own perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination'...[C]are must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants. [citations omitted].

Id. at 558-59. See also L. Walker, supra note 5, at 6. "Boys typically learn to use their fists and other parts of their bodies as weapons, while girls do not...a woman's ability to defend herself is unequal as to permit her to use a weapon." Id.

17. L. Walker, supra note 5, at 17, 18 (Most battered women interviewed by the researchers had no history of violent behavior and for most it was the first time they had fought back against their batterer). See also M. Roy, supra note 1, at 60 (The escalating frequency of violence influences women's actions).
self-esteem, she believes no one will help her resolve her predicament but herself.18 If and when she finally does defend herself the facts surrounding that defense may not follow traditional self-protection definitions.

There are three primary elements to the right of self-defense: armed force may only be used against unlawful armed force; the defendant must have a belief of imminent danger of death or serious bodily harm; and the defendant has a duty to retreat.19

One has the right or privilege to use self-protection when another is using or about to use physical force upon him and may only use deadly physical force if he believes it is necessary in order to protect himself from death or serious physical injury.20

For the defense to apply, one must not use more force than appears necessary to him. He may not ordinarily use deadly force against a non-deadly force. During an affray, it may be difficult to distinguish between deadly and non-deadly force. It can be even more difficult when the force is used some time subsequent or prior to an anticipated battering and still more difficult when the force is used against an unarmed person.

These legal rights are allowed under the theory of justification, but they are inadequate to fairly encompass the problems encountered in most abused women's self-defense cases.

Spouse abuse as a defense is an elaborate, if overlapping, expansion of the traditional self-defense rationale. The spouse abuse defense centers around the defendant's and deceased's personal history of difficulties, including repeated batterings, and an ex-

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18. L. Walker, supra note 15, at 31-35. The "Common Characteristics of Battered Women" are listed as follows:

1. Has low self esteem.
2. Believes all the myths about battering relationships.
3. Is a traditionalist about home; strongly believes in family unity and the prescribed feminine sex-role stereotype.
4. Accepts responsibility for the batterer's actions.
5. Suffers from guilt, yet denies the terror and anger she feels.
6. Presents a passive face to the world but has the strength to manipulate her environment enough to prevent further violence and being killed.
7. Has severe stress reactions, with psychophysiological complaints.
8. Uses sex as a way to establish intimacy.
9. Believes that no one will be able to help her resolve her predicament except herself.

Id.


planation of why there is such a history. Without this history, the defense cannot put into perspective the defendant's belief of imminent danger of great bodily injury or loss of life.

Ironically, in order for women to be treated equally in our legal system, self-defense is a legal right which should be given gender. While the better practice would be to give each individual equality, one must presently recognize the inequality in the way the criminal justice system treats men and women who kill. This inequality works against the woman, and has been recognized as violative of equal protection guarantees. Many sociologists and psychologists have recognized the bias operating in the courts which may make it difficult to find mitigating circumstances for women who use violence.

Expanding the defense of self-protection to include spouse abuse as a legal defense for women provides a standard whereby the special phenomena which need to be explained in order to present the battered woman's viewpoint are included in presentation of evidence. It is a more complex defense than traditional self-defense, involving deep-rooted, complex problems calling for expert testimony.

Many people do not understand why domestic violence exists or why the wife "tolerates" it. Although the wife is the victim of

21. See generally L. Walker, supra note 5.
22. Ky. Rev. Stat. § 503.050 eliminates the requirement that defendant's belief and action be reasonable for the defense of self-protection, but does not relieve him of all criminal liability for action based on unreasonable belief. See also supra note 2 (commentary).
24. L. Walker, supra note 5, at 6. There is inequality in the way the criminal justice treats men and women who kill, which works against the battered women. Courts find it more difficult to see mitigating circumstances for women who use violence, even if the same act would be considered justifiable for a man. Id.
25. In the landmark case of Ibn-Tamas v. United States the court discussed the criteria for determining whether expert testimony would have demonstrated the battered woman's behaviors at variance with the average lay person's concept of her behavior, applying the criteria set out in Dyas v. United States, 376 A.2d 827 (D.C.App. 1977) governing admissibility of expert testimony. 407 A.2d, 626, 632-640 (D.C.App. 1979).
26. Hawthorne v. State, 408 So.2d 891 (Fla.App. 1982). Defendant was convicted of first degree murder of her husband. The case was remanded and defendant was convicted of second degree murder, and then it was remanded again on several points, including that the testimony of a clinical psychologist regarding the battered wife syndrome which should have been admitted. The court stated, "Our determination [is] that this expert testimony would provide the jury with an interpretation of the facts not ordinarily available to them...." Id. at 806. The court pointed out that defective mental state was not offered as a defense. Rather the specific defense was self-defense which requires a showing that the accused reasonably believed it was necessary to use deadly force to prevent imminent
abuse, she may be blamed for not leaving or not divorcing her husband, and may even be accused of provoking the abuse.\footnote{27} The victims trade places. The wife is unjustly judged by a "reasonable man" standard and even a male physical standard.\footnote{28} These attitudes must be understood and dealt with prior to defending the battered woman.

A. The Battered Woman Syndrome

While every self-defense case should be tailored to its own unique facts and the individual defendant, abused women's self-defense cases have some common characteristics which should be considered. In the case of battered women who kill their husbands, a thorough explanation and understanding of the battered woman and the cycle theory of violence is essential to present the defendant's perspective, her state of mind at the time of the killing. Expert testimony is the best means of conveying this information.\footnote{29}

Although physical facts are important, the defendant's state of mind, at the time of the homicide is, perhaps, the single most important element in the defense. The fact finder must believe defendant faced "imminent danger," or "imminent use of unlawful physical force by the other person."\footnote{30}

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\footnote{27} See L. WALKER, supra note 5, at 14, 15. Psychologist William Ryan originally applied the term "blaming the victim" to those experiencing racial discrimination. He discussed how prejudicial attitudes affected both perpetrator and victim, and stated that, by perpetuating the belief to blame the victim for her abuse, we ultimately excuse men for the crime. Id.

\footnote{28} See State v. Wanrow, 88 Wash.2d 221, 559 P.2d 548 (1977).


\footnote{30} KY. REV. STAT. § 503.050(1), requires a belief by defendant that the force being used by another person was an unlawful attack; his belief be based on reasonable grounds; the force used by defendant was believed necessary to avoid imminent danger; and the force used was not in excess of that believed necessary to avoid imminent danger and the force us-
In the traditional self-defense case, evidence of the deceased’s reputation, threats, and violent acts or statements committed within a “reasonable time” before the crime are admissible to show defendant’s state of mind and who was the aggressor.\textsuperscript{31} Evidence of this nature, which tends to support the defense’s theory of justification may be lacking in the typical abused spouse defense case. This calls for other methods and means of eliciting evidence to show the abused spouse’s state of mind. The defendant herself may be able to relate certain incidents, but be unable to explain why these incidents occur and repeat, culminating in a fatal tragedy. A qualified expert’s detailed testimony may explain these things.\textsuperscript{32} Explanation of the cycle of violence\textsuperscript{33} and common characteristics of the battered woman\textsuperscript{34} may help dispel the myths\textsuperscript{35} surrounding the battered defendant and unvoiced prejudices toward her.

Dr. Lenore Walker, psychologist and author, in her studies of battered women, discovered a definite battering cycle that these women experience.\textsuperscript{36} The cycle has three distinct phases: the tension-building phase; the explosion or acute battering incident; and the calm, loving respite.\textsuperscript{37} This cycle helps explain how these

\begin{itemize}
\item \textbf{THE CYCLE THEORY OF VIOLENCE}
\item \textbf{I.} Phase One—The Tension—Building Stage
\begin{enumerate}
\item Attempts to calm batterer
\item Nurturing
\item Complaint
\item Anticipates his whims, stays out of his way
\item Lets him know she accepts his abusiveness as legitimately directed toward her
\item She assumes the guilt if he explodes
\item She resorts to defense of ‘denial’
\item Reasons if she waits it out, situation will improve
\end{enumerate}
\item \textbf{II.} Phase Two—The Acute Battering Incident
\begin{enumerate}
\item Uncontrollable discharge of tensions that have built up in phase one
\item Rage is out of control
\end{enumerate}
\end{itemize}
women become victimized by their husbands, fall into learned helplessness behavior, and why they do not attempt to escape this situation.

The developing body of law seems to favor admissibility of expert testimony to explain the battered woman syndrome, although there are problems in persuading courts to recognize this subject area as being beyond the juror's ken. Consequently, the court may refuse to allow expert testimony.

Victim becomes anxious, depressed, severely tense
(4) Briefer than 1st phase—usually lasts from two to twenty-four hours
(5) Lack of predictability and lack of control
(6) Following the attack, shock, denial, disbelief

III. Phase Three—Kindness and Contrite Living Behavior
(1) Phase is welcomed by both parties—both rationalize batterer's behavior
(2) Batterer knows that he has gone too far and tries to make up to her
(3) Batterer begs forgiveness
(4) Batterer becomes loving, generous, dependable, helpful
(5) Symbiotic bonding takes place (over-dependence and over-reliance on each other)
(6) Battered woman held responsible for the consequences of any punishment batterer receives

Id.
38. Id. at 14, 51-52. Through society's definition of the woman's role, she believes she has no choice but to be a victim.
39. Id. at 16, 42-54, 187. The area of research concerned with early-response reinforcement and subsequent passive behavior is called learned helplessness. To the battered woman, repeated batterings diminish her motivation to respond. She becomes passive. Her cognitive ability to perceive success is changed. She does not believe her response will result in a favorable outcome. Finally, her sense of emotional well-being becomes precarious and she is more prone to anxiety and depression.
40. See Hawthorne v. State, 408 So.2d 801 (Fla.App. 1982).
41. See supra note 30 for a list of some jurisdictions which have allowed testimony regarding the battered woman syndrome in reported decisions.
42. Professor Walker discusses thoroughly the application of expert testimony from a psychologist for the purpose of refuting the many myths that still surround battered women in the average layperson's mind. By comparing the defendant with other battered women, the expert may conclude within professional limits that defendant was battered and could be expected to follow certain common patterns. L. Walker, supra note 5.

The defendant was convicted of murdering her husband. "[T]he Court of Appeals reversed the conviction and ordered a new trial solely because the trial court erred by refusing to admit... expert testimony on battered wives and the peculiar state of mind which might prompt the shooting of the 'battering husband.'" Id. at 138. The Supreme Court of Ohio, however, reversed the Court of Appeals. In affirming the conviction, the Ohio Supreme Court stated that the expert testimony on the "battered wife syndrome" is inadmissible because:

(1) it is irrelevant and immaterial to the issue of whether the defendant acted in self-defense...; (2) the subject of the expert testimony is within the understanding of the jury; (3) the 'battered wife syndrome' is not sufficiently developed, as a matter of
The expert's most important function is to explain the crucial element of the self-defense case—the defendant's state of mind. This will help the fact finder determine reasonableness of the defendant's belief of imminent danger of death or serious physical injury at the time of the homicide. The expert may also present a psychological profile of the deceased. This "psychological autopsy" will give the jury an opportunity to meet the intimidator and fit him and his behavior into the cycle theory of violence. The batterer, too, has certain common characteristics which will be discussed later in this article. The expert, having explained the battered woman's common characteristics, myths about her, and the cycle of violence theory, may now apply them commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and (4) its prejudicial impact outweighs its probative value.

Id.

In Buhrle v. State, the defendant was convicted of murder in the second degree for killing her husband during an altercation which occurred seven days after a battering. The court held the trial court did not abuse discretion in excluding expert testimony of a defense psychologist concerning the battered woman syndrome because the state of the art was not adequately demonstrated. The trial judge used the criteria set out in Dyas v. United States, 376 A.2d 827 (D.C.App. 1977) in rejecting the proffered testimony of Dr. Lenore Walker. 627 P.2d 1374 (Wyo. 1981).

In State v. Anaya, 438 A.2d 892 (Me. 1981). The defendant, a battered woman who had stabbed her abusive lover, was convicted of manslaughter. The case was remanded for a new trial, the court finding the expert testimony on the battered woman syndrome "highly probative and more helpful than confusing to the jury. [T]his evidence would have given the jury reason to believe defendant's conduct was, contrary to the State's assertions, consistent with her theory of self-defense." Id. at 894.

In State v. Baker, the defendant was convicted of attempted murder of his wife and had pled not guilty by reason of insanity. The defense called two psychiatrists as witnesses. The State called an expert on domestic violence to testify on the subject of battered wives, who testified that current research does not indicate that mental illness is an important cause of wife-beating and that defendant's marriage fell within the contours of the "battered wife syndrome." The defense argued that this testimony was only marginally relevant, highly prejudicial and obscured in the "real issue" of defendant's insanity. The State contended the attempted murder was but a single episode in a recurring pattern of domestic violence and not caused by mental illness or insanity. The court held that the evidence pertaining to the "battered wife syndrome" was relevant to the issue of insanity and that the opinion testimony bore directly on the insanity issue. 424 A.2d 171 (N.H. 1980).

45. See infra note 46. It is interesting to note that testimony regarding the battered woman syndrome was used by the prosecution in State v. Baker, 424 A.2d 171 (N.H. 1980). See supra note 44.


47. L. Walker, supra note 15, at 35-41. See infra note 54 for a discussion of the common characteristics of the batterer.
to the defendant’s particular fact situation.48 This may also be an effective thread to weave into closing argument. Finally, a psychologist or psychiatrist as an expert witness may aid the development of yet another aspect of the spouse abuse defense, her sanity or insanity at the time the killing took place.49 There are a variety of emotional factors which led up to the killing which need examination whether an insanity defense is used or not.

Indeed, some of the common characteristics shared by battered women, i.e., low self-esteem, suffering from guilt, denial of terror and anger, severe stress reaction, and other psycho-physiological complaints,50 suggest such a defense. Although an unpopular defense with judges and jurors,51 the insanity defense has often been a forced choice52 because of the difficulties encountered in applying traditional self-defense rules to the battered woman homicide case.

The better choice is the defense which juxtaposes the insanity defense and/or self-defense: the abused spouse defense. This allows the defendant the benefit of the insanity defense without exposing her to the danger of involuntary commitment to a mental institution53 for a justifiable, albeit intentional, defensive act.

B. Evidence

The defendant in any self-defense case is entitled to show why she believed it necessary to kill in self-defense.54 The fact finder must learn to know the defendant, but evidence should also be geared toward knowing as much about the deceased as possible—both his good and bad sides. In both the traditional and abused spouse defenses, this may allow the defense some agreement with the prosecution (that deceased wasn’t all bad), provides

48. See supra note 42. See also infra text accompanying footnotes 54-60.

49. L. WALKER, supra note 5, at 18. Many battered women's emotional stability at the time of the killing is extremely fragile . . . [with] selective memory loss associated with the trauma. Id.

50. L. WALKER, supra note 15, at 31-35. The nine "Common Characteristics of Battered Women" are representative of a mixed group, representing all ages, races, religions (including no religion), educational levels, cultures and socioeconomic groups. These common characteristics are listed supra note 18.

51. See Note, supra note 46, at 587, 590.


53. Id. at 29, 30.

an opportunity to develop a history of his battering behavior (his Dr. Jekyll-Mr. Hyde personality) and introduces the deceased's psychological autopsy. 55

Batterers, like the battered, share common characteristics. 56 They too, have low self-esteem and severe stress reactions. 57 There are other characteristics which the expert witness may explain to the jury, such as pathological jealousy, dual personality, and a tendency to blame others for his actions. 58 Caution should be taken, however, in a flat listing of characteristics. An otherwise favorable juror might be lost if he identifies with a particular "negative" characteristic.

Evidence of the deceased's character and reputation may be used as a tool to show the jury both sides of the deceased's personality and behavior. 59 This evidence is admissible and relevant to establish and support testimony that deceased was the aggressor 60 and to help establish reasonable doubt with the fact finder regarding defendant's fear for her life. Evidence is also admissible to show that the defendant knew the victim's bad reputa-

55. See Note, supra note 46.
56. L. WALKER, supra note 15, at 35-41. Batterers like the battered were a mixed group, representing all ages, races, religions (including no religion), educational levels, cultures and socioeconomic groups. The batterer, according to the women in this sample, commonly:
   1. Has low self esteem.
   2. Believes all the myths about battering relationships.
   3. Is a traditionalist believing in male supremacy and the stereotype masculine sex role in the family.
   4. Blames others for his actions.
   5. Is pathologically jealous.
   6. Presents a dual personality.
   7. Has severe stress reactions, during which he uses drinking and wife battering to cope.
   8. Frequently uses sex as an act of aggression to enhance self-esteem in view of waning virility. May be bi-sexual.
   9. Does not believe his violent behavior should have negative consequences.

Id. at 36.
57. Id. at 35-41.
58. Id.
59. In Amos v. Commonwealth, the court explained that
   'Reputation' and 'character' are not synonymous and that different rules apply to the introduction of evidence on these two subjects. Character means disposition . . . and denotes what a person is, not what he is reputed to be. . . . 'One's general reputation is not what another person may know or think about him, but it is the estimate in which he is held by the people generally with whom he associates and comes in contact with in every day life.'

516 S.W.2d 836, 837 (Ky. 1974).
60. See Johnson v. Commonwealth, 477 S.W.2d 159 (Ky. 1972).
tion for peace and quiet and acted out of fear based on that reputation.61

Defendant may offer evidence of her own good reputation.62 This must be done very carefully, as it puts her reputation in issue and opens the door to prosecution rebuttal.63 It is essential to know the client and what others may say about her.

In the traditional self-defense case, before any evidence regarding the deceased's character/reputation is admitted into evidence, there must first be some evidence of aggression by deceased.64 If there are no witnesses to support this, the defendant will have to take the stand early in the defense phase of the trial to testify about the aggression in order for other witnesses to then testify about his reputation.

To this extent spouse abuse and other self-defense cases may differ. The husband may have had no such bad reputation in the community. His spouse might have been his only violent outlet. Although his wife may have been all too familiar with his violent propensities, she might not know her husband's reputation in the community for turbulence and violence. She may have hidden the batterer's behavior and no one else may know about it.65 She may be on her own to relate such incidents.

61. See infra notes 66, 68 and 69.

62. Pickelseimer v. Commonwealth, 217 Ky. 606, 290 S.W. 498 (1927). Evidence of good character offered should be restricted to the trait of character which is in issue or ought to bear some reference to the nature of the charge. Pruitt v. Commonwealth, 487 S.W.2d 940 (Ky. 1972); Gaugh v. Commonwealth, 261 Ky. 91, 87 S.W.2d 94 (1935). The defendant may offer affirmative evidence with regard to the trait on trial to prove it is unlikely he would have committed the act charged. If the defendant has a very good reputation and if he is of good character, this may help to create reasonable doubt. See 13 Am. Jur. Trials § 28 at 502 (Character); 7 Am. Jur. Trials § 96 at 565 (Homicide).

63. Shell v. Commonwealth, 245 Ky. 223, 53 S.W.2d 524 (1932). Evidence regarding the character of the accused must first be introduced by the accused and the prosecution may introduce rebuttal evidence of the same kind. See also Pruitt v. Commonwealth, holding that the prosecution may not introduce evidence to show the accused's bad character or reputation unless the accused first introduces evidence of good character or reputation. 487 S.W.2d 940, 942 (Ky., 1972).

64. J. RICHARDSON, KENTUCKY LAW OF EVIDENCE, § 26.7.

65. Smith v. State, 247 Ga. 612, 277 S.E.2d 678 (1981). The defendant was charged with murder of her live-in boyfriend, and claimed she shot him in self-defense. She was convicted of voluntary manslaughter and the Court of Appeals upheld the trial court's exclusion of expert testimony on the battered woman syndrome. The Georgia Supreme Court reversed the conviction, stating that "the expert's testimony explaining why a person suffering from battered woman's syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself, would be such conclusions that jurors could not ordinarily draw for themselves." Id. at 683.
The traditional self-defense case usually centers around a single act of aggression. The abused spouse's case, however, usually involves numerous acts of aggression.\textsuperscript{66} To paint a clear picture of the battering relationship which existed between deceased and defendant, evidence of specific acts by deceased are important in explaining defendant's state of mind or conduct. In the traditional self-defense case, it must be shown that defendant knew of those acts. In the spouse abuse case, the specific acts are known by defendant better than anyone. Perhaps they are known only by the defendant.

In the self-defense case, this evidence may be limited to statements and acts committed or existing within a "reasonable time" before the crime.\textsuperscript{67} The "reasonable time" criterion is plainly inadequate and insufficient to present the abused spouse's defense. Since these statements and acts may go back many years in time and thus not be considered to be within a "reasonable time," the rule must be expanded to include the years of battering incidents to explain the defendant's condition of mind and conduct as they affected her mental state at the time. An instruction embodying the history of abuse is essential.\textsuperscript{68}

The self-defense rule is that "[p]roof of the violent and

\textsuperscript{66} L. WALKER, \textit{supra} note 5, at 3.

\textsuperscript{67} Carnes v. Commonwealth, 453 S.W.2d 595 (Ky. 1970); Fannon v. Commonwealth, 295 Ky. 817, 175 S.W.2d 531 (1943). It is relevant to prove any knowledge that comes into possession of the accused which might have induced her condition of mind, so long as it is within a reasonable time. In Fleenor v. Commonwealth, a period of two years was held not to be too remote. 255 Ky. 526, 75 S.W.2d 1 (1934).

\textsuperscript{68} An instruction embodying the history of abuse was given in Commonwealth v. Phillips, an unreported Kentucky Circuit Court case. A copy of the case may be obtained by writing the Office for Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601. The instruction is set forth as follows:

\textbf{Instruction:} Self-protection and use of deadly force under fear, based upon a history of past repeated and serious physical injury, or present or future abuse.

1. If at the time the defendant shot and killed Eugene Phillips (if she did so), she believed that Eugene Phillips was about to use such physical force upon her, she was privileged to use such physical force against Eugene Phillips as she reasonably believed, based upon a prior history of repeated and serious physical abuse, to be necessary in order to protect herself from death or serious physical injury.

2. "Physical force" means force used upon or directed toward the body of another person.

3. "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

\textit{Id.}
dangerous character of deceased can only be made by evidence of his general reputation in the community for such character, and not by evidence of specific acts or general bad conduct..." This rule shortchanges the battered spouse, whose state of mind was brought about to some degree by a history of specific acts of battering.

Since the battered woman lives with threats, the following rule of law helps her. Evidence of threats made by deceased (toward the accused) is admissible in self-defense cases. Even if the threat is not actually directed against defendant or communicated to her, it is admissible to show the state of mind of deceased preceding the killing and may be heard for the purpose of determining who was the aggressor.

C. Choosing the Defense and Jury Instructions

Alternative and overlapping defenses should be considered in the battered woman's defense. Even seemingly inconsistent defenses are not always mutually exclusive. After familiarity with the facts is acquired, self-defense and accident, self-defense and insanity, and self-defense and intoxication should be considered.

70. See Carnes v. Commonwealth, 453 S.W.2d 595 (Ky. 1970).
71. Id.
72. L. Walker, supra note 5, at 17. Research found that usually women who turn on their mates never intended to kill them. See also Pace v. Commonwealth, 561 S.W.2d 664 (Ky. 1978).
73. L. Walker, supra note 5, at 19, "[I]t seems appropriate to use both diminished capacity and self-defense initially. Acquittal on straight self-defense is more likely." Id. See also F. McNulty, The Burning Bed (1980) for a discussion of a celebrated case in which Francine Hughes, following a beating, poured gasoline around the bed where her husband slept and set fire to the room. Her defense centered around temporary insanity, but included elements of self-defense, for what was basically an abused spouse defense.
74. Ky. Rev. Stat. § 501.080 deals with intoxication as a defense. Intoxication of the deceased is frequently a factor in homicides involving women who kill their husbands. The defendant herself, however, may have been intoxicated at the time she killed her spouse. Intoxication, may then, be used as a defense intended to reduce the degree of the charge to some lesser offense. This could be a critical point in cases involving an allegation of premeditation, although it may, at the same time, invite the prosecution's argument of recklessness and wantonness. The comments to Ky. Rev. Stat. § 501.080 state that while the law is that intoxication is not a defense to a criminal charge, there are two basic exceptions. One exception is that intoxication negates an individual's capacity to form a culpable mental state essential to the commission of an offense, i.e. she didn't know what she was doing. The other exception involves involuntary intoxication where it is so incapacitating, the defendant would be excused under the insanity provisions if his incapacity had resulted from a mental disease or defect.
In defending the battered woman, defenses of justification are the most appropriate.75 The most effective of the defenses of justification is, of course, self-defense or self-protection,76 but other defenses may be applicable and necessary, including mental disease or defect,77 voluntary78 or involuntary intoxication,79 and extreme emotional disturbance.80 Such defenses may be helpful in mitigating or reducing the offense to a lesser degree if an acquittal appears unlikely.

In choosing the defense of self-protection in any self-defense case, entitlement to a self-defense instruction may become a serious issue. The burden of proof is on the defendant to convince the jury by her evidence that the act, once admitted, was excusable.81

Instructions used in self-defense homicide cases usually define physical force, deadly physical force and serious physical injury.82 Thus, the issue arises as to whether the force used against the defendant, if any, was deadly or non-deadly. The battered spouse defendant's facts may not fit the typical facts granting self-defense instructions, nor do the typical self-defense instructions fit her facts and needs.83 In her fact situation, the force or injury may be remote, or only anticipated and thus not appear as imminent deadly force to the court and jurors. Typical self-defense

75. See supra notes 2 and 14 (regarding defenses of justification).
   (1) A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
   (2) As used in this chapter, the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
   (3) A defendant may prove mental disease or defect, as used in this section, in exculpation of criminal conduct. (Enact. Acts 1974, ch. 406, § 39).
78. Ky. Rev. Stat. § 501.010 defines voluntary intoxication as intoxication caused by substances which the defendant knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such duress as would afford a defense to a charge of crime.
81. Williams v. Commonwealth, 304 Ky. 359, 200 S.W.2d 926 (1947); Anderson v. Commonwealth, 291 Ky. 727, 166 S.W.2d 30 (1942).
82. See generally J. Palmore & R. Lawson, Kentucky Instructions to Juries (1975), § 10.02-10.34, at 342-75.
83. L. Walker, supra note 5 at 4, 5.
instructions do not make allowance for such misfit facts, her perception of her situation, or physiological differences from her aggressor. For the battered woman defendant, one must request instructions which emphasize the physical circumstances which must be considered in evaluating and meeting the situation as the defendant did. Physical circumstances may generally include the strength and physical condition of the parties involved and the fact that women generally are not as able as men to defend themselves against an attack by a man. Other physiological factors should be developed where appropriate, and instructions requested regarding them. Factors such as pregnancy may affect the defendant's perception of the situation and her ability to protect herself. Menopause or Pre-Menstrual Syndrome may also have affected her emotional stability and state of mind.

An instruction allowing the jury to consider a history of the deceased's prior acts of violence against the defendant, defendant's knowledge as to the deceased's prior acts of violence, and evidence of threats, should be requested.

One enlightened Kentucky court used an instruction embodying some of these principles. In that case, Kathy Phillips was acquitted on a murder charge. The defendant, a twenty-year-old mother of two young children, had suffered physical abuse from her husband. She shot and killed her husband as he stood several yards from her, taunting her. Her husband had beaten her three days prior to the shooting, but had not actually touched her the evening of the shooting, nor was he armed. These facts did not fit the mold of the traditional self-defense case, but with an understanding of the battered woman syndrome, the defendant's personality and the circumstances, a self-defense instruction was allowed.
The language used which set this instruction apart from the standard self-defense instruction was the language which directed the jury to see the situation as the defendant perceived it. The jury instructions recognized the spouse abuse defense approach by referring to the history of abuse.

III. CONCLUSION

Slowly, the age-old problem of spouse abuse is being recognized. Steps are being taken to research, understand and help to eliminate or at least alleviate the problem. Based on that research and understanding, lawmakers, judges and practitioners should and must contribute to the solution. One contribution should be recognition of the problems unique to abused women who kill in self-defense and development of proper defenses to meet those problems.

The abused spouse defense will not cure the problem of spouse abuse, nor will it meet the needs of all women who kill in self-defense. It will, however, establish a structure to accommodate the case of an abused spouse who kills his or her mate in self-defense. Since doctrines and theories develop slowly in law, there is little danger that such a defense will ever be overbroad.

The battered woman/abused spouse is not unique. Her plea of self-defense as an abused spouse should not be unique either. The abused spouse defense should be as readily recognized as self-defense when facts demand its use.
COMMENT

WORKERS' RIGHT-TO-KNOW ABOUT CHEMICAL HAZARDS IN THE WORKPLACE: A PROPOSED MODEL UNIFORM RIGHT-TO-KNOW ACT AND A CRITICAL LOOK AT CINCINNATI'S RIGHT-TO-KNOW ORDINANCE

by Robert G. Gough*

INTRODUCTION

One of the "hottest" areas in legislative activity in the past three years has been in Workers' Right-To-Know legislation, i.e., legislation designed to assure that employees are informed about toxic and hazardous chemicals to which they may be exposed in the course of their employment. The intensity and breadth of interest in Right-To-Know statutes may be gauged by the fact that since 1980 no fewer than twenty-seven states and fourteen cities either have considered or are considering such statutes or ordinances.¹

On June 3, 1982, Cincinnati became the second major city to enact a workers' Right-To-Know ordinance,² thus joining at least three other cities³ and ten other states⁴ which at the time of this

* Copyright 1983, Robert G. Gough, Ph.D., all rights reserved. Although the author of this comment represented a major local employer on the Greater Cincinnati Chamber of Commerce Right-To-Know Task Force, the views expressed herein are solely the author's and should not be attributed to either the Greater Cincinnati Chamber of Commerce or the author's former employer. The author is presently studying law at the Salmon P. Chase College of Law, Northern Kentucky University, Highland Heights, Ky.

1. States: Alaska, Ark., Cal., Conn., Fla., Ga., Hawaii, Ill., Ind., Me., Md., Mass., Mich., Minn., Mo., N.D., N.J., N.Y., N.C., Ohio, Or., Pa., R.I., Tex., Wash., W. Va., Wis. Cities or counties: Chelsea, Mass.; Cincinnati, Ohio; Contra Costa County, Cal.; Dallas, Tex.; Danbury, Conn.; Hartford, Conn.; Louisville, Ky.; Norwood, Ohio; Orange County, Cal.; Philadelphia, Pa.; Sacramento, Cal.; Santa Clara, Cal.; Santa Monica, Cal.; Vallejo, Cal. Based on a variety of sources including private communications with industry work groups studying the Right-To-Know issue. Readers wishing to conduct further research may be aided by the following information, H.R. 806, 1982, Alaska (Rogers); S.R. 804, 1982, Fla. (Steinberg); H.R. 3109, 1982, Hawaii (Taniguchi); H.R. 2379, 1982, Ill. (McPike); H.R. 1556, 1982, Ill. (Tappan); S.R. 108, 1983, Ind. (Mrvan); H.R. 242, 1980, Md. (Garet); S.B. 1531, 1982, Minn. (Dicklich); H.R. 205, 1983, Mo. (Birch); L.R. 909-1, 1983, Mo. (Feigenbaum); S.R. 1670, 1983, N.J. (Dalton); Hearings conducted by the Ohio Legislative Comm'n, 1982.

2. CINCINNATI, OHIO, MUNICIPAL CODE ch. 1247, §§ 01-99 (1982).


writing had enacted statutes having similar purposes. In view of
the large number of cities and states presently considering Right-
To-Know bills there is little doubt that other cities and states will
also be adopting such legislation in the near future. Cincinnati’s
ordinance is of particular interest in that it is the most com-
prehensive of all the city ordinances and may be looked to as a
model by other cities and states. The purpose of this comment is
to critique the Cincinnati ordinance and to propose a uniform
Right-To-Know Act which would serve as a better model for both
state and city enactments.

We shall begin with a brief overview of the Cincinnati or-
dinance and the major issues. The Cincinnati Right-To-Know or-
dinance requires employers to (1) label all containers of hazardous
substances in the workplace, (2) make available to employees
Material Safety Data Sheets (MSDS) on all hazardous substances
used in the workplace, (3) post signs notifying employees of their
right of access to MSDS and information on symptoms of over-
exposure, (4) implement employee training and education pro-
grams concerning safe work practices, nature of hazards, and
emergency procedures, and (5) compile and supply to the Fire
Chief lists of all toxic or hazardous substances used in each work
area. The ordinance also provides that the fire division shall con-
duct inspections of workplaces to insure employer compliance to
the Right-To-Know law, and provides that the fire division has the
authority to issue citations and stop orders. The fire division
is also required to “investigate” within 72 hours “any complaint”
about a violation of the ordinance.
The scope of regulated substances is rather broad. All of the approximately 450 substances listed in the federal Occupational Safety and Health Administration (OSHA) regulation Part 1910, Subpart Z\textsuperscript{13} are declared to be hazardous or toxic substances.\textsuperscript{14} Moreover, any mixture containing one percent or more of such substances is also regulated.\textsuperscript{15} This mixture provision vastly increases the number of substances regulated under the ordinance. In addition to those specifically listed hazardous or toxic substances, the ordinance also regulates any substance which "is known by the employer to present a significant risk of personal injury or illness in workplaces in the City of Cincinnati as the result of foreseeable use, handling, accidental spill, exposure or contamination."\textsuperscript{16}

On its face, any proposition that workers should be informed of the hazards to which they are exposed in the workplace, be they chemical hazards or other types of hazards, is about as objectionable as warm sunshine on a spring day. Therefore, it may be surprising that Right-To-Know laws have become a hotly disputed issue. In Cincinnati the issue was vigorously contested with the major local employers on one side, largely under the mantle of the Greater Cincinnati Chamber of Commerce, and on the other side, organized labor (AFL-CIO) and the Ohio River Valley Committee on Occupational Safety and Health.\textsuperscript{17} The intensity of the debate and the degree of rhetorical flourish is reflected in the fact that at one city council hearing a witness gave testimony while wearing a plastic hood over his head, claiming fear of retaliation by his employer.\textsuperscript{18}

The major contentions put forth by the employers were (1) that the ordinance would merely duplicate the function of regulations, controls and incentives already existing under federal and state Occupational Safety and Health Act regulations, local fire codes, and tort law, (2) that the imposition of a substantial regulatory burden on Cincinnati employers would place them at a competitive disadvantage in relation to the rest of the state and na-

\textsuperscript{14} CINCINNATI, OHIO, MUNICIPAL CODE ch. 1247 § 21 (1982).
\textsuperscript{15} Id. §§ 7-A, 7-B, 7-D.
\textsuperscript{16} Id. § 7-C(2).
\textsuperscript{18} The Cincinnati Enquirer, Nov. 11, 1981, at A1, col. 1, B4, col. 1.
tion and therefore such regulation, if needed, should be imposed on a statewide or national basis rather than locally, (3) that the definition of toxic and hazardous substances was so over-inclusive that it encompassed harmless substances and mixtures, (4) that the approach mandated by the ordinance would not result in improved worker safety because the prescribed methods were either duplicative of existing programs or would supersede more effective worker safety programs, and (5) that the ordinance failed to provide adequate protection for trade secrets.19

Having briefly outlined the Cincinnati Right-To-Know ordinance and the major issues, this comment will now take a detailed look at several key and controversial provisions of the ordinance and compare them with the model uniform Right-To-Know statute proposed in Part III.

I. Scope of Regulated Substances

There appears to be three basic approaches to defining the scope of regulated chemical substances and mixtures under the various Right-To-Know acts. The approaches are (1) listing the regulated substances, usually incorporating by reference a list prepared by some government agency, (2) definition of toxic or hazardous properties, and (3) delegation to an agency or administrator the authority to promulgate rules to list or otherwise specify the scope of regulated substances and mixtures.

Most Right-To-Know ordinances enacted to date have adopted the listing approach20 and some have combined the listing approach with rulemaking authority delegated to an agency to select from the list the actual substances to be regulated.21 None have employed the direct approach of defining the toxic and hazardous properties.

A. The Listing Approach as Exemplified by the Cincinnati Ordinance

Cincinnati's ordinance essentially employs the listing approach and provides a good example for examining the advantages and
disadvantages of such an approach. The ordinance incorporates by reference the federal OSHA Occupational Safety and Health Standards Subpart Z list (hereinafter OSHA Subpart Z).\(^2\)

Superficially, the ordinance provides for an item by item determination of whether a chemical substance or mixture\(^2\) is toxic or hazardous.\(^4\) Section 7-C of the ordinance defines a toxic or hazardous substance as:

(1) A substance which, because of the toxic or hazardous properties which it exhibits, is determined by the council to represent a significant risk to the public health and safety as a result of foreseeable use, handling, accidental spill, exposure, or contamination; or

(2) A substance which is known by the employer to present a significant risk of personal injury or illness in workplaces... as the result of foreseeable use, handling, accidental spill, exposure or contamination...\(^2\)

Notwithstanding the above provisions for an item by item determination, Section 21 of the ordinance sets forth a finding that

certain substances in commercial use... listed in the list of substances contained in Part 1910, Subpart Z of Title 29 of The Code of Federal Regulations (1981), including Tables Z-1 through Z-3 thereof, which have been found to be toxic or hazardous substances and represent a significant risk to the public health and safety as a result of foreseeable use, handling, accidental spill, exposure, or contamination...are 'toxic or hazardous substances'....\(^2\)

The main thrust of Cincinnati's ordinance is thus to specify a list of approximately 450 compounds to be regulated. It should be noted, however, that Section 7-C(2) has very broad potential for increasing the scope of regulated substances and mixtures because any substance or mixture which is known to the employer to present a significant risk of injury or illness is also regulated.\(^2\)

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\(^2\) CINCINNATI, OHIO, MUNICIPAL CODE ch. 1247, § 7-C (1982).
\(^3\) Id. § 7-C(2) (emphasis added). The language employed in this section is peculiar and would appear to admit of a fair reading that not all the substances listed in OSHA Subpart Z are regulated, rather only "certain substances...listed in OSHA Subpart Z and] which have been found to be toxic or hazardous...are toxic or hazardous substances..." Under this reading a separate finding by the council would be required before any substances, other than those covered by Section 7-C(2), would be regulated.
\(^4\) Id. § 1247, § 7-C(2) (1982).
also that the ordinance defines substances to include mixtures, and a regulated mixture is one which contains any listed substance at concentrations of one percent or greater. Since many mixtures are used in industry, this provision greatly increases the scope of the regulation.

The main advantages of the approach of adopting a list are the ease of administration (no requirement for complex technical hearings and findings on a substance by substance basis), a clear cut limit to the scope of substances regulated, and, arguably, a lower compliance cost to employers (no need to obtain data or perform tests on each substance or mixture). The main disadvantages are the difficulty of coming up with a rational list which is neither grossly over-inclusive nor under-inclusive, and the apparent inability to regulate mixtures in a rational manner.

Cincinnati's listing approach fails in that it is grossly over-inclusive because it includes substances and mixtures for which regulation is not rationally related to the objective of improving worker safety and health. It also fails because it is under-inclusive in that many substances or mixtures which are very toxic or hazardous are not regulated. To cite but a few examples of the over-inclusiveness, the following substances or mixtures would be regulation as toxic and hazardous substances under the Cincinnati ordinance:

1. silver metal;
2. nickel metal;
3. chromium metal;
4. rubbing alcohol (70% isopropyl alcohol in water);
5. water solutions containing one percent ethyl alcohol (compare beer which contains up to six percent ethyl alcohol); and
6. stainless steel (contains 4% or more of chromium).

These substances and mixtures are regulated because silver, nickel, chromium, isopropyl alcohol, and ethyl alcohol are on the list, and the ordinance regulates any mixture containing one percent or more of a listed substance. It hardly seems open to question that the above substances or mixtures, at least in their common forms and usages, do not present a significant risk to the health of workers, yet they are regulated as toxic and hazardous substances under the Cincinnati ordinance.

28. Id. § 7-A.
29. Id. §§ 7-B, 7-D.
The reader may wonder why such substances were included by OSHA in Subpart Z, Tables Z-1 through Z-3. The answer is found in the fact that OSHA prepared Tables Z-1 through Z-3 as lists of hazardous air contaminants. Thus silver, nickel or chromium metal dust in the air over certain levels of concentration does present a health hazard. Similarly, ethyl alcohol presents a health hazard when present in the air at concentrations over 1000 parts per million, but common experience tells us that ethyl alcohol does not present a significant risk when present in a water solution at one percent concentration. By taking a list prepared for one purpose, and using it for an entirely different purpose, the ordinance creates some absurd and irrational results. This fault is compounded by the way the ordinance treats mixtures. Thus, stainless steel becomes a toxic or hazardous substance regulated under the ordinance because it is a "mixture" containing more than one percent of chromium.

The point in discussing these examples is not to cite specific substances which should not be listed, for they could be cured by careful and selective editing of the list. The point is to show the inappropriate use of a list prepared for an entirely different purpose, and to show that a mixture is not necessarily toxic or hazardous merely because it contains a component which in its pure state is toxic or hazardous. Nor can mixtures be adequately treated by the simple expedient of a uniform cut-off concentration. A one percent mixture of dioxin is still extremely toxic, whereas a one percent mixture of ethyl alcohol poses no substantial risk. These examples also illustrate the fact that the health hazards of a substance may depend on its physical state. Thus, although a nickel coin is not a health hazard, respirable nickel dust is considered to be a health hazard. We shall return to this discussion when we consider how these problems are avoided by the Model Uniform Workers' Right-To-Know Act proposed in Part III of this comment.

The above discussion illustrated the over-inclusive nature of the listing approach as exemplified by the Cincinnati ordinance. From the point of view of protecting workers' health a more serious fault is the grossly under-inclusive nature of the listing approach of the Cincinnati ordinance. There are many substances used in industry which are either toxic or hazardous and are not included in OSHA's Subpart Z list. A very rough estimate of the degree of under-inclusiveness may be inferred from the fact that the Department of Transportation lists approximately four times as
many hazardous substances as the Cincinnati ordinance.\footnote{30} Thus, the Cincinnati ordinance regulates perfectly harmless substances and at the same time fails to regulate many acknowledged hazardous chemicals.

The grossly over-inclusive and under-inclusive nature of the listing approach employed in the Cincinnati ordinance opens the ordinance to a constitutional challenge which cannot be dismissed as frivolous. Although challenges to mere economic or social regulations based on denial of equal protection in violation of the Fourteenth Amendment\footnote{31} are seldom successful when the mere rationality standard of review is applicable, the requirement that the regulation be rationally related to a legitimate governmental objective is "not a toothless one."\footnote{32} Recently, the Court has shown a willingness to invalidate economic and social regulations which are not rationally related to a legitimate governmental objective.\footnote{33}

Chemical substances, of course, do not have constitutional rights. But, as was implied above, the listing approach employed in the Cincinnati ordinance creates a class of employers who manufacture, process or use chemical substances which are neither toxic nor hazardous but are nevertheless regulated because of the over-inclusive nature of the list. Against this class are two other classes which are treated more favorably. First, there is the class of employers who manufacture, process or use toxic or hazardous substances but are nevertheless not regulated due to the under-inclusive nature of the list. Second, there is the class of employers who manufacture, process or use chemical substances which are neither toxic nor hazardous and are not subject to the regulation because the substances are not included in the list.

\footnote{30} The Hazardous Materials Table compiled by the Dep't of Transportation contains approximately 2,000 substances whereas the OSHA Subpart Z lists contain approximately 450 substances. To cite but a few examples, the following substances are regulated as hazardous by the Dep't of Transportation but are not included in the OSHA Subpart Z list: acetyl bromide (corrosive), acetyl chloride (flammable liquid), toluene diisocyanate (poison, highly toxic), sodium nitrate (oxidizer). Hazardous Materials Table, 49 C.F.R. § 172.101 (1982).

\footnote{31} U.S. CONST. amend. XIV, § 1.


\footnote{33} Logan v. Zimmerman Brush Co., 102 S.Ct. 1148, 1159, 1161 (1982) (Blackmun, J., concurring; Powell, J., concurring) (six Justices agreeing that a state law was invalid under equal protection analysis because the classification created was not rationally related to a legitimate governmental objective); U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).
It may not be difficult to convince a court that an ordinance which fails to regulate extremely toxic substances such as toluene diisocyanate, and at the same time regulates silver dollars, nickel coins, chromium plated metal, stainless steel and the industrial equivalent of one percent beer as "toxic or hazardous substances" is not rationally related to a legitimate governmental objective.

Even if the reader accepts the contention that the list employed by the Cincinnati ordinance is seriously defective, the question remains whether other lists are available which would adequately serve the purpose of a Workers' Right-To-Know Act. Unfortunately, the answer appears to be in the negative. That is not to say, however, that other lists have not been used. Several Right-To-Know statutes have used the NIOSH Registry of Toxic Effects of Chemical Substances (RTECS). At least one statute has employed the list of hazardous substances compiled by the Department of Transportation (DOT). Other lists which might arguably be appropriate but have not yet been used for this purpose are (1) the list of substances for which the National Fire Protection Association (NFPA) has established numerical and color hazard codes, (2) the list of substances and mixtures which the Environmental Protection Agency (EPA) has compiled as components of hazardous wastes, and (3) the list of substances designated as hazardous by the EPA pursuant to Section 311 of the Federal Water Pollution Control Act.

All of these lists have features which make them unsuitable for use in Workers Right-To-Know statutes. RTECS is a huge list which contains both toxic and non-toxic substances, and makes no effort to list substances which pose hazards not related to toxicity, e.g., flammability. The July 1982 microfiche edition of

34. National Institute for Occupational Safety and Health, U.S. Dep't of Health and Human Services, Pub. No. 82-111-3, Registry of Toxic Effects of Chemical Substances (Quarterly Microfiche Edition, July 1982) [hereinafter cited as RTECS]. This list has been employed in the Right-To-Know statutes of Cal., Conn., Mass. and N.Y. See supra note 4.


37. 40 C.F.R. §§ 261.31, 261.32, 261.33(e), 261.33(f), 261 App. VIII (1982). These lists contain approximately 400 substances and mixtures determined to be hazardous on the bases of ignitability (flammability), corrosivity, reactivity or toxicity.

RTECS contained 55,174 chemicals.\textsuperscript{39} RTECS compiles "toxicity" data on all types of compounds, even if the data indicates the substance is not toxic. For example, RTECS includes sodium chloride (common table salt), and citric acid. The editors of RTECS point out that "the absence of a substance from the Registry does not imply that the substance is non-toxic, and thus non-hazardous, \textit{anymore than the presence of a substance in the Registry indicates that the substance is hazardous in common use}"\textsuperscript{40}

Therefore, for the purpose of a Workers’ Right-To-Know Act, RTECS is both over-inclusive in that it includes non-hazardous substances, and under-inclusive in that it makes no effort to include certain types of hazardous substances, e.g., flammable substances.

The other lists have similar problems. The list of hazardous substances included in Part 49 of the NFPA standards\textsuperscript{41} is useful in that it provides excellent hazard symbols combining color and numerical codes, but the list contains only about 416 substances and is substantially under-inclusive.

The list of hazardous substances prepared by the EPA pursuant to Section 311 of the Federal Water Pollution Control Act (FWPCA)\textsuperscript{42} is primarily directed to substances which pose water pollution problems and would not include, for example, a substance which, though very toxic to humans in the pure state, rapidly undergoes reaction with water to produce non-toxic products.

Closer to the mark are the lists of hazardous waste substances prepared by the EPA,\textsuperscript{43} and the DOT’s list of hazardous materials.\textsuperscript{44} The criteria used in preparing these lists, i.e., flammability, corrosivity, reactivity and toxicity are essentially the hazardous criteria to which a Workers’ Right-To-Know act is logically directed. The DOT list in fact includes all the substances in both the EPA hazardous waste list and the list of hazardous substances under Section 311 of the FWPCA. Weighing in at a hefty 2,000 or so listed substances, the DOT list would put a very

\textsuperscript{39} RTECS, supra note 34, at 1 (Page 1 of the Statistical Report of the Registry of Toxic Effects of Chemical Substances appears immediately after the last page of the introduction to RTECS).

\textsuperscript{40} RTECS, supra note 34, at 10 of the introduction (emphasis added).

\textsuperscript{41} See supra note 36.

\textsuperscript{42} See supra note 38.

\textsuperscript{43} See supra note 37.

\textsuperscript{44} See supra note 35.
broad scope on any Right-To-Know act and result in a correspondingly large compliance cost. In spite of the large number of substances encompassed, the DOT list is probably not susceptible to a credible claim that it is over-inclusive. Nevertheless, the list is deficient in that it is under-inclusive to the extent that toxic or hazardous substances not included in the list would not be regulated.

In summary, a number of lists are available but most, if not all, are unsuitable because they were prepared with a different purpose in mind. The advantage of the listing approach is that from both the enforcement and compliance viewpoints it is easier to administer. On the other hand, most of the lists proposed or used to date are substantially under-inclusive, over-inclusive, or both. A major problem with the listing approach is the apparent inability to cover mixtures in a rational manner. An alternative to the listing approach is to define the scope of regulated substances in terms of hazardous or toxic properties. This approach will be discussed in the next section.

B. The Definition of Toxic and Hazardous Properties Approach

A better alternative to the listing approach is to determine the scope of regulated substances and mixtures by defining the toxic or hazardous properties which shall cause a substance or mixture to be regulated. In sharp contrast to the listing approach, this approach is not substantially over-inclusive or under-inclusive.

The Model Uniform Workers' Right-To-Know Act (hereinafter "the Model Act") proposed in Part III below adopts the definitional approach. Section 104(FF) of the Model Act defines the term "Toxic or Hazardous Substance or Mixture" to mean:

(1) Any chemical substance or mixture which possesses a hazardous property as defined in subsection (Q); or
(2) Any chemical substance or mixture known by the employer to present a significant risk of personal injury or illness as a proximate result of any customary or reasonably foreseeable handling or use...

45. To attack the list as substantially over-inclusive would require a collateral challenge to the validity of the DOT list which has long been accepted as a list of substances presenting flammable, corrosive, reactive or toxic hazards.
46. UNIFORM WORKER'S RIGHT-TO-KNOW ACT §§ 104(Q), 104(FF).
47. Id. § 104(FF).
“Hazardous Property” is defined in Section 104(Q) of the Model Act to mean:

any of the following qualities or conditions . . . cancer hazard agent, combustible liquid, compressed gas, corrosive, dangerously reactive, extremely flammable, flammable gas, flammable liquid, flammable solid, highly toxic, pressure-generating material, primary skin irritant, pyrophoric, strong eye irritant, strong oxidizer, strong sensitizer, toxic, or water reactive.\(^{48}\)

Each of these “qualities or conditions” is in turn defined in Section 104.\(^{49}\)

Thus a substance or mixture which actually possesses any of the listed toxic or hazardous properties will be regulated,\(^{50}\) whereas a substance or mixture which does not possess any of those properties will not be regulated. Note that mixtures, which caused such a problem with the listing approach, neatly fall into place under the definition of properties approach. Consider, for example, the one percent ethyl alcohol in water mixture which would be regulated under the Cincinnati ordinance. Under the Model Act approach the mixture would be neither toxic nor flammable and therefore would not be regulated. Consider also a substance which, although highly toxic, has not been included in any of the usual lists.\(^{51}\) It would not be regulated under the listing approach but would be regulated under the definition of toxic or hazardous properties approach used in the Model Act.\(^{52}\) Thus the Model Act approach achieves the highly desirable objective of being neither substantially over-inclusive nor under-inclusive.

A qualification must be made to the criticism that the Cincinnati ordinance would fail to regulate a toxic or hazardous material which

\(^{48}\) Id. § 104(Q).

\(^{49}\) Id. § 104.

\(^{50}\) Provided that the employer has actual or constructive knowledge of such property. UNIF. WORKERS’ RIGHT-TO-KNOW ACT §§ 104(FF), 105(c).

\(^{51}\) It would not be unusual to find a highly toxic substance which had not been included in either the OSHA Subpart Z lists, the DOT Hazardous Materials Table, the NFPA Part 49 list, the EPA list of hazardous wastes and components, or the FWPCA list of hazardous water pollutants. This could easily occur if the substance was relatively new or not used in large volumes. For example, until recently the DOT list of hazardous materials, although approximately 2,000 items in length, did not contain many of the substances in the EPA list of hazardous waste materials. See 49 C.F.R. § 172.101 (1982) (see list of Specific Chemical Wastes located immediately after the Hazardous Materials Table). Even the RTECS list which is much more comprehensive does not purport to list all toxic substances and would not contain many of the more recently created chemical substances.

\(^{52}\) UNIF. WORKERS’ RIGHT-TO-KNOW ACT § 104(FF).
is not included in the OSHA Subpart Z lists. Both the Cincinnati ordinance and the Model Act contain a catch-all provision which brings within the scope of the regulation any substance which is "known by the employer to present a significant risk of personal injury or illness ... as the result of foreseeable use, handling, accidental spill, exposure or contamination." However, in the Cincinnati ordinance the reach of this provision is sharply limited in that it does not place any duty on the employer to "compile or generate new data." Thus the scope of the Cincinnati ordinance is essentially limited to the listed substances and mixtures thereof.

Although the definition of toxic and hazardous properties approach has the very desirable aspect of being neither substantially over-inclusive nor under-inclusive, some industry representatives have expressed the concern that the compliance burden may be substantially higher than for the listing approach due to the perceived need to make measurements of the various toxic or hazardous properties for each substance or mixture. In a great majority of the cases, however, at least for the pure substances, the necessary test data will already be available from the manufacturer or in the technical literature. Mixtures, however, present a greater problem.

A great many mixtures are used in industry, and if each one had to be tested for toxic or hazardous properties the compliance cost would be prohibitive. The Model Act addresses this problem by limiting the knowledge (of toxic or hazardous properties) chargeable to the employer to actual knowledge or that which would have been obtained by a reasonable and prudent employer under similar circumstances. Thus, where a reasonable and prudent employer would believe that it is highly unlikely that a substance or mixture would be toxic or hazardous as defined in the Model Act, the employer would not be charged with the knowledge that the substance was toxic or hazardous regardless of the actual properties unless he had actual knowledge of such properties. Of course, where a mixture is reasonably expected to have the toxic or hazardous properties of one or more of its components, the cost of testing can be avoided by merely treating the mixture as if it had the same or greater toxic or hazardous properties.

55. UNIF. WORKERS' RIGHT-TO-KNOW ACT §§ 104(FF)(2), 105(C).
In summary, the definition of properties approach is preferred because it is more logical, less arbitrary, and avoids the problems of over-inclusive and under-inclusive lists. The definition of properties approach also is a more rational approach to the mixture problem. Rather than regulating all mixtures having one percent or more of a listed component, a grossly over-inclusive approach, the definition of properties approach regulates only those mixtures which are actually toxic or hazardous.

II. HAZARD IDENTIFICATION AND COMMUNICATION

One commonly recurring and hotly contested issue in the debate over Right-To-Know laws has been whether the disclosure of chemical identity is necessary to the achievement of the goal of protecting employees who are exposed to toxic or hazardous chemicals in the course of their employment. Organizations purporting to speak for the workers have generally argued strenuously for the proposition that disclosure of chemical identity is essential. Employers, on the other hand, contend that the employees' interest and need to know are fully satisfied by hazard identification and communication. That is, identification of the hazardous quality or condition, e.g., cancer hazard agent, corrosive, flammable liquid, toxicity, etc., and the communication to the employee of (1) the types of hazards involved, (2) the necessary precautions, handling practices and personnel protective equipment, (3) emergency procedures for spills, fire and first aid, (4) routes of entry known to produce toxic effects, e.g., inhalation, skin absorption or ingestion, and (5) known symptoms of overexposure.

The Model Act adopts the viewpoint that an effective hazard identification and communication program does not require the disclosure of chemical identity. The employee needs to know whether a substance is toxic, flammable or corrosive. He needs to know how to safely work with the substance, and how to safely clean up spills. He needs to know any known symptoms of overexposure. He does not, however, need to know that the name of the substance is Dichloromonofluoromethane or 4-Dimethylaminoazobenzene, and it is doubtful that disclosure of technical names

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for chemical substances will, in general, convey much useful information to the lay employee.

Although required disclosure of chemical identity may not benefit the employee, it may seriously harm the employer. Many employers invest large sums of money in research and development to create proprietary products and must rely on trade secret protection of the chemical identity or formulation of their products. Employers fear that forced disclosure of chemical identity, even if only to customers, will rapidly result in competitors learning of the formulation and copying the products. It would appear that this concern is a major factor in the vigorous opposition that employers have generally raised against Right-To-Know laws. When viewed in the light of the great potential harm to employers, and the dubious benefit to employees, it seems unwise to require disclosure of chemical identity without providing for a trade secret exemption. The Model Act provides for such trade secret protection in Sections 105(B)(2)(b), 105(B)(3), and 109.

The Model Act's hazard identification and communication scheme is built upon requirements for (1) a program of employee training and education, (2) a file of Material Safety Data Sheets available for employee inspection, (3) posting a notice disclosing the toxic or hazardous substances or mixtures regularly used in a work area and the categories of hazardous properties associated with those substances or mixtures, and (4) an election of one or more supplementary methods of communicating information on hazardous properties and safety precautions.

The employee training program must be designed to impart to the employees the knowledge necessary to understand the types of hazards involved, the communication methods employed (labels, Material Safety Data Sheets, etc.), appropriate work practices, protective measures, and emergency procedures. Material Safety Data Sheets must be made available to the employees and must contain a summary of key information on each toxic or hazardous

57. Manufacturers often rely on trade secret protection for their products because protection by patents is often inadequate due to the difficulty and cost of detecting and enforcing patent infringements for many chemical products.

58. UNIF. WORKERS' RIGHT TO KNOW ACT §§ 105(B)(2)(b), 105(B)(3), 109.

59. Id. § 105(B)(1).

60. Id. § 105(B)(2).

61. Id. § 105(B)(3).

62. Id. § 105(B)(4).
substance or mixture. The posting requirement serves as a quick and concise reference to the categories of hazards in a given work area and the toxic or hazardous substances or mixtures regularly used in that work area. Finally, the election of one or more supplementary hazard identification and communication methods from a list including (1) labels, (2) signs, (3) placards, (4) coding or marking systems, (5) identifiers and (6) other appropriate forms of communication, is designed to allow the employer the flexibility to tailor his program to the unique characteristics and needs of each facility.

In summary, the worker has a need to know about the hazardous properties of the chemical substances or mixtures to which he is exposed, but this does not require disclosure of chemical identity. The interests of both employee and employer will be best served by a program which identifies the hazardous properties and effectively communicates them to the employee, together with training on safe working methods, emergency procedures, and disclosure of any known symptoms of overexposure. Mandatory disclosure of chemical identity is of dubious aid in the communication of hazardous properties and in many cases will cause serious injury to the employer by forcing disclosure of trade secrets. Therefore a provision for protection of trade secrets is highly desirable and will have little, if any, adverse effect on the overall effectiveness of the hazard identification and communication program. The Model Act imposes a rigorous scheme of hazard identification and communication while maintaining some flexibility so that the employer can tailor his program to best fit the particular conditions in his workplace.

**Summary and Conclusion**

In the past few years many states and cities have shown a strong interest in enacting Worker's Right-To-Know legislation, and there is little doubt that the trend to enact such legislation will continue for some time. So far, the Right-To-Know laws which have been enacted vary greatly in the scope of products regulated and the requirements imposed. Most, if not all, have serious defects in that they are either over-inclusive or under-inclusive and treat mixtures in an inadequate and irrational manner. If, as expected, Right-To-Know laws proliferate at the state and local level it seems likely that sellers of chemical products will be faced
with a hodgepodge of inconsistent, if not conflicting, and inadequate regulations from city to city and state to state.

One does not need to pass judgment on the need for Right-To-Know laws to decry a complex system of inadequate and inconsistent regulations varying from city to city and state to state. Such a system will clearly work to the advantage of local sellers in non-Right-To-Know jurisdictions over sellers in interstate commerce. Clearly there is a need for uniformity of regulation in this area, and federal preemption would seem most desirable. However, since most states and cities are showing no inclination to wait on the Federales, there is a need for a model uniform act for the states and cities to follow. This comment attempts to fulfill that need.

Virtually all of the Right-To-Know acts adopted to date have relied on a listing approach wherein the substances to be regulated are listed by statute. This approach is seductively simple for legislative bodies. It has the advantages of being apparently finite in scope, requiring limited legislative or rulemaking deliberation, and being easy to administer. Unfortunately, there appears to be no appropriate ready-made list, and the task of compiling an appropriate list is extremely complex and time consuming. Moreover, the simple listing approach seems quite incapable of dealing with mixtures in a rational manner. Nevertheless, lists prepared for entirely different purposes were adopted, resulting in Right-To-Know laws that are either woefully under-inclusive or outrageously over-inclusive, if not both.

The Model Act proposed in this comment eschews the listing approach and adopts the view that Workers' Right-To-Know regulations should be focused on hazardous properties rather than on lists of chemical substances per se. Thus, an extensive effort was made to define the hazardous properties to be regulated rather than listing chemical substances. This approach has the advantage of being equally applicable to mixtures and pure substances alike. To the extent that all the appropriate hazardous properties are adequately defined it is neither over-inclusive nor under-inclusive.

The definition of hazardous properties approach also neatly circumvents one problem that has been at the root of much of the industry opposition to Right-To-Know laws, i.e., the protection of trade secrets. The listing approach naturally leads to the conclu-
sion that the chemical identity must be disclosed on a label, and this causes serious conflict with the industry's need to protect valuable trade secret formulations. The definition of hazardous properties approach, on the other hand, focuses on communication of hazardous properties and leads to the logical result that hazardous properties rather than chemical names should be disclosed on labels.

This comment which serves as an introduction to the Model Act has treated only a few of the many issues which might be raised. Time and space constraints preclude a full discussion, and the reader is entreated to undertake a careful reading of the Model Act. Particular attention should be given to the sections on employee's remedies and preemption.

The Model Act is a product of an effort to take the best ideas from existing acts and industry codes and to combine them with ideas and concepts gleaned from innumerable discussions with industry and government representatives over the past several years. It is hoped that it will be a useful aid in future legislative deliberations on Workers' Right-To-Know enactments.

III. MODEL UNIFORM WORKERS' RIGHT-TO-KNOW ACT

Outline: Uniform Workers' Right-to-Know Act

Section 100. Short Title.
Section 101. Findings.
Section 102. Scope.
Section 103. Exemptions.
Section 104. Definitions.
   (A) Cancer Hazard Agent.
   (B) CAS Number.
   (C) Chemical Abstracts Service Rules of Nomenclature.
   (D) Chemical Name.
   (E) Combustible Liquid.
   (F) Common Name.
   (G) Compressed Gas.
   (H) Container.
   (I) Corrosive.
   (J) Dangerously Reactive.
   (K) Employer.
   (L) Extremely Flammable.
   (M) Flammable Gas.
(N) Flammable Liquid.
(O) Flammable Solid.
(P) Flash Point.
(Q) Hazardous Property.
(R) Highly Toxic.
(S) Identifier.
(T) International Union of Pure and Applied Chemistry
    Rules of Nomenclature.
(U) Label.
(V) Material Safety Data Sheet.
(W) MSDS.
(X) Placard.
(Y) Pressure-Generating Material.
(Z) Primary Skin Irritant.
(AA) Pyrophoric.
(BB) Strong Eye Irritant.
(CC) Strong Oxidizer.
-DD) Strong Sensitizer.
(EE) Toxic.
(FF) Toxic or Hazardous Substance or Mixture.
(GG) Water Reactive.
(HH) Work Area.
(II) Workplace.

Section 105. Employers' Duties.
(A) Notification to Employees.
(B) Hazard Communication and Risk Reduction Program.
    (1) Employee Training and Education.
    (2) Material Safety Data Sheets.
    (3) Posting Requirement.
    (4) Supplementary Measures.
(C) Knowledge Charged to the Employer.

Section 106. Remedies Available to [Attorney General/City
    Solicitor].

Section 107. Employee’s Rights and Remedies.

Section 108. Waiver of Rights Invalid.

Section 109. Trade Secrets and Confidential Business Informa-
    tion.

Section 110. Preemption.

Section 111. Implementation Schedule.

Section 112. Penalties.
SECTION 100. SHORT TITLE

This Act shall be known and may be cited as the "Uniform Workers' Right-To-Know Act."

SECTION 101. FINDINGS

Public health and safety in general, and the health and safety of employees in particular, requires that information concerning the hazards, symptoms of overexposure, and safe handling of toxic or hazardous substances used in the workplace must be communicated to employees who work with or may reasonably be expected to be exposed to such substances, and that such employees have a right to know of such information.

SECTION 102. SCOPE

This Act shall apply to all toxic or hazardous substances or mixtures as defined herein which are manufactured, processed, used or stored in workplaces.

SECTION 103. EXEMPTIONS

(A) Notwithstanding any language to the contrary, the provisions of this Act shall not apply to toxic or hazardous substances or mixtures which are:

1. Consumer products or food stuffs packaged for distribution to, and intended for use by, the general public. This includes any product used by an employer in the same physical form, approximate amount, concentration and manner as used by consumers, and to which, in the employer's knowledge, employee exposure is not significantly greater than that of the consumer in foreseeable consumer uses of the product;


4. Wastes labeled pursuant to the Resources Conservation
(5) Toxic or hazardous substances or mixtures used in research and development laboratories; and
(6) Toxic or hazardous substances or mixtures present in quantities not greater than one gallon (3.79 liters) or one pound (0.454 kg).

SECTION 104. DEFINITIONS


(B) CAS Number. "CAS number" means the identification number assigned to chemical compounds or mixtures by the Chemical Abstracts Service. The "CAS Numbers" for chemical substances are published in Chemical Abstracts Service, American Chemical Society, Registry Handbook: Number Section (1981).


(D) Chemical Name. "Chemical name" means the scientific name of a chemical compound or mixture in accordance with either the International Union of Pure and Applied Chemistry Rules of Nomenclature or the Chemical Abstracts Service Rules of Nomenclature.

(E) Combustible Liquid. "Combustible liquid" means any liquid having a flash point at or above 100°F (37.8°C) but less than 200°F (93.3°C), except any liquid mixture having one or more components with a flash point at or above 200°F (93.3°C) which together make up 99 percent or more of its total volume. For the purpose of this Act, an aqueous solution con-
taining 24 percent or less ethyl alcohol by volume is not a combustible liquid if the remainder of the solution, i.e., in the absence of the ethyl alcohol component, would not be a combustible liquid.

(F) Common Name. "Common name" means any designation or identification, such as trade name, generic name, code name, or brand name used by the manufacturer or employer to identify a substance or mixture other than by its chemical name(s).

(G) Compressed Gas. "Compressed gas" means any gas or mixture of gases having, in a container, an absolute pressure exceeding 40 psi at 70°F (21.1°C) or, regardless of the pressure at 70°F (21.1°C), having an absolute pressure exceeding 104 psi at 130°F (54.4°C); or any liquid having a vapor pressure exceeding 40 psi at 100°F (37.8°C).

(H) Container. "Container" means any bag, barrel, bottle, box, can, cylinder, drum, carton, pipe, tank, vessel or vat.

(I) Corrosive. "Corrosive" means a chemical substance or mixture which causes visible destruction of, or irreversible alterations in living tissue by chemical action at the site of contact. A substance or mixture is considered corrosive if, when tested on the intact skin of the albino rabbit by the method described by the U.S. Department of Transportation in Appendix A to 49 C.F.R. § 173, the structure of the tissue at the site of contact is destroyed or changed irreversibly after an exposure period of four hours or less.

(J) Dangerously Reactive. "Dangerously reactive" means that the substance or mixture is able to undergo a violent self-accelerating exothermic chemical reaction with common materials, or by itself.

(K) Employer. "Employer" means any person, firm, corporation, partnership, association or other entity engaged in a business or in providing services, who (which) has more than ten employees. The term "employer" includes the state and any of its political subdivisions, but does not include hirers of domestic workers or casual laborers employed at the place of residence of the hirer.

(L) Extremely Flammable. "Extremely flammable" means the substance or mixture has a flash point at or below 20°F (−6.7°C).

(M) Flammable Gas. "Flammable gas" means a gas which at at-
mospheric temperature and pressure forms a flammable mixture with air when it is present in air at a concentration of 13 percent or less by volume, or that forms flammable mixtures with air over a range of concentrations wider than 12 percent, regardless of the lower limit of that range.

(N) *Flammable Liquid.* "Flammable liquid" means a liquid that has a flash point above 20°F (−6.7°C) but below 100°F (37.8°C), except that this term does not include any liquid mixture that has one or more components with flash points at or above 100°F (37.8°C) which together make up 99 percent or more of its total volume.

(O) *Flammable Solid.* "Flammable solid" means a solid, other than an explosive, that can cause fire through friction, absorption of moisture, spontaneous chemical change, or retained heat from its manufacturing or processing, or that can readily be ignited, and after ignition continues to burn so vigorously and persistently as to create a serious hazard. A material is considered a flammable solid if, when it is tested by the method described in 16 C.F.R. § 1500.44, and not exempted by 16 C.F.R. § 1500.83(a)(3), it ignites and burns with a self-sustained flame at a rate greater than one-tenth of an inch per second along its major axis.

(P) *Flash Point.* "Flash point" means the minimum temperature at which a liquid gives off vapor in sufficient concentration to ignite when tested according to the procedures set forth in 16 C.F.R. § 1500.43.

(Q) *Hazardous Property.* "Hazardous property" means any of the following qualities or conditions as defined in this Act: cancer hazard agent, combustible liquid, compressed gas, corrosive, dangerously reactive, extremely flammable, flammable gas, flammable liquid, flammable solid, highly toxic, pressure-generating material, primary skin irritant, pyrophoric, strong eye irritant, strong oxidizer, strong sensitizer, toxic or water reactive.

(R) *Highly Toxic.* "Highly toxic" means the substance or mixture:

1. has a median lethal dose, \( LD_{50} \) (oral), of 50 milligrams or less per kilogram of body weight as determined by the procedure set forth in 16 C.F.R. § 1500.3(c)(1)(ii)(A);  
2. has a median lethal dose, \( LD_{50} \) (dermal), of 200 milligrams or less per kilogram of body weight as determined by the procedure set forth in 16 C.F.R. § 1500.3(c)(1)(ii)(C);
(3) has a median lethal concentration, \( LC_{50} \) (inhalation; gas or vapor), of 200 parts per million by volume or less of gas or vapor in air as determined by the procedure set forth in 16 C.F.R. § 1500.3(c)(1)(ii)(B); or

(4) has a median lethal concentration, \( LC_{50} \) (inhalation; mist, fume or dust), of 2 milligrams per liter or less of mist, fume or dust in air as determined by the procedure set forth in 16 C.F.R. § 1500.3(c)(1)(ii)(B).

(S) Identifier. "Identifier" means any color, number, symbol, code name or other means the employer uses to identify chemical substances, mixtures, or categories of chemical hazards found in a particular work area.

(T) International Union of Pure and Applied Chemistry Rules of Nomenclature. The nomenclature rules are published as:


(U) Label. "Label" means any written, printed or graphic information displayed on or affixed to a container of a substance or mixture.

(V) Material Safety Data Sheet (MSDS). "Material safety data sheet" means a document listing the information required by Section 105(B)(2)(b) of this Act.

(W) MSDS. "MSDS" means material safety data sheet.

(X) Placard. "Placard" means either a fixed or removable sign which can be placed on walls, bulletin boards, reaction or mixing vessels, or other appropriate places or containers in a work area so as to notify employees of the hazards associated with any chemical substances or mixtures being manufactured, processed, used or stored in that work area.

(Y) Pressure-Generating Material. "Pressure-generating material" means a substance or mixture that (1) must be protected from spontaneous reaction or polymerization by
the addition of an inhibitor, or by refrigeration or other thermal control, or (2) under foreseeable use or storage conditions can decompose to release gas in its container in sufficient quantities to cause an internal absolute pressure exceeding 40 psi at 70°F (21.1°C), or (3) comprises the contents of a self-pressurized container.

(Z) **Primary Skin Irritant.** "Primary skin irritant" means a substance or mixture, which although not a corrosive substance or mixture, causes a moderate to severe inflammatory effect on living tissue by chemical action at the site of contact. A substance or mixture is a primary skin irritant if, when tested on the intact skin of albino rabbits by the method prescribed by 16 C.F.R. § 1500.41 for periods of twenty-four and seventy-two hours, it results in an average empirical score of five or greater.

(AA) **Pyrophoric.** "Pyrophoric" means a substance or mixture that ignites spontaneously in dry or moist air at or below 130°F (54.4°C).

(BB) **Strong Eye Irritant.** A substance or mixture is a "strong eye irritant" if it is so determined under the procedure prescribed by 16 C.F.R. § 1500.42 or other appropriate techniques, such as those recommended in *Principles and Procedures for Evaluating the Toxicity of Household Substances*, National Academy of Sciences Committee Report No. 1183 (1977).

(CC) **Strong Oxidizer.** "Strong oxidizer" means a substance or mixture that vigorously promotes oxidation such that its contact with combustible material may cause spontaneous ignition.

(DD) **Strong Sensitizer.** "Strong sensitizer" means a substance or mixture that causes a substantial proportion of exposed people to develop a hypersensitive reaction on normal tissue after repeated exposure.

(EE) **Toxic.** "Toxic" means a substance of mixture that produces death within 14 days in half or more than half of a group of:

1. albino rats weighing between 200 and 300 grams each, when administered orally by a single dose of more than 50 milligrams but not more than 500 milligrams per kilogram of body weight (LD₅₀ (oral));

2. albino rabbits weighing between 2.3 and 3.0 kilograms each, tested at a dosage of more than 200 milligrams
but not more than 1,000 milligrams per kilogram of body weight, when administered by continuous contact with the bare skin for 24 hours or less by the method described in 16 C.F.R. § 1500.40 \( \text{LD}_{50} \) (dermal); or

(3) albino rats weighing between 200 and 300 grams when an atmospheric concentration of more than 200 parts per million but not more than 2,000 parts per million by volume of gas or vapor \( \text{LC}_{50} \) (inhalation; gas or vapor)), or more than 2 milligrams but not more than 20 milligrams per liter of mist, fume or dust \( \text{LC}_{50} \) (inhalation; mist, fume or dust), when administered by continuous inhalation for one hour or less.

(FF) *Toxic or Hazardous Substance or Mixture.* “Toxic or hazardous substance or mixture” means:

(1) Any chemical substance or mixture which possesses a hazardous property as defined in subsection (Q); or

(2) Any chemical substance or mixture known by the employer to present a significant risk of personal injury or illness as a proximate result of any customary or reasonably foreseeable handling or use. The employer shall not be charged with knowledge beyond that which would have been obtained by a reasonable and prudent employer under similar circumstances.

(GG) *Water Reactive.* “Water reactive” means a chemical substance or mixture that reacts with water to release a gas in sufficient quantities and at a sufficient rate so as to create a toxic or hazardous condition when water is used to clean up a spill in an enclosed work area.

(HH) *Work Area.* “Work area” means any room or defined space, whether inside or outside of a building or other structure, where toxic or hazardous substances or mixtures are used, manufactured, or stored, and includes, but is not limited to, areas where toxic or hazardous substances or mixtures are handled, mixed, processed, packaged or repackaged.

(II) *Workplace.* “Workplace” means an establishment or business at one geographic location containing one or more work areas.

*COMMENT*

In developing the definitions of toxic and hazardous properties contained in this section the drafter has attempted to combine and harmonize the best aspects of two major works in the field, i.e.,

SECTION 105. EMPLOYERS' DUTIES

(A) Notification to Employees.

Every employer knowingly manufacturing, processing, using or storing toxic or hazardous substances or mixtures in a work area shall post a notice, at the location where notices to employees in that work area are normally posted, to inform those employees that they have a right of access to material safety data sheets or other information the employer may possess concerning the hazardous or toxic properties of toxic or hazardous substances or mixtures to which they may be exposed in the course of their employment.

(B) Hazard Communication and Risk Reduction Program

(1) Employee Training and Education

Every employer knowingly manufacturing, processing, using or storing toxic or hazardous substances or mixtures shall have an employee training and education program designed to impart to the employees who may be exposed to such substances or mixtures the knowledge necessary to understand (a) the hazards of the substances or mixtures to which they may be exposed, (b) the hazard communication methods (labels, Material Safety Data Sheets, identifiers, placards, etc.) used by the employer, (c) appropriate work practices, (d) protective measures, and (e) emergency procedures. The specific hazards and circumstances of each work area should be taken into account in determining both the complexity of the content and the frequency of repetition of the required training and education program.

(2) Material Safety Data Sheets (MSDS)

(a) Every employer knowingly manufacturing toxic or hazardous substances or mixtures in a work area shall compile a list of Material Safety Data Sheets (MSDS) for such toxic or hazardous substances or mixtures. Every employer knowingly processing,
using or storing, but not manufacturing, toxic or hazardous substances or mixtures in a work area shall compile a list of available MSDS for such toxic or hazardous substances or mixtures. The MSDS shall be made available upon request to any employee who, in the course of his employment, may be exposed to the toxic or hazardous substance or mixture.

(b) Except as otherwise excluded under Section 109 of this Act, the MSDS shall contain the following information where applicable and available or otherwise known by the employer:

(i) The chemical name and common name of the substance or, in the case of a mixture, the chemical name and common name of any substance that contributes substantially to a toxic or hazardous property of the mixture;

(ii) The trade name, code name, CAS number, or identifier as used in the work area;

(iii) The nature of the hazards presented by exposure to the substance or mixture;

(iv) Necessary precautions, handling practices, and protective equipment;

(v) Emergency procedures for spills, fire, and first aid;

(vi) Route(s) of entry known to produce toxic effects, e.g., inhalation, skin absorption, ingestion;

(vii) Known symptoms of overexposure;

(viii) The permissible exposure limit for those substances for which the federal Occupational Safety and Health Administration has promulgated a permissible exposure limit in 29 C.F.R. § 1910.1000;

(ix) Name of the manufacturer or seller of the substance or mixture; and

(x) The date on which the MSDS was last revised or updated.

(c) Notwithstanding paragraph (a) of this subsection, if a MSDS is not available from a supplier, seller or manufacturer of a toxic or hazardous substance or
mixture, then upon an employee's request to inspect the MSDS, an employer who is only a processor, user, or storer of the toxic or hazardous substance or mixture shall be deemed to satisfy his obligations under Section 105(B)(2)(a) of this Act if:

(i) Within 10 working days of the employee's request the employer makes a written inquiry to the supplier, seller or manufacturer requesting a MSDS or equivalent information. If the employer has made such a written inquiry in the preceding six months, then an additional inquiry need not be made;

(ii) The employer notifies the employee, in writing, of the date that the inquiry was made, to whom it was made, and the response, if any, received; and

(iii) The employer notifies the employee of the availability of the MSDS within 10 working days of receipt of the MSDS from the supplier, seller or manufacturer, or provides a copy of the MSDS to the employee within 10 working days of the receipt of the MSDS.

(3) **Posting Requirements**

Every employer knowingly manufacturing, processing, using, or storing toxic or hazardous substances or mixtures shall post, at a conspicuous location in each work area or group of work areas in which toxic or hazardous substances or mixtures are regularly used, a notice which, except as otherwise excluded under Section 109 of this Act, shall contain:

(a) A list of categories of hazardous properties associated with the toxic or hazardous substances or mixtures regularly used in that work area or group of work areas;

(b) A list of chemical names, or common names, or trade names, or code names, or other identifiers of all toxic or hazardous substances or mixtures regularly used in that work area or group of work areas, and the categories of hazardous properties associated with each substance or mixture listed; and
(c) The location where Material Safety Data Sheets for each listed substance or mixture are available for inspection, or the procedure by which the employee may inspect a copy of the Material Safety Data Sheet.

(4) Supplementary Measures

In addition to the training, education, Material Safety Data Sheets and posting required by this section, every employer knowingly manufacturing, processing, using or storing toxic or hazardous substances or mixtures must elect one or more of the following supplementary methods of communicating information on toxic or hazardous properties of chemical substances or mixtures regularly used in the work area:

(a) labels;
(b) placards;
(c) signs;
(d) coding or marking systems;
(e) identifiers; or
(f) other appropriate forms of hazard communication.

(C) Knowledge Charged To The Employer

For the purposes of this section an employer has knowledge of toxic or hazardous properties of a substance or mixture if (1) he has actual knowledge, or (2) if a reasonable and prudent employer under similar circumstances would have known of such toxic or hazardous properties.

COMMENT

Although this section does not place upon the employer a general duty to test substances or mixtures for toxic or hazardous properties, it does place upon the employer a duty to conduct such tests or gather the necessary information from other sources where a reasonable and prudent employer would conduct such tests or gather such data. There are many cases in which a reasonable, prudent employer would not conduct such tests. For example, when a new substance is simply the combination of two non-toxic components there may be very persuasive reasons for believing the new compound is also non-toxic. Similarly, a mixture composed of a small amount of a flammable substance in a water solution might reasonably be assumed to be non-flammable.

Subsection (B)(2)(a) of this section places a greater duty on
manufacturers than on mere processors, users, or storers. The manufacturer must compile lists of MSDS for toxic or hazardous substances knowingly manufactured. The manufacturer must either obtain or produce the MSDS. The processor or user, on the other hand, need only compile MSDS which are available from other sources.

SECTION 106. REMEDIES AVAILABLE TO [ATTORNEY GENERAL/CITY SOLICITOR]

The [attorney general/city solicitor], or his or her designee, may institute appropriate legal action as authorized herein, or as may be otherwise available and appropriate either at law or in equity, which may, in the judgment of the [attorney general/city solicitor] or his or her designee, be necessary for the enforcement of this Act. This section shall not be construed to eliminate or abridge any remedies either at law or in equity which any employee or other individual may have arising out of any breach or violation of the provisions of this Act.

SECTION 107. EMPLOYEE'S RIGHTS AND REMEDIES

(A) As provided in Section 105(B)(2)(a) and (c) of this Act, the employee has a right to inspect the Material Safety Data Sheets for any toxic or hazardous substance or mixture to which he may be exposed in the course of his employment.

(B) No employer shall discharge, or cause to be discharged, or otherwise discipline, or in any manner discriminate against an employee or prospective employee because that person has exercised any right, or filed any complaint or suit under this Act, or has testified or is about to testify in any suit under this Act. Nor shall any remuneration, position, seniority, or other benefits be lost for exercise of any right provided by this Act.

(C) If an employee in good faith believes that his employer is not in compliance with any provision of this Act, the employee may, upon written notice to the [attorney general/city solicitor] particularizing the type and location of the alleged non-compliance(s), request the [attorney general/city solicitor] or his or her designee to inspect the workplace. Upon the request of the person giving such notice, his or her identity and that of any employees referred to in the notice shall be
treated as confidential information and shall not be revealed except for good cause.

(D) Except for good cause, the [attorney general/city solicitor] or his or her designee, upon receipt of an employee complaint particularizing specific types and locations of alleged violations of this Act, shall conduct within ten working days such inspections and investigations as deemed appropriate within the discretion of the [attorney general/city solicitor].

(E) [For state enactments] If an employee in good faith believes that his employer is not in compliance with any provision of this Act, and the employee gives written notice to the employer particularizing the type and location of the alleged non-compliance(s), and if the employee in good faith believes the employer is still not in compliance after more than thirty days after the date of the written notice, then the employee may personally commence an action in any appropriate court of law to enforce the employer's obligation, duty or responsibility under this Act which is specifically alleged to have been violated in the written notice of non-compliance. If an employee commences an action under this part, the party which prevails will be entitled to an award of reasonable attorneys fees and costs.

(F) [For state enactments] In addition to any other remedy in this section, any employee who has been discharged by an employer in violation of this Act may within 60 days of the date of the violation, or within 60 days of the date at which a reasonable person in the position of the employee should have discovered the violation, commence an action for damages for wrongful discharge in any court of competent jurisdiction. The prevailing party will be entitled to an award of reasonable attorneys fees and costs.

COMMENT

1. The means for effective enforcement of right-to-know acts presents a major difficulty. Routinely scheduled inspections by administrative officials would not only be very costly for the administration of the Act but would also be disruptive and of dubious efficacy. The drafter of this Act believes the most efficient and effective means of enforcement is to make the Act self-enforcing by granting employees a right to request the attorney general or city solicitor to make an inspec-
tion, provided the employee gives written notice specifying the type and location of the alleged violations.

2. For state enactments, the self-policing effectiveness of the Act is increased by granting the employee a private cause of action to enforce the Act. Such a right is tempered with a requirement of good faith and thirty days written notice during which the employee and employer should be able to settle their disagreement. In order to avoid harassment, the cause of action is limited to the alleged violations specified with particularity in the employee’s written notice to the employer, and the party which prevails will be entitled to an award of reasonable attorneys fees and costs.

3. For state enactments, dismissal in retaliation for the exercise of employee rights under this Act is recognized as grounds for an action for wrongful discharge.

SECTION 108. WAIVER OF RIGHTS INVALID

Any waiver by an employee or applicant for employment of the benefits of this Act is against public policy and is null and void.

SECTION 109. TRADE SECRETS AND CONFIDENTIAL BUSINESS INFORMATION

(A) Notwithstanding any provisions of this Act to the contrary, an employer shall not be required to disclose in any Material Safety Data Sheet, posting, training information, listing, labeling, report, or notice any information which under state or federal law qualifies as a trade secret or confidential business information, except that information relating solely to the toxic or hazardous properties of a chemical substance or mixture may not be withheld under this Act. Chemical name, common name, trade name and CAS number of a chemical substance or mixture may be a trade secret, and if so, may be withheld from disclosure under this Act. If an employee pursuant to his rights under this Act seeks access to documents which contain both information on toxic or hazardous properties and trade secret or confidential business information, the employer must either allow the employee access to the documents or within ten working days provide the employee with a summary of the informa-
tion relating to toxic or hazardous properties after the trade secret or confidential business information has been excised.

(B) Employers shall upon request provide the authorized physician of an employee with all pertinent information which is required for medical treatment, provided, however, that trade secrets or confidential business information must be disclosed only if specifically requested by the physician, and then only:

(1) after the physician has reviewed all of the non-confidential information the employer has made available and has determined that the additional information is needed, and

(2) after the physician has agreed to enter into an appropriate confidentiality agreement with the employer.

SECTION 110. PREEMPTION

[For state enactments] This Act is intended to provide a uniform state-wide standard for employees' right to know of the toxic and hazardous properties of the chemical substances to which they are exposed in the workplace and therefore expressly preempts any local ordinances having substantially the same purpose.

SECTION 111. IMPLEMENTATION SCHEDULE

(A) Employers shall be in compliance with this Act within the following periods from the date of enactment:

(1) Employers who manufacture chemical substances must be in compliance within one year of the date of enactment if they have 250 or more employees, or within one and one half years if they have fewer than 250 employees;

(2) Employers who manufacture, process, or use mixtures but do not manufacture chemical substances must be in compliance within two years of the date of enactment if they have 250 or more employees, or two and one half years if they have fewer than 250 employees.

SECTION 112. PENALTIES

Any employer, which violates any provision of this Act shall be fined not more than $500.00.
NOTES

SECURITIES REGULATION—KENTUCKY TAKEOVER
BIDS ACT DECLARED UNCONSTITUTIONAL—
Esmark, Inc. v. Strode, 634 S.W.2d 768 (Ky. 1982).

Introduction

Esmark, Inc. (hereinafter Esmark), a Delaware corporation, with its principal place of business in Chicago, Illinois, is a holding company whose subsidiaries include, among others, International Playtex, Inc., Estech, Inc., Swift & Co. and STP Corporation. Beginning in November 1977, Esmark, through its New York broker, began to purchase on the over-the-counter market stock of Reliance Universal Inc. (hereinafter Reliance), a Kentucky corporation, whose principal place of business is in Louisville, Kentucky. As of December 1978, roughly fifty percent of Reliance's shareholders owning sixty percent of the stock resided in Kentucky.1

By August 13, 1979, Esmark had acquired over five percent of Reliance's stock.2 In accordance with The Williams Act,3 Esmark on August 23, 1979, filed a Schedule 13D with the Securities and Exchange Commission. On the Schedule 13D Esmark announced it desired to acquire Reliance in order to expand and diversify the business of Estech Specialty Chemicals Corporation, a wholly-owned subsidiary of Esmark's subsidiary, Estech, Inc. Esmark added that any further acquisitions would be made in the open market or in privately negotiated transactions. In two subsequent amendments to its Schedule 13D, Esmark gave the same statement of purpose. On August 27, 1979, the Wall Street Journal reported Esmark's purchase of seven percent of Reliance's stock and its interest in acquiring Reliance. The article also reported that Kentucky law appeared to prohibit a tender offer.4 By October 22, 1979, Esmark had acquired 223,700 or 11.45% of

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2. Id. at 97,803.
3. 15 U.S.C.A. §§ 78m(d)-(e), 78n(d)-(f) (West 1981) (amending Securities Exchange Act of 1934, §§ 13(d), 13(e), 14(d)-(f)). § 13(d) requires a purchaser of securities registered with the Securities and Exchange Commission to file a Schedule 13D with them within 10 days after its purchases have exceeded five percent of the outstanding shares of the security.
Reliance's outstanding shares. Just three days before, however, on October 19, 1979, James C. Strode, the Director of the Division of Securities of the Department of Banking and Securities for the Commonwealth of Kentucky, sought and obtained a temporary restraining order enjoining Esmark from acquiring any additional shares of Reliance on the ground that Esmark had violated and was continuing to violate the Kentucky Take-over Bids Act. Subsequently, the trial court permanently enjoined Esmark from purchasing Reliance's stock and from making a take-over bid, and ordered Esmark to divest itself of all shares in excess of five percent. The court of appeals affirmed the injunction, but reversed the order of divestiture.

Both Esmark and Strode sought discretionary review by the Supreme Court of Kentucky. Strode contended that the court of appeals erred in reversing the order of divestiture, arguing it was authorized by the statute. Strode further argued that Esmark should disgorge the profits on the stock. Esmark argued (1) that the Kentucky courts lacked *in personam* jurisdiction over it; (2) that its open market purchases were not a tender offer and consequently did not constitute a take-over bid under the Kentucky Act; and (3) that the Kentucky Act violates the Commerce Clause of the United States Constitution.

Responding to Strode's contentions, the supreme court affirmed the court of appeals' decision that there is no statutory provision authorizing divestiture and consequently no authority to require disgorgement. As to Esmark, it dismissed, without discussion, the claim of lack of personal jurisdiction as "esoteric". It acknowledged that Esmark's actions did not constitute a classic

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97,804 (Franklin Cir. Ct. May 13, 1980).

Although the term "tender offer" is not defined in the Williams Act, a basic working definition is offered in SEC CONSEQUENCES OF CORPORATE ACQUISITIONS 313 (C. Schneider ed. 1971): "A published offer to purchase a specified number of shares [from current stockholders] at a fixed price for cash for a limited specified period of time." See also Note, The Developing Meaning of "Tender Offer" Under The Securities Exchange Act of 1934, 86 HARV. L. REV. 1250 (1973) for an in-depth analysis of what constitutes a "tender offer".


6. Id. at 97,802 KY. REV. STAT. ANN. §§ 292.560-.991 (Bobbs-Merrill 1981).

7. Esmark v. Strode, 639 S.W.2d 768, 768-69 (Ky. 1982).

8. Id. at 770. Esmark argued that the Kentucky Act is unconstitutional on both Commerce Clause and Supremacy Clause grounds, but the court chose to ignore the Supremacy Clause argument. Brief for Movant Esmark, Inc. at 11 and Combined Brief for Esmark, Inc. at 21, Esmark, Inc. v. Strode, 639 S.W.2d 768 (Ky. 1982) [hereinafter cited as Brief for Movant Esmark and Combined Brief for Esmark, respectively].
tender offer, but seemed to conclude that the issue was irrelevant, because the court declared the Kentucky Take-over Bids Act invalid on Commerce Clause grounds. 9

The court may be correct in holding the Act unconstitutional, but its decision to do so based upon the facts presented in Esmark seems, to this writer, to be premature. Because Esmark's purchases did not constitute a classic tender offer, the case could have been dismissed without reaching the constitutional issue. By its decision to follow the trend 10 declaring state take-over acts unconstitutional, the court has further muddied the already confused question of what constitutes a tender offer.

This note will attempt to examine take-over legislation on both the federal and state level, the United States Supreme Court's

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9. 639 S.W.2d at 774-75.

response to take-over legislation, and the effect that *Esmark* presents as a precedent for similar challenges to other states' take-over acts.

I. BACKGROUND

In order to evaluate the effect of *Esmark*, it is necessary to review the setting from which it arose, and in particular the development of federal and state take-over acts and the types of transactions to which they apply.

A. Federal Regulation—The Williams Act

It is only recently that a need for take-over legislation was recognized. Senator Williams of New Jersey was the first to propose federal legislation on the subject, and, in recognition thereof, the federal act that developed out of his proposal bears his name.11 He argued that the then existing securities laws failed to recognize the activities of corporate raiders who under a cloak of secrecy often acquired control of a corporation before their identities and intentions were known.12

The need for take-over legislation was prompted by the increased use of the tender offer as the favored method of acquiring control of a publicly held corporation.13

The offer normally consists of a bid by an individual or group to buy shares of a company—usually at a price above the current

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A group of corporate raiders, collusively joined together, can buy up enough shares of a corporation's stock virtually to guarantee victory in a proxy fight without management or shareholders having any knowledge of these acquisitions. The purchases can be made in so-called street names or, even more furtively, by Swiss banks for an undisclosed account number. There is no way of telling in all cases whether the funds for these purchases are coming from legitimate businessmen who seek to take over a corporation, or from persons who have untaxed profits through illegal activities.

The biggest loophole open to the corporate raider is this cloak of secrecy under which he is permitted to operate while obtaining the shares needed to put him on the road to successful capture of a company.

*Id.* at 28,258. S. 2731 was not adopted, but a subsequent bill S. 510 was. See infra note 16.

13. In 1966, there were over 100 such offers for companies listed on the national exchanges compared with eight in 1960. H.R. REP. No. 1711, 90th Cong., 2d Sess. 3, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2812.
market price. Those accepting the offer are said to tender their stock for purchase. The person making the offer obligates himself to purchase all or a specified portion of the tendered shares if certain specified conditions are met. ¹⁴

The idea behind the federal legislation was one of consumer protection: to provide enough information to the investor so that he could make an informed decision whether to sell his shares on the open market or to hold on to them, in anticipation of receiving a premium for them in a tender offer, and if such a tender offer materialized, to evaluate the qualifications and intentions of the offering party. ¹⁸ But, there was no attempt to discourage takeover bids. To the contrary, Senator Williams acknowledged that they often served "a useful purpose by providing a check on entrenched but inefficient management." ¹⁶ Thus, in reporting on the bill, The Committee on Interstate and Foreign Commerce emphasized that

[t]he bill avoids tipping the balance of regulations either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.¹⁷


(1) Under § 13(d), those persons who acquire more than five percent ¹⁹ of a corporation's securities must disclose (on a Schedule 13D) to the Securities and Exchange Commission (hereinafter SEC), within ten days of the acquisition:

(A) their background, identity, residence and citizenship;
(B) the source and amount of funds used for the purpose;
(C) if the purpose is to acquire control, their plans for the corporation (whether to sell its assets, merge the company, etc.);
(D) the number of shares owned;
(E) information regarding contents, arrangements, loans, etc.

¹⁴. Id. at 2811.
¹⁵. Id. at 2812.
Material changes in this information are required to be filed with the SEC in the form of an amended Schedule 13D. 19

(2) Under § 14(d), those persons who propose to make a tender offer which would result in their owning more than five percent of the corporation's stock must furnish to the SEC and to each offeree the same information required under § 13(d), but on a Schedule 14D-1. This section also provides:

(A) that the tender offeror may withdraw his offer within 15 days 21 of the invitation;

(B) where the offer is for less than all outstanding shares, the securities must be accepted on a pro rata basis according to the number of securities deposited by each depositor; and

(C) where the terms of the offer are changed before its expiration date, the offeror must pay the increased consideration to all offerees. 22

The Act distinguishes, therefore, between those persons who have simply acquired more than a five percent interest in a corporation on the open market, without having made a tender offer, and those who make a tender offer, resulting in their owning more than five percent of the corporation's stock. This distinction is critical for an understanding of subsequent case law. "The purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time." 23 Section 14(d), on the other hand, is specifically directed to "any person who makes a tender offer." 24 The terms "tender offer" and "take-over bid" are used alternatively in the legislative history. 25

The distinction between purchases of large blocks of stock on the open market and a direct offer to a stockholder, although it may seem clear enough, has caused much confusion. The confusion arises from the contention that "open-market purchases of securities made for the purpose of obtaining control of a corpora-

20. See supra note 18.
22. 15 U.S.C.A. § 78n(d) (1), (5)-(7) and 17 C.F.R. 240.14d-7(a) (1) (1982).
24. Id. at 2819.
25. Id. at 2811.
tion are tender offers within the meaning of the Williams Act," because they "put pressure on investors to make hurried ill-considered investment decisions."26 Such purchases have been described as "creeping tender offers," that is, an acquisition strategy where, by achieving a substantial position in a company through open market purchases, an acquiring company can achieve a blocking position which enables them to purchase the remaining shares by tender or exchange offer at a cost that would be substantially less than if a formal tender offer had been made earlier.27

The case law on this point is extensive and beyond the scope of this note,28 but it is fair to say that the facts of each case are determinitive and the SEC's view of them should be given great weight, as they are the agency charged with enforcing this highly technical regulatory scheme. The SEC, in fact, has offered some guidance in the form of eight factors which it considers to be indicative of a tender offer:

1. an active and widespread solicitation;
2. a solicitation for a substantial percentage of the company's stock;
3. an offer of a premium over the market price;
4. whether the terms are fixed rather than negotiable;
5. whether the offer is contingent on the tender of a fixed number of shares;
6. whether the offer is open for only a limited period of time;
7. whether the offerees are placed under any pressure to sell; and
8. whether there are public announcements accompanying the purchase program.

But all this has not solved the problem, which is further com-

26. E. Aranow, H. Einhorn & G. Berlstein, Developments In Tender Offers for Corporate Control 11-14 (1977). The authors vehemently disagree with this view arguing that: The absence of any statutory language distinguishing between those tender offers to which these sections should apply [§ 14(d) (5) (6) and (7)], and those tender offers made through open market purchases of securities for control to which they should not, most certainly would seem to indicate that Congress did not intend to regulate market purchases for control as tender offers.

Id. at 13.


plicated by the fact that the SEC is not the only governmental body concerned with tender offer regulation. Because there is a concurrent system of federal-state regulation, the problem is magnified.

B. State Regulation

When Congress passed the Williams Act in 1968, only the state of Virginia had a take-over statute. Because Congress did not change the Saving Clause of § 28(a) of the Securities Exchange Act of 1934, it has been held that it did not attempt to pre-empt the field of state securities regulation. That clause provides, in part:

Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

In fact, that section has been the authority under which states regulate the sale of securities within their borders. These state laws are known as Blue Sky laws, from a decision which said that they are aimed at "speculative schemes which have no more basis than so many feet of 'blue sky'." They are intended to "stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations." Blue Sky laws have been upheld as a valid exercise of police power on the ground that they are, at most, only an indirect burden upon interstate commerce, because the securities are subject to the jurisdiction of the state only when they are being sold there.

Unlike the constitutionality of state Blue Sky laws, state take-over acts, which rapidly proliferated to thirty-eight, following

30. "There is no evidence in the legislative history that Congress was aware of state takeover laws when it enacted the Williams Act . . . The Virginia statute, Va. Code § 131-528, became effective March 5, 1968; the Williams Act was enacted several months later on July 19, 1968." Edgar v. MITE, 102 S. Ct. 2629, 2635 n.6 (1982).
31. 102 S.Ct. at 2635.
34. Id.
enactment of the Williams Act, have been under constant constitutional attack. Two patterns of attack have emerged: (1) the director of securities for the state seeks an injunction to restrain the offeror from purchasing additional shares and the offeror defends itself by arguing the statute is unconstitutional; or (2) the offeror seeks an injunction to prevent enforcement of the act against it, and a declaration that the act is unconstitutional. Most of the challenges, however, have been against state take-over acts seeking to regulate classic tender offers.

C. The Supreme Court Speaks—Edgar v. MITE Corp.

These challenges finally culminated in Edgar v. MITE Corp., [hereinafter cited as MITE], decided June 23, 1982. Until that case, the United States Supreme Court had never addressed the merits of a state take-over act. In fact, MITE itself almost did not reach the merits, as it was challenged as moot. That
challenge was defeated, however, and the Court interpreted the constitutionality of the Illinois Business Take-over Act as applied to a classic tender offer.

MITE, a Delaware corporation with principal offices in Connecticut, initiated a cash tender offer on January 19, 1979, of over $23,000,000 or $28 a share for all the outstanding shares of Chicago Rivet and Machine Co. (hereinafter Chicago Rivet), a publicly held Illinois corporation, by filing a Schedule 14D-1 with the SEC. MITE, however, did not comply with the Illinois Act, but instead commenced litigation in the United States District Court.

would expose MITE to civil and criminal liability [under ILL. REV. STAT. ch. 121/2, §§ 137.63-.65 (1979)] for making the February 5, 1979 offer in violation of the Illinois Act” (footnote omitted). 102 S. Ct. 2629, 2635. However, it is noteworthy that Justice Marshall, joined in his opinion by Justice Brennan, dissented on this issue. Id. at 2650. So too did Justice Rehnquist in a separate dissent. Id. at 2652. And Justice Stevens, though concurring in part with the final decision, indicated the question really depended on the effect of the preliminary injunction restraining the Ill. Secretary of State from enforcing the Ill. Act while the injunction remained in effect. Id. at 2643.

41. Id. at 2635. ILL. ANN. STAT. ch. 121½ §§ 137.57-.70 (Smith-Hurd Supp. 1982-1983). Pertinent sections are summarized or cited as follows:

§ 137.51-1-Findings and Purpose-
The purpose of this Act shall be to protect the interest of Illinois security-holders of companies having a close connection with this State without unduly impeding take-over offers, and this Act shall be interpreted so as to strike a balance that does not favor either management of a target company or an offeror.

§ 137.52-9-Take-over offer defined- The offer to acquire the equity securities of a target company “pursuant to a tender offer or request or invitation to tenders, if after acquisition the offeror would be directly or indirectly, a beneficial owner of more than 5% ...” of the corporation.

§ 137.52-10-Target company defined- A corporation of which 10% of the outstanding stock which is the subject of the take-over is held by Ill. holders which meets any two of the following: (a) has its principal office in Ill.; (b) is organized under Ill. law; or (c) has at least 10% of its stated capital and paid in surplus represented in Ill.

§137.54-Registration requirements- Before a person makes a take-over offer, he is required to file a registration statement with the Secretary of State containing the same information required on the SEC Schedule 14D-1, but requiring greater detail. The take-over offer is considered registered 20 business days after the filing of this statement.

§ 137.57-Hearings- A hearing may be held either at the discretion of the Secretary of State or within 15 business days after filing the registration statement if a majority of directors of the target company who are neither officers nor employees or an Ill. resident holder of at least 10% of the stock so requests in writing. The Secretary may deny registration if he finds it does not provide for full and fair disclosure to offerees.

§137.59-Limitation on offerors- The offer must remain open for 20 days, but an offeree may withdraw his securities within 17 days after tendering them and within 60 days from the time the offer is made.

§137.62 to .65 Provides for criminal and civil penalties.

§137.70- Contains a severability clause.

42. 102 S. Ct. at 2633-34. That was a premium of $4 over the then prevailing market price.
Court for the Northern District of Illinois seeking (1) a declaratory judgment that the Illinois Act was in violation of the Supremacy and Commerce Clauses of the United States Constitution;\(^43\) and (2) a temporary restraining order and preliminary and permanent injunctions prohibiting the Illinois Secretary of State from enforcing the Act.\(^44\) On February 1, 1979, the Secretary of State notified MITE that he intended to issue an order requiring it to cease and desist its tender offer efforts for Chicago Rivet. MITE renewed its efforts for injunctive relief and on February 2, the district court issued a preliminary injunction prohibiting the Secretary of State from enforcing the Illinois Act against MITE. MITE then published its tender offer in the February 5th edition of the Wall Street Journal. On the same day, Chicago Rivet made an offer for approximately forty percent of its own shares at $30 a share.\(^45\) On February 9, the district court entered final judgment, declaring that the Illinois Act was pre-empted by the Williams Act and that it violated the Commerce Clause. The district court then permanently enjoined enforcement of the Illinois Act against MITE. The United States Court of Appeals for the Seventh Circuit affirmed.\(^46\) The United States Supreme Court also affirmed, but the majority concluded the Illinois Act was unconstitutional only on Commerce Clause grounds.\(^47\) Before reaching that conclusion,

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43. Id. at 2634 (citing U.S. Const. art. VI, cl. 2)-

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding;-

and U.S. Const. art. I, § 8, cl. 3: "The Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

44. 102 S. Ct. at 2634.

45. Id. n. 4, "Chicago Rivet's offer for its own shares was exempt from the requirements of the Illinois Act pursuant to Ill. Rev. Stat., ch. 121 1/2 ¶ 137.52-9.4 (1979)." A short time later, MITE and Chicago Rivet entered into an agreement whereby both offers were withdrawn and under which MITE was given until March 12 to make a tender offer of $31 a share which Chicago Rivet agreed not to oppose. On March 2, 1979, MITE announced its decision not to make a tender offer. 102 S. Ct. at 2634.

46. The court of appeals affirmed sub. nom. MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980).

47. 102 S. Ct. at 2643. The decision contains six separate opinions. Justice White wrote the plurality opinion, joined by Chief Justice Burger and Justice Blackmun. Id. at 2633. Only one of his two Commerce Clause arguments (that the Act excessively burdened interstate commerce) was joined by Justices O'Connor and Stevens, that part of Justice White's opinion constituting the majority opinion. Id. at 2641. Justices Powell, O'Connor and Stevens each wrote separate opinions, concurring in part with Justice White's opinion.
however, the Court, speaking through the plurality opinion of Justice White, first analyzed the court of appeals' holding that the Illinois Act was unconstitutional on (1) Supremacy Clause grounds and (2) Commerce Clause grounds.\(^\text{48}\)

Justice White concluded that Congress did not intend to pre-empt the field of takeover regulation as evidenced by the fact that when it passed the Williams Act, it left intact § 28 (a)—the saving clause—of the Securities Exchange Act of 1934.\(^\text{49}\) He further reasoned, however, that if the Court should find that the Illinois Act actually conflicts with the Williams Act, it would be void. The criteria for determining whether such a conflict exists, he said, were two: (1) physical impossibility of compliance with both state and federal regulations; or (2) whether the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\(^\text{50}\) Justice White dismissed the first criterion on the ground that there was no contention of impossibility of compliance with both federal and state law, and concentrated on the second criterion—whether the Illinois Act frustrates the objectives of the Williams Act.

Justice White agreed with the court of appeals that the purpose of the Williams Act was to protect the investor by furnishing him information and by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice.\(^\text{51}\) He further agreed with the court of appeals' finding that three provisions of the Illinois Act stood as obstacles to Congress' objectives.\(^\text{52}\)

First, the Illinois Act required the tender offeror to notify the Secretary of State and the target company of its intent to make an offer twenty business days before the offer becomes effective.

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\(^{48}\) Id. at 2643. Justice Marshall, joined by Justice Brennan, dissented on grounds that the case was moot. Id. at 2648. Justice Rehnquist wrote a separate dissent on the mootness issue. Id. at 2652.

\(^{49}\) Id. at 2648 (citing 15 U.S.C. § 78bb(a) (1976)).

\(^{50}\) Id. at 2635 (citing Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978); (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

\(^{51}\) Id. at 2636-37 (citing 633 F.2d at 495-96). The MITE court characterized the aim of the act as the "federal market approach". This is contrasted with the "fiduciary approach" that state take-over acts adopt, where rather than permitting the investors to rely on their own decisions, the states prefer to rely on the business judgment of corporate directors who have a fiduciary duty to their shareholders. Great W. United Corp. v. Kidwell, 577 F.2d at 1279.

\(^{52}\) Id. at 2648 (citing 633 F.2d at 493-98).
During this period the offeror was not free to communicate with the shareholders, but the target company management is. This precommencement notification provided management with a powerful tool in combating tender offers. The Williams Act has no such requirement. There the critical time is the date the tender offer is "first published or sent or given to security holders". The Court pointed out that in October 1965, when Senator Williams introduced S. 2731, it contained a proposal requiring the filing of a public statement with the SEC twenty days before commencement of a cash tender offer, and that the Commission rejected the proposal as unnecessary. It was felt that prior review by the SEC "might delay the offer when time was of the essence".

Second, the hearing provisions of the Illinois Act, since they did not exist in the Williams Act, similarly frustrated Congressional purpose by introducing extended delay. This was particularly so because the Secretary may delay a tender offer by indefinitely extending the date of the hearing. During this interval, management of the target company may:

(1) repurchase its own securities;
(2) announce dividend increases or stock splits;
(3) issue additional shares of stock;
(4) acquire other companies to produce an anti-trust violation should the tender offer succeed;
(5) arrange a defensive merger;
(6) enter into restrictive loan agreements;
(7) institute litigation challenging the tender offer.

Third, Justice White found that the Illinois Act pre-empted the Williams Act because it permitted the Secretary of State to pass on the substantive fairness of the offer. Registration may be denied if the Secretary finds the offer "fails to provide full and fair disclosure of the offerees . . . or that the take-over offer is inequitable . . . ." In contrast, the SEC makes no such determination. That decision is the investor's. "[T]he state thus offers in-

53. 102 S. Ct. at 2637 (citing § 137.54).
54. 102 S. Ct. at 2637 (citing 15 U.S.C.A. § 78n(d) (1); 17 C.F.R. § 240.14d-2 (1981)).
55. 102 S. Ct. at 2637 (citing S. 2731, supra note 12, at 28,259).
56. 102 S. Ct. at 2638 (quoting S. 550, 90th Cong., 1st Sess. 4 (1967)).
57. 102 S. Ct. at 2638-39 (citing § 137.57); see supra note 41.
58. 102 S. Ct. at 2639 n. 19 (quoting Brief for the Securities and Exchange Commission as amicus curiae at 10, n.8).
59. 102 S. Ct. at 2639 (quoting § 137.57.E) (emphasis added by the Court).
vestor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress." 60

The majority did not reach Justice White's conclusion that the Illinois Act was pre-empted by the Williams Act. Justice O'Connor, in her concurring opinion, dismissed it thusly: "[I]t is not necessary to reach the preemption issue, . . . ." 61 Justice Powell declined to reach the pre-emption issue, because he believed that the "Commerce Clause reasoning leaves some room for state regulation of tender offers." 62 He agreed with Justice Stevens, who, in a separate concurring opinion, said he was not persuaded "that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management." 63

Justice White then offered two Commerce Clause arguments for the unconstitutionality of the Illinois Act: (1) "[I]t directly regulates and prevents, unless its terms are satisfied, interstate tender offers which in turn would generate interstate transactions;" and (2) "[T]he burden the Act imposes on interstate commerce is excessive in light of the local interest the Act purports to further." 64 Justice White argued that, unlike Blue Sky laws, whose "regulations affect interstate commerce in securities only incidentally", the Illinois Act directly regulated transactions occurring outside its jurisdiction. Although only twenty-seven percent of Chicago Rivet's stockholders lived in Illinois, the remaining seventy-three percent would be prevented from tendering their shares if the Illinois Act was enforced. Furthermore, the Act sought to directly regulate transactions where no stockholders reside in Illinois by its provision that only two of the following conditions need be met to invoke it: (1) The target corporation has its principal office in Illinois; (2) It is organized under Illinois law; or (3) It has at least ten percent of its stated capital and paid-in surplus represented in Illinois. 65 Justice White concluded that the practical effect of Illinois' Act was to control conduct beyond its borders. He then said that "[t]he limits on a state's power to enact

60. 102 S. Ct. at 2640 (quoting 633 F.2d at 494). The contrast offered is between the federal "market approach" and the state "fiduciary approach" discussed supra note 51.
61. 102 S. Ct. at 2643 (O'Connor, J., concurring).
62. Id. (Powell, J., concurring).
63. Id. at 2648. (Stevens, J., concurring).
64. Id. at 2640.
65. Id. (quoting Hall v. Geiger-Jones Co., 242 U.S. at 558 (1917)).
66. 102 S. Ct. at 2641 (citing § 137.52-10-(2)).
ESMARK, INC. V. STRODE

substantive legislation are similar to the limits on the jurisdiction of state courts," as "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." This reasoning, however, did not convince the majority either. The second Commerce Clause argument constituted the majority opinion.

The Court held that the Illinois Act was unconstitutional based on the general rule enunciated in Pike v. Bruce Church, Inc. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." The Court reasoned that the Illinois Act excessively burdened interstate commerce because the effect of blocking a nationwide tender offer could not be balanced against any legitimate local interests. The Court argued that the burden was substantial because stockholders, wherever they resided, were deprived of an opportunity to sell their shares at a premium, and the reallocation of economic resources to their most efficient use is hindered. While agreeing that the protection of local investors is a legitimate state objective, the Court emphatically maintained that Illinois had no legitimate interest in protecting non-resident shareholders: "Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." The Court further noted that the Act exempted from its coverage the target corporation's purchase of its own shares. In that respect, Chicago Rivet's shareholders were left to the protection of federal securities law, the same protection which Illinois had claimed so inadequate as to necessitate state regulation. This ran contrary to the Act's stated objective "to strike a balance that does not favor either management of a target company or an offeror." The Court concluded that any possible

67. 102 S. Ct. at 2641 (citing Southern Pac. Co. v. Ariz., 325 U.S. 761, 775 (1945) where similar language was used to strike down a state law regarding train length).
68. 102 S. Ct. at 2641 (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)).
69. 102 S. Ct. at 2633, 2643, 2647-48. Only Chief Justice Burger and Justices Blackmun and O'Connor (the latter in a separate concurrence) joined Justice White.
70. 102 S. Ct. at 2641-43 (quoting 397 U.S. 137, 142 (1970)).
71. 102 S. Ct. at 2641-43.
72. Id. at 2642.
73. Id.
74. Id. at 2642 (citing § 137.51-1); see supra note 41.
benefits derived from the Illinois Act’s provisions which differed from those supplied by the Williams Act were “speculative”, as there was no proof that they enhanced the shareholders ability to make an informed decision and, by adding the element of delay, they posed the risk that the tender offer would fail as a result of the defensive tactics of the target corporation’s management. By utilizing the balancing test announced in Pike v. Church and arriving at the narrow holding that the Illinois Business Takeover Act of 1978 was unconstitutional under the Commerce Clause because it imposed a substantial burden on interstate commerce which did not outweigh its putative local benefits, it might at first appear that the Court left open the possibility that some state take-over acts might survive constitutional scrutiny and form the basis for concurrent jurisdiction in this area. But, on the other hand, based upon the Court’s categorical statement that “[i]nsofar as the Illinois law burdens out-of-state transactions [involving non-resident shareholders], there is nothing to be weighed in the balance to sustain the law”, it appears to have closed the door on state take-over legislation.

75. 102 S. Ct. at 2642.
76. Id. at 2643 (noting especially Justice Powell’s concurring opinion); See also Note, State Takeover Statutes: Edgar v. MITE Corp., 96 Harv. L. Rev. 62, 63 n.15 (1982).
77. 102 S. Ct. at 2642. The cases since MITE have not survived constitutional scrutiny. MITE was decided on June 23, 1982, Esmark on October 12, 1982. In that short interval, four other state take-over acts came under attack. Since neither the Esmark Court nor the Briefs for Esmark or Strode allude to these cases, we cannot assume they formed any part in the Kentucky Supreme Court’s reasoning, and for that reason, are discussed in this footnote.

1. Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029, 1036, 1040 (1st Cir. 1982). Agency challenged the automatic one year sanction provision of the Mass. Act Regulating Takeover Bids in the Acquisition of Corporations for failure to comply with its creeping tender offer provision. The court of appeals reversed the district court’s injunction and finding of pre-emption on the ground that the conflict presented in MITE between the Ill. and Williams Act were more “egregious” than that between the Mass. and the Williams Acts. The court remanded for consideration of Agency’s challenge under Commerce Clause grounds as there was insufficient development of that issue in the record for the court to make a decision.

2. National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1128, 1133 (8th Cir. 1982). The court found that the Mo. Takeover Bid Disclosure Act provisions relating to timetables, disclosure and substantive requirements discriminated in favor of the target corporation’s management, disrupting the neutrality essential to the operation of the market approach adopted by the Williams Act, and thus was pre-empted by it. The Mo. Act was then summarily held unconstitutional under the Commerce Clause citing the Supreme Court’s ruling in MITE. There was no discussion.

D. The Kentucky Take-over Bids Act

Less than four months later, on October 12, 1982, Esmark, Inc. v. Strode was decided, using as the basis for its decision only two cases—Edgar v. MITE Corp. and Pike v. Bruce Church, Inc. Before embarking on an analysis of the Kentucky Supreme Court’s reasoning, however, we must first have a thorough understanding of the Kentucky statute regulating take-overs. How did the parties to the action interpret it and what are the views of some leading authorities on the subject?

The Kentucky Act, enacted in 1976, is entitled “Take-over Bids” and defines such a bid as

the acquisition of or offer to acquire pursuant to a tender offer or request or invitation for tenders made to or accepted by ten (10) or more record holders, any equity security of a corporation organized under the laws of this state or having its principal place of business and substantial assets within this state, if after acquisition thereof the offeror would directly or indirectly, be a record or beneficial owner of more than five percent (5%) of any class of the issued and outstanding equity securities of such corporation. (emphasis added).

against Martin-Marietta's counter tender offer to Bendix's tender offer. The court of appeals found the corporations had a likelihood of success on the merits to a challenge of unconstitutionality of the Mich. Act under the reasoning of MITE—that the Act imposes an impermissible burden on interstate commerce by interfering with a nationwide tender offer—and thus granted a preliminary injunction.

4. Telvest v. Bradshaw, 547 F. Supp. 791, 793-94 (E.D. Va. 1982). This case was decided on September 27, 1982, two weeks before Esmark. Telvest, a Del. corporation, brought action against the Director of the Division of Securities and Retail Franchising seeking a declaration that a 1980 amendment to the Va. Take-Over Bid Disclosure Act (VA. CODE § 13.1-529(b) (iii)), which applied the Act to open market purchases including those made over-the-counter, was unconstitutional. Prior to that amendment, open market purchases were specifically exempted from the Act. The amendment provided that an offeror who owns more than 10% of the outstanding shares and who has purchased more than 1% during the 12 months preceding the offer is presumed to intend to change the control of the target. The court cited MITE's Commerce Clause argument as dispositive and declined to consider any of the other grounds proposed. Although the facts seem similar to Esmark's, the state statute involved is not; in Esmark there was no specific statute attempting to cover over-the-counter transactions that could be attacked. Rather, there the court presumed the transaction fell within the Act.

These four cases indicate that, rather than trying to find a basis under which to save state take-over acts, the courts have considered MITE a basis for their destruction. See also State Developments, 34 SEC. REG. & L. REP. (BNA) (14) 1513-14 (August 27, 1982); State Developments, 40 SEC. REG. & L. REP. (BNA) (14) 1795-96 (October 22, 1982). 78. 639 S.W.2d 768.
80. Id. § 292.560(1).
The language "pursuant to a tender offer or request or invitation for tenders" is the same language used in § 14(d) of the Securities Exchange Act of 1934. For this reason, Esmark argued that its over-the-counter transactions did not represent a tender offer and filed a Schedule 13D rather than a Schedule 14D-1 with the SEC. In support of their argument that "tender offer" must be given its § 14(d) conventional meaning of a formal offer made directly to stockholders to buy their shares at a given price by a specified date, Esmark cited the testimony of a witness at the trial, Allan Solomon, an officer of National Industries. It was he who supervised the drafting and authorized the submission of the bill which became the Act to the Kentucky General Assembly. Mr. Solomon stated he worked on the bill because National was "concerned with a transfer of a major part of shares that would shift control," which "could only have been accomplished by means of a tender offer". He then defined a "tender offer" as "an offer that's publicized, that's made for a substantial number of shares, it's open for a limited time, at a fixed price. Sometimes it is contingent on receiving a certain number of shares and where pressure is put on stockholders to sell."

Strode, on the other hand, argued that Esmark's transactions fell under the definition "take-over bid," because Esmark had acquired from more than ten shareholders more than five percent of the stock of a Kentucky corporation. He further argued that the language "tender offer" must be broadly construed, quoting from a scholarly article written by one of Esmark's lawyers:

"Tender offer" was not defined by Congress in drafting the Williams Act nor by the SEC in adopting implementing rules. Case law, in defining "tender offer", has followed the Act's legislative history, which makes it clear that the Act was not intended to be restricted to conventional tender offers but rather was meant to encompass all methods of takeovers sought to be achieved by large-scale stock purchase programs . . . Lipton & Steinberger, "Cash Tender Offers," in Flom, Lipton and Steinberger, 1 Takeovers and Takeouts—Tender Offers and Going Private 9, 27 (1976).

82. Brief for Movant Esmark, supra note 8, at 14-27.
83. Id. at 26 n.19 (quoting Record at 2656).
84. Id. (quoting Record at 2657).
85. Brief for Strode at 16-18, 630 S.W.2d 768.
86. Id. at 18.
A narrow definition of "tender offer" according to Strode would frustrate the fundamental purpose of Kentucky's Act—protecting shareholders of companies closely connected with Kentucky, when those companies are the subject of a bid for control, by requiring the purchasers of control blocks to comply with the disclosure and substantive requirements of Kentucky securities law. 87

The Act further provides:

No offeror shall make a take-over bid if he owns five percent (5%) or more of the issued and outstanding securities of any class of the target company, any of which were purchased within one (1) year before the proposed take-over bid, and the offeror, . . . failed to publicly announce his intention to gain control of the target company, or otherwise failed to make a fair, full, and effective disclosure of such intention to the person from whom he acquired such securities. 88

Strode argued that this section was enacted to prevent "creeping tender offers", "by which an offeror attempts to accumulate a substantial or even controlling position in a target company, without complying with the statute, on the theory that a formal 'tender offer' has not been made." 89

Esmark countered that this argument contradicted Strode's prior analysis of the definition of "take-over bid", because if a "take-over bid" included "creeping tender offers," there would be no need for this section. Esmark further contended, however, that this section only applies to purchases made pursuant to a tender offer and that "open-market purchases which are not accompanied by other significant indicia [direct offer to buy at a specified price to be held open for a specified time] of a tender offer are plainly not proscribed by the Kentucky Act." 90

The Act also contained precommencement notice, hearing, and disclosure provisions. An offeror must announce his terms publicly at least twenty days in advance of his take-over bid, send a copy of the terms to the director of securities and the target, and wait ten days for the director of securities' decision whether or not a hearing will be held before making the offer. The hearing may be held either at the director's or the target company's re-

87. Id. at 18-19.
89. Brief for Strode, supra note 85, at 19.
90. Combined Brief for Esmark, supra note 8, at 14.
quest. The disclosure to be sent to the director of securities and the target company calls for the same information as the federal Schedule 13D.

Paradoxically, the Act also contained a provision permitting the director of securities to exempt take-over bids not made for the purpose, and not having the effect of changing or influencing the control of a target company. It is hard to imagine the basis for this section, for it would seem to be a contradiction in terms.

Finally, the Act provided as its only penalty, upon conviction for willful noncompliance, a fine of not more than $10,000 or imprisonment for not more than five years or both.

The Act, effective July 1, 1976, had hardly been passed when comment upon it questioned its constitutionality on (1) pre-emption grounds (arising from the fact that the local interest of protecting Kentucky corporations against take-overs places it in opposition to the neutral philosophy of federal legislation which seeks to protect the investor and the target in a take-over situation), and (2) Commerce Clause grounds, arising from its extraterritorial effect which places an undue burden on interstate commerce. But, until October 29, 1979, when the Commonwealth's Director of Securities, James C. Strode, brought an action against Esmark, there were no prior cases challenging it.

II. THE COURT'S REASONING

Esmark, Inc. v. Strode is noteworthy not only because it is the first suit of its kind in Kentucky, but also because it represents the first time since the United States Supreme Court has ruled on a state take-over act that a state court has declared its own act unconstitutional. Thus, the Kentucky Supreme Court's analysis is significant as a precedent for other state courts confronted with the question whether to uphold their own take-over acts.

The Kentucky Supreme Court's decision must be read closely

96. Brief for Strode, supra note 85, at 20.
97. 639 S.W.2d 768.
with the prior decisions of the Franklin Circuit Court and the Kentucky Court of Appeals, because significant facts are omitted (for example, when exactly Esmark's purported violation occurred). Although it is possible to fill in the facts, it is not so easy to fill in the reasoning. One hesitates, for example, to assume that the court's silence means acquiescence in the lower courts' opinions; it may equally well mean that it does not consider a given issue important. Because of these problems, interpretation of the court's reasoning is difficult. With that word of caution, we begin.

The issues presented in Esmark's appeal as described by the court were three: (1) whether the Kentucky courts had in personam jurisdiction over it; (2) whether Esmark's open market purchases constituted a tender offer within the meaning of the Kentucky Take-over Bids Act; and (3) whether the Kentucky Act violated the Commerce Clause of the United States Constitution. We shall address the court's response to each in turn.

(1) The court assumes jurisdiction. Its only comment on the subject was "[w]e do not get into the esoteric personal service question." Although the court acknowledged that the MITE decision involved a classic take-over bid and that it would be mere "conjecture" to speculate on whether that decision would be applicable to over-the-counter sales, the court still assumed that there was a tender offer when, in a footnote, it said that because of MITE, "[w]e do not sort through the myriad cases on 'creeping tender offers.'" The court then characterized as "interesting" a law review note which sought to expand the conventional definition of tender offer to "include any offer to purchase securities likely to pressure shareholders into making uninformed, ill-considered decisions to sell." Yet the court went on to say that the above-
quoted language "would not appear to be applicable in any event to the open market purchases made here as there is no showing that these sales had that effect." 104

(3) The entire thrust of the court's argument and the one it was anxious to discuss, because it considered it "dispositive," was the issue of whether the Kentucky Act violated the Commerce Clause. The court, after setting out the pertinent provisions of the Kentucky and Illinois Acts, proceeded to analyze the case in accordance with the *MITE* decision. The court failed, however, to distinguish the pre-emption analysis of Justice White as a plurality, not a majority opinion, when it said, "*MITE, supra*, holds that three provisions of the Illinois Act are preempted by the Williams Act . . ." and, "The issue stated by the Supreme Court is whether the Illinois Act frustrates the objectives of the Williams Act in some substantial way." 105

The court then went on to make an indirect pre-emption analysis. It was indirect because instead of first comparing the Kentucky Act with the Williams Act, it first compared the Kentucky Act against the precommencement, hearing and fairness provisions 106 of the Illinois Act (which the plurality in *MITE* found upset the neutral policy of the Williams Act toward cash tender offers), and by analogy found the *MITE* decision applicable to the Kentucky Act. The court concluded that the twenty day precommencement notification requirements of the Kentucky and Illinois Acts were essentially the same and conflicted with the Williams Act, which considers the critical date as the date a tender offer is "first published or given to security holders." 107 Both the Illinois and Kentucky Acts, by allowing for delay, gave the target company an advantage over the offeror, which runs counter to the neutral policy of the Williams Act. The court then found that the hearing provisions of the Kentucky Act were less objectionable than those of the Illinois Act, because in Kentucky the offeror would know within ten days if a hearing is required, whereas the Illinois Act provided for a twenty day notice, which could be extended at the discretion of the Secretary of State. Although the delay provided for in the Kentucky Act was substantially less of-

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104. 639 S.W.2d at 774.
105. Id. at 771.
107. 639 S.W.2d at 772.
fensive than that provided for in the Illinois Act, the court considered it "so objectionable as to fall within the prohibition of Mite." Finally, the court noted that, while the Kentucky Act did not provide for the director of securities to pass on the substantive fairness of a tender offer, as did the Illinois Act, "and for that reason the third issue in Mite is not on point," still it does confer on him the power to adjudicate after a hearing whether the offer discloses enough information to enable the investor to make an informed decision regarding the offer. Here, the court cleverly argued, the Kentucky Act overstepped its bounds:

[T]he terms of the disclosure in the Williams Act are set out in information required to be incorporated in Schedule 14D and Schedule 13D filed with the SEC and the disclosure requirements are tested by the Williams Act in that form and not by the director of securities in this state.

The court announced that the similarity between the two state statutes required the conclusion that the holdings in MITE were applicable.

Once again, however, the court failed to distinguish Justice White's opinion for the plurality from his opinion for the majority when it treated the following as the holding of MITE and held it applicable to the Kentucky Act:

The Illinois Act violates these principles for two reasons. First, it directly regulates and prevents, unless it terms are satisfied, interstate tendered offers which in turn would generate interstate transactions. Second, the burden the Act imposes on interstate commerce is excessive in light of the local interests the Act purports to further.

The majority in MITE only accepted the second principle as applicable to the Illinois Act. That principle is essentially the test of Pike v. Bruce Church, Inc. The court then went on to quote significant paragraphs from MITE supporting both principles. It concluded by saying, "[t]his language is equally applicable to the Kentucky Act, and we are of the opinion the Kentucky Act is in-

108. Id.
109. Id. at 773.
110. Id.
111. Id.
112. Id.
113. 397 U.S. at 142.
valid under the Commerce Clause of the U.S. Constitution.”114 It offered no analysis of the specific facts in this case which enabled it to reach this conclusion. The court noted only that Professor Ham’s law review article115 characterized the Act as one of local interest strengthening management. The court concluded its Commerce Clause argument by saying that Kentucky has no legitimate interest in protecting shareholders who live outside of its borders.116

The court then briefly addressed the two issues urged by Strode: (1) whether the court of appeals erred in reversing the trial court’s order that Esmark divest itself of all Reliance stock in excess of five percent;117 and (2) whether Esmark should disgorge any profits it made as a result of its purchases of Reliance’s stock.118 (1) The court, without elaborating, agreed with the court of appeals’ conclusion that there is no statutory provision authorizing divestiture as a remedy.119 In a footnote, it acknowledged that the issue may be moot since Esmark had already sold all its Reliance stock.120 (2) The court concluded by saying that its holding on divestiture “disposes of Strode’s disgorgement issue.”121

On its first challenge, the Kentucky Take-over Bids Act fell. The Kentucky Supreme Court did not even attempt to reconcile the factual differences between MITE and Esmark, for example, that in MITE only twenty-three percent of the target’s shares were held by Illinois residents compared with sixty percent being held by Kentucky residents in Esmark. Rather, it went straightaway to conclude as in MITE that a state has no interest in protecting shareholders outside its borders, and that, for that

114. 639 S.W.2d at 774.
115. Id. (citing Ham, supra note 95).
116. 639 S.W.2d at 774.
117. Id. at 774-75; Strode v. Esmark, Inc., [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,538 at 97,807 (Franklin Cir. Ct. May 13, 1980).
118. 639 S.W.2d at 774-75.
119. Id. at 775 (citing Esmark, Inc. v. Strode, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,238 at 91,583 (Ky. Ct. App. April 3, 1981)). The court of appeals said that the Kentucky Act is a remedial statute creating rights and liabilities unknown to the common law. Because it provides for specific remedies, those remedies are exclusive.
120. 639 S.W.2d at 774, n.3; Combined Brief for Esmark, supra note 8, at 34.
121. 639 S.W.2d at 775. The court, however, did not acknowledge that the disgorgement issue had never been brought before either the circuit court or the court of appeals and for that reason could not be brought up at the supreme court level. Combined Brief for Esmark, supra note 8, at 35.
reason, such protective legislation, as the Kentucky Act purports to be, imposes a burden on interstate commerce. Such reasoning leaves not even a glint of hope that a future take-over statute would pass muster.

III. Analysis

The Kentucky Supreme Court's decision in *Esmark, Inc. v. Strode* is noteworthy more for what it chose not to address than for what it chose to address. Unlike a federal court, a state court cannot abstain from a challenge to the constitutionality of a state statute. But a state court must decline to hear a case where it does not have jurisdiction. Jurisdiction was challenged by Esmark both on *in personam* and on subject matter grounds.

Esmark contended that there was no *in personam* jurisdiction, because it did not do business in Kentucky (though acknowledging that its subsidiary, Estech, Inc., did), that it had not appointed an agent for service of process, and had not consented to the service made on it by serving Strode as provided under KY REV. STAT. § 292.430(2). That statute purports to provide jurisdiction over persons who violate Kentucky's Blue Sky laws by allowing service to be accomplished by serving the summons and complaint on the director of securities. Rather than attempt to challenge § 292.430(2) or to dismiss the case for lack of *in personam* jurisdiction, the Supreme Court of Kentucky assumed jurisdiction, dismissing Esmark's challenge as "esoteric." Since it did not say why, one can only assume that the court agreed with the Kentucky Court of Appeals' decision that personal jurisdiction was satisfied under the Court of Appeals for the Sixth Circuit's three prong test set out in *Southern Machine Co. v. Mohasco Industries, Inc.*

Second, Esmark contended that there was no subject matter

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122. Brief for Movant Esmark, supra note 8, at 9-14; Combined Brief for Esmark, supra note 8, at 5-12.
123. 639 S.W.2d at 775.
124. 401 F.2d 374, 381 (6th Cir. 1968):

First, the defendant must purposely avail himself of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, by the acts of the defendant or the consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.


jurisdiction because its open market purchases were not regulated by the Kentucky Take-over Bids Act. The Act defines a “take-over bid” as “the acquisition of or offer to acquire, pursuant to a tender offer or request or invitation for tenders . . .” from ten or more stockholders of more than five percent of the stock. The quoted language is exactly the language of § 14(d) of the Securities Exchange Act of 1934, clearly indicating that the legislature meant to cover under this Act the same kinds of transactions which are covered under the federal act. While it is true that what constitutes a tender offer is not always clear, the Supreme Court of Kentucky made little attempt to analyze this crucial element. In spite of its conclusion that there was no evidence that Esmark’s purchases resulted in an “offer likely to pressure shareholders into making uninformed, ill-considered decisions to sell,” the court still assumed that Esmark’s purchases came within the scrutiny of the Act.

Strode “instituted this action to prevent appellant Esmark from acquiring a controlling or blocking position in Reliance by means of a 'creeping tender offer.'” He cited § 292.570(2) which prohibits an offeror who owns more than five percent of the outstanding stock of a corporation from making a take-over bid until one year has passed since his last acquisition. The court again did not discuss whether Esmark had, in fact, made a take-over bid after it had acquired more than five percent of the stock. Instead, it presumed that MITE somehow controlled this issue and that, if

125. Brief for Movant Esmark, supra note 8, at 14-27; Combined Brief for Esmark, supra note 8, at 12-21.
128. 639 S.W.2d at 774. Contra Chromalloy Am. Corp. v. Sun Chem. Corp., 474 F. Supp. 1341 (1979), aff’d, 611 F.2d 240 (1979) where a target company was denied a preliminary injunction with respect to claims of an illegal tender offer under the Williams Act, Mo. Take-Over Bid Disclosure Act and Del. General Corporation Law on the ground that since there was “no pressure” placed on shareholders, plaintiff had “not shown sufficiently serious questions going to the merits of these counts to warrant a preliminary injunction.” 474 F. Supp. at 1347.
129. Brief for Strode, supra note 85, at 1, 6. Strode argued that the extensive telephone solicitations by Esmark’s brokers, particularly to institutional investors thought to hold Reliance shares constituted a tender offer. Esmark argued that these were open market purchases over a two year period at the prevailing market rate, without any special pressure, and that such telephone conversations by brokers in their daily business of buying and selling cannot be given the formal consequences of a tender offer. Combined Brief for Esmark, supra note 8, at 17.
130. Brief for Strode, supra note 85, at 7.
ESMARK, INC. V. STRODE

the statute was unconstitutional, it did not matter whether Esmark's offer constituted a tender offer or not.131

Such reasoning completely ignores the notion of justiciable controversy. Kentucky cannot assert a claim of right where there is none. It further ignores the general principle of statutory construction that, as between one or more reasonable interpretations, the one which would render the statute valid should be adopted.132 The court made no attempt to save the statute. Neither did it address itself to the Franklin Circuit Court's analysis of the balancing test enunciated in Pike v. Bruce Church, Inc.,133 under which the circuit court found that (1) the Kentucky Act operated in an even-handed manner because it applied to all offerors, neither favoring local investors at the expense of out-of-state investors nor insulating local citizens or businesses from interstate commerce; (2) that Kentucky had a legitimate interest in regulating the affairs of corporations incorporated in and operating under its laws, especially when sixty percent of the stock was held by Kentucky residents; and (3) that any burdens upon the offeror were incidental compared to the benefits gained by the public from compliance with the Act.134

Instead, the Kentucky Supreme Court immediately attacked the Act's constitutionality. Because the court did not first fully explore all other grounds for disposing of the case, particularly the argument that Esmark's purchases through brokers on the open market did not constitute an offer to Reliance's shareholders to tender their shares, its decision was premature. Although the Act would probably have fallen had a classic tender offer been the subject of its challenge, by its approach the court has further muddied the already unclear area of what constitutes "tender offer." It slammed the door on any future state legislation in this area135

131. 639 S.W.2d at 770 n.2.
132. George v. Scent, 346 S.W.2d 784, 790 (Ky. 1961); Folks v. Barren County, 313 Ky. 515, 232 S.W.2d 1010 (Ky. 1950).
133. 397 U.S. at 142. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (citing Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)).
135. On April 29, 1981, the North American Securities Administrators Association approved the report of its Tender Offer Committee to adopt a Uniform Take-Over Act whose purpose is to create uniformity in state regulation while still providing an effective state
and has in effect given to the federal government exclusive control of a field it claimed it was not pre-empting.\footnote{136. 15 U.S.C.A. § 78bb(a) (West 1981).}

Rosalie Van Nuis

\footnote{18.}

presence. The Act proposes only to cover classic tender offers, on the ground that creeping tender offers can best be regulated by the federal government. It does, however, offer two alternative proposals for states wishing to control creeping tender offers. One provides for a presumption of a tender offer once the purchaser has obtained 10% of a corporation's stock. The other, similar to Kentucky's, prohibits an offeror already holding five percent to make a tender offer until one year has passed since his last acquisition. State Developments, 626 SEC. REG. & L. REP. (BNA)(14) F-1, G-1 to G-6 (October 28, 1982).

Virginia in 1980 amended its Take-over Act to include a provision which embodied the first feature of a presumption of a tender offer and the second feature of a sanction of one year for not complying with the requirements resulting from the presumption. It was held unconstitutional under a MITE analysis in Telvest v. Bradshaw, 547 F. Supp. 791 (E.D. Va. 1982). That case was decided two weeks before Esmark. Although the Kentucky Act did not contain a provision for a rebuttable presumption that the purchaser intends to make a tender offer, the court treated it as if it did.

If the Uniform Act was passed by all states, it might defeat MITE's argument that a state has no business burdening the shareholders of another state since all states would be imposing the same burden, but that, in effect, would mean two sets of uniform laws: one imposed by the states and one imposed by the federal government. Would anything be served thereby?

Since the MITE decision, the status of the Uniform Act is in limbo. State Developments, 40 SEC. REG. & L. REP. (BNA)(14) 1759 (October 15, 1982).
TORTS—PRODUCTS LIABILITY—SHOULD CONTRACT OR TORT PROVIDE THE CAUSE OF ACTION WHEN A PLAINTIFF SEEKS RECOVERY ONLY FOR DAMAGE TO THE DEFECTIVE PRODUCT ITSELF—


INTRODUCTION

In July of 1975, a new Michigan loader tractor shovel, model 475B, rolled off the assembly line of Clark Equip. Co. [hereinafter referred to as Clark], a Delaware corporation with its principal place of business in Michigan. On the 22nd of that month, the shovel was sold and shipped to Linder Industrial Machinery Co. of Lakeland, Florida, which, on November 15, 1975, leased the machine to Chester Berry of Miami, Florida. Berry retained possession of the unit until April 30, 1976, when it was sold successively to Ike Turner Mining Co., Quality Coal, and finally, on November 19, 1976, to C & S Fuel, Inc. [hereinafter referred to as C & S].

C & S, a Kentucky fuel company, purchased the machine for $285,000 to remove coal overburden from a strip mining site in Leslie County, Kentucky. On March 16, 1977, after C & S had used the machine approximately 750 hours, an explosion and fire occurred while the shovel was in operation, resulting in its total destruction. No personal injury or collateral property damage was sustained.

A products liability action with jurisdiction based upon diversity of citizenship was subsequently filed by C & S in federal court in which it sought to recover the value of the destroyed shovel on theories of strict liability and negligence. In the fall of 1981, Clark filed a motion for summary judgment, contending inter alia that because the destruction of the shovel was an economic or commercial loss, commercial law, not tort law, should


2. The machine reportedly had approximately 2000 hours of work time on it when C & S made the purchase; see Plaintiff’s Memorandum In Opposition to Defendant’s Motion For Summary Judgment at 3, C & S Fuel, Inc. v. Clark Equip. Co., 524 F. Supp. 949 (E.D. Ky. 1981) [hereinafter cited as Brief for Plaintiff].
govern disposition and, that because C & S failed to state any cause of action in contract or warranty theory, the complaint should be dismissed.\(^3\) C & S attacked Clark's contentions by arguing principally that a defective product should be considered "property" for purposes of strict liability under THE RESTATEMENT (SECOND) OF TORTS § 402 A,\(^4\) and accordingly, when a defect causes the product's self destruction, the resultant loss is actionable outside the warranty strictures of the Uniform Commercial Code.\(^5\)

The district court recognized that Kentucky law would govern the disposition of the case. The issue presented was whether Kentucky law would permit a purchaser to maintain a tort action against a manufacturer based upon RESTATEMENT (SECOND) OF TORTS SECOND § 402 A strict liability in order to recover the value of a product destroyed by its own defective condition, or whether the buyer's cause of action existed exclusively under the Uniform Commercial Code's warranty provisions which articulate a buyer's remedies when products fail to properly perform. The significance of this issue is that, due to Kentucky's adoption of a highly restrictive privity of contract requirement under the Uniform Commercial Code,\(^6\) if the Code approach were adopted, remote purchasers would have no available remedy when an inherently defective product subsequently damages or destroys itself.

District Judge Siler noted that no Kentucky court had squarely addressed this issue. While the court was "not unmindful of the defendant's forceful policy arguments in refusing to recognize a cause of action in tort,'" it still held that because the elements of a cause of action in tort and contract differ, C & S could maintain a tort action solely to recover for damage to the defective product

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3. Brief for Defendant, supra note 1, at 3-10.
4. RESTATEMENT (SECOND) OF TORTS § 402 A (1965) [hereinafter cited as 402 A] states:
   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
      (a) the seller is engaged in the business of selling such a product, and
      (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
   (2) The rule stated in Subsection (1) applies although
      (a) the seller has exercised all possible care in the preparation and sale of his product, and
      (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
5. KY. REV. STAT. ANN. § 355 (Baldwin 1981) [hereinafter referred to as the U.C.C.].
itself. Accordingly, the summary judgment motion was denied. The case then went to trial, resulting in a judgment for Clark, and is currently on appeal to the Sixth Circuit.

Although dispositive of the issue, Judge Siler’s opinion did not consider in depth the clashing policy arguments underpinning this controversy between the laws of tort and contract. Furthermore, no attempt was made to reconcile these converging theories consonant with the current tenor of Kentucky law. The Sixth Circuit now must don the robes of the Kentucky judiciary and attempt to untangle the knot of confusion surrounding this troublesome yet highly significant issue in Kentucky products liability law.

This article will consider the important factors the Sixth Circuit must evaluate when predicting how the Supreme Court of Kentucky would decide this issue. Included in this discussion is an analysis of the underlying policy conflicts between tort and contract law, and more specifically, the Restatement’s strict liability formulation and aspects of the Uniform Commercial Code. Additionally, the approaches employed by other jurisdictions are compared and contrasted and a new approach is suggested—all in an effort to determine whether 402 A strict liability or the Code should govern when recovery is sought exclusively for damage to a product injured or destroyed by its own defect.

I. PRODUCTS LIABILITY: THE DEVELOPMENT

One commentator and scholar has defined products liability as the nomenclature given to case law exposing sellers of chattels to liability to third persons with whom they are not in privity of con-

8. Id.
9. While this was not the only issue dispositive in the Judge’s denial of the motion, it is the only issue relevant for the purposes of this comment.
10. C & S Fuel, Inc. v. Clark Equip. Co., 552 F. Supp. 340 (E.D. Ky. 1982). Presiding at trial, Judge William O. Bertelsman found that C & S had not adequately shown negligence or breach of a duty to warn on the part of Clark. On the strict liability claim, however, the court did find the 475B shovel “defective” under 402 A, but precluded liability because a previous owner’s fuel deflector plate modification constituted a “substantial change.”
12. Clark was faced with this same issue in Rudd Cost. Equip. Co. v. Clark Equip. Co., Civil No. C79-0314 L(A) (W.D. Ky., May 8, 1981) where Judge Allen denied Clark’s motion for summary judgment and permitted Rudd’s claim in tort to stand. Judge Siler accordingly qualified his holding in this case by invoking the doctrine of “uniform application of the law,” stating that it would be incongruous to hold that the law for Clark was different in each half of the state. The Judge did, however, advise the parties to certify the question to the Kentucky Supreme Court for a dispositive ruling. 524 F. Supp. at 952.
tract. While the simplistically misleading parameters of this definition may cause contemporary products law practitioners to object, it does provide some insight into the historically problematic concepts that fostered the birth of modern products liability doctrine.

Negligence theory originally had been utilized for recovery in cases involving harm from products. The rigid privity of contract requirement set forth in Wright v. Winterbottom, however, seriously limited the feasibility of recovery for most plaintiffs who sought a remedy under negligence principles. The ensuing years found courts fashioning exceptions to the general privity rule by predominately focusing upon the various dangerous propensities of certain products. This abrogation of contractual privity culminated in McPherson v. Buick Motor Co., in which the court held that privity was no longer required in products cases based upon negligence. McPherson's abolition of privity, while expanding the field of potential plaintiffs, did not enhance the probability of recovery for most plaintiffs because a breach of a duty of due care, often a most onerous burden, still had to be shown.

The first semblance of a liability without fault or "strict liability" emerged from the concurrent development of warranty theory. In cases involving implied warranty, courts slowly began eliminating the privity requirement; this was first applied in cases involving food products, but was eventually expanded into other product areas. Later, cloaked in the garb of express warranty, strict liability concepts surfaced again. Often, however, plaintiffs advancing express warranty claims were required to prove several somewhat troublesome elements in order to recover.

14. The definition implies that a products liability action is not available to those who are in privity of contract.
17. 217 N.Y. 382, 111 N.E. 1050 (1916).
18. Comment, supra note 16.
The elements include: 1) a misrepresentation of fact, 2) made by defendant or chargeable to him, 3) with the expectation or intent of inducing plaintiff's action, and 4) reliance by plaintiff which induced purchase or use of product.
Because of this, implied warranty was the theory most often employed.

The overall impact of the implied/express warranty development was manifest in two distinct situations: purchasers could now sue remote sellers, and some non-purchasers could sue the seller with whom the purchaser was in privity. While these two situations necessarily engendered causes of action sounding in tort law, contractual notions continued to linger in most warranty cases. Often anomalous situations arose where plaintiffs, while advancing causes of action which essentially were tort based, were permitted to employ aspects of contract law and at times were defeated by contract defenses. A major step toward explicit recognition of a cause of action in tort was taken in Henningsen v. Bloomfield Motors, Inc., where the court declared that an implied warranty extended from the manufacturer to all foreseeable users, notwithstanding a lack of privity, for all products placed in the stream of commerce. This warranty did not require a binding promise on the part of the manufacturer because its imposition occurred by operation of law. The final step was taken by Chief Justice Traynor in Greenman v. Yuba Power Products, Inc., where he reasoned that non-privity, implied warranty cases such as Henningsen were essentially cases of strict liability in tort. The intended impact of Traynor's rule was not to abolish contractual warranty as a theory of recovery, but rather to demonstrate that consumer remedies did not rest solely upon contract law.

Collateral and subsequent to Greenman was the development of § 402 A of The Restatement (Second) of Torts [hereinafter referred to as 402 A]. The original drafts of 402 A, which at first included only food, were later expanded to cover all products

24. This situation was perhaps due to the fact that the term "warranty" rings of contract. Comment, supra note 16, at 32.
25. Franklin, supra note 23, at 992.
27. Id. at 412-17, 161 A.2d at 99-101.
29. See Franklin, supra note 23, at 992.
31. See supra note 4.
designed for "intimate bodily use." The doctrine took final form in 1964 and covered all products "in a defective condition unreasonably dangerous." 32

The "new" doctrine of strict products liability espoused by Greenman and 402 A soon disseminated to other jurisdictions as states, in whole or in part, began adopting either THE RESTATEMENT (SECOND) OF TORTS [hereinafter referred to as Restatement] or some other similar policy. 33 Kentucky followed suit and embraced 402 A in 1966. 34

II. C & S FUEL: 35 AN ANALYSIS

When the C & S Fuel litigants came before the District Court on the motion for summary judgment, the tort vs. contract dichotomy for recovery of damage to a defective product had never been squarely addressed by a Kentucky court. Judge Siler, however, considered three cases which at least provided guidance for his disposition.

The seminal Kentucky case which is of at least tangential significance is C.D. Herme, Inc. v. R.C. Tway Co., 36 where the purchaser of a semi-trailer sued the manufacturer when a defective kingpin failed, thus causing the trailer to overturn, which in turn damaged it and its cargo. The trial court had directed a verdict for the defendant. On appeal, the court of appeals took issue with the long standing rule of Olds Motor Works v. Shaffer 37 which had held that manufacturers are not liable for products that, because of a defect, are imminently dangerous, unless the manufacturers have actual knowledge of the defect or the defect is so obvious that knowledge can be presumed. 38 Furthermore, Olds Motor Works had reaffirmed the then "general rule" of non-liability of manufacturers to persons with whom they are not in privity. In an analysis strikingly reminiscent of McPherson v. Buick Motor Co., 39

33. Today over 30 jurisdictions have adopted Greenman or THE RESTATEMENT (SECOND) OF TORTS. Comment, supra note 16, at 34.
36. 294 S.W.2d 534 (Ky. 1956).
37. 145 Ky. 616, 140 S.W. 1047 (1911).
38. Herme, 294 S.W.2d at 536.
the Herme court overruled Olds Motor Works on both issues, permitted the plaintiff to proceed under ordinary principles of negligence, and remanded the case for further proceedings. Of equal significance in Herme, however, was the language extending foreseeability of bodily harm to include property damage. Because the recovery for property damage sought in Herme included the defective trailer, and because strict liability under 402 A permits recovery for property damage, this case is often cited as support for the proposition that Kentucky permits recovery under 402 A for damage to the defective product itself. But the controlling impact of Herme on this issue should be considered cautiously in light of several factors. First, Herme was decided in 1956 prior to Kentucky's enactment of the U.C.C. and prior to the adoption of 402 A in Dealers Transport Co., thus none of the cogent policy arguments surrounding the interrelationships of these two bodies of law were considered. Second, the primary issues in Herme involved privity, negligence of manufacturers, and the propriety of property damage as a component of foreseeable harm. The parties did not litigate whether a defective product is "property" for purposes of tort recovery, and it is not clear that the court sua sponte would have raised and decided this issue.

Herme was cited as controlling when this same issue arose in another district court case, Hardly Able Coal Co. v. International Harvester Co., where a tractor-bulldozer exploded, caught fire, and irreparably damaged itself. The plaintiff sought to recover the value of the tractor under theories of strict liability and negligence. On defendant's motion for summary judgment, Judge Shadur, applying Kentucky law, contended that Kentucky had

40. 294 S.W.2d at 536, 537.
41. "Although the duty is stated in terms of the foreseeability of bodily harm, we think that if the duty has been violated, the mere fact that the actual injury in the particular case happens to be to property only does not relieve the offender from liability." Id. at 537.
43. See, e.g., Brief for Plaintiff, supra note 2, at 13-14.
44. Kentucky enacted the U.C.C. in 1958, effective 1960. See supra note 5, prefatory note at 1.
45. 402 S.W.2d 441 (Ky. 1966).
46. See infra section IV of this comment.
47. The parties apparently presumed this. As later cases decided under the U.C.C. and 402 A demonstrate, this distinction was often critical to a determination of which law controlled disposition. See infra section IV-B.
spoken on the issue, quoting directly from *Herme.*\(^{49}\) The judge accordingly denied the motion and allowed the tort claim to proceed to trial, stating that the fact that other property was involved in *Herme* was irrelevant: "It is the fact that the Kentucky court specifically granted relief for the damages to the *product* that controls."\(^{50}\) No other authority was cited or discussed, nor was an in-depth analysis of *Herme* attempted. It therefore still remains open to speculation whether Kentucky would embrace *Herme* as controlling on this issue.

The final case Judge Siler considered was *Rudd Construction Equipment Co. v. Clark Equipment Co.*\(^{51}\) Rudd filed a three count complaint against Clark when the 475B tractor purchased from Clark caught fire and burned during a demonstration.\(^{52}\) Clark filed a motion for summary judgment contending that Rudd had no cause of action in strict liability under Kentucky law for recovery of the defective product itself. Judge Allen initially granted summary judgment for Clark, reasoning that since 402 A had principally been adopted to fill the gaps of contract law created by the privity requirement, these parties in privity must be relegated to the remedies of the U.C.C.\(^{53}\) On May 8, 1981, after re-examination of Kentucky's U.C.C. and 402 A, however, Judge Allen reversed himself: "While Section 402A was designed ... for the situation ... [where] ... privity ... was lacking, it does require proof ... that the defect was unreasonably dangerous, [an additional element] not [required] under a Uniform Commercial Code warranty claim."\(^{54}\) Therefore, the plaintiff’s tort claim was permitted to proceed to trial.

The motion for summary judgment in *C & S Fuel* was denied on the results of *Herme, Hardly Able Coal* and *Rudd.* Due to the antiquity and dubious authority of *Herme,* the incomplete conclusions of *Hardly Able,* the doctrinal vacillation in *Rudd,* and the uncertainty replete in *C & S Fuel,*\(^{55}\) the burden of determining a more

\(^{49}\) 294 S.W.2d 534 (Ky. 1956).
\(^{50}\) 494 F. Supp. at 251.
\(^{53}\) KY. REV. STAT. ANN. § 355 (Baldwin 1981).
\(^{55}\) See, e.g., supra note 12.
analytically complete resolution now falls upon the Sixth Circuit.\(^6\)

In considering this issue in the context of Kentucky law, that court must analyze the underlying policy considerations of 402 A and the U.C.C. as advanced by scholars and the courts of other jurisdictions.

III. RECOVERY OF DAMAGES IN PRODUCTS CASES: CONTRACT OR TORT?

As a broad proposition it can be stated that both contract law and tort law revolve around recognition of the same basic legal concept of duty. A breach of contract is said to be a material failure of performance of a duty arising under, or imposed by, an agreement between two or more parties. A tort is viewed, however, as a violation of a duty imposed by law, a wrong independent of any contractual duty.\(^5\) Because of the disparate nature of these two respective notions of duty, contract and tort law had followed essentially dissimilar paths throughout modern legal history. With the advent of the U.C.C. and 402 A, however, the law has witnessed the convergence and overlap of these two branches of theory in the field of products liability.\(^5\)

A. The U.C.C. And Strict Liability: A Comparison

The Uniform Commercial Code [hereinafter referred to as the Code] was promulgated\(^5\) to "simplify, clarify, and modernize the law governing commercial transactions."\(^6\) Article 2 of the Code specifically sets forth the rules applicable in transactions involving the sale of goods. Several Code sections are of particular relevance when defective product disputes arise. Section 2-313\(^6\) recognizes that the seller may make certain affirmations, pro-

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56. Both Rudd Construction and C & S Fuel are on appeal to the Sixth Circuit and both cases have raised this issue. The court's decision in Rudd, docketed prior to C & S Fuel, would effectively dictate the outcome of C & S Fuel on this issue.
58. Historically the courts did not confront the contract/tort dilemma because, to a large extent, the judicial technique utilized was guided by the theory chosen by the plaintiff's attorney. The U.C.C. and 402 A brought the conflict to the forefront as many thought 402 A encroached upon the U.C.C.'s provisions. See Franklin, supra note 23, at 990.
59. Promulgated by the Commissioners on Uniform State Laws and the American Law Institute; see supra note 5, prefatory note at 1.
mises, or “express warranties” of performance. Section 2-314 im-
poses an implied warranty of merchantability or fitness for or-
dinary purposes, while § 2-315 establishes the implied warranty of fitness for a particular pur-
pose. Section 2-316 states that implied warranties may only be
excluded or modified if in writing and conspicuous (for fitness) or
if specifically mentioned or conspicuous in a writing (for merchan-
tability). These sections make clear that freedom of contract re-
mains intact in every sales agreement, and that attempts to ex-
clude or modify the implied warranties imposed upon the seller by
law must explicitly be brought to the attention of the buyer. Fur-
thermore, §§ 2-714 and 2-715 stipulate the remedies available and
the damages recoverable for breaches of warranty, while § 2-719
permits a limitation or exclusion of remedies by agreement, ex-
cept where such exclusion or limitation is “unconscionable.”
Finally, § 2-318 extends the protection of the warranty provisions
to certain non-privity beneficiaries who are “in the family or
household of the buyer” and who are “injured in person by breach
of the warranty.” This section, particularly important in C & S
Fuel, denies a remedy under the Code to remote buyers and cer-
tain other third parties.

The overall tenor of the Code’s warranty provisions permits the
parties to a contract for the sale of goods to allocate certain risks
between themselves as they see fit, subject to specific Code rules
requiring full disclosure, conscionability, and fair dealing through
honest representation. In contrasting the Code’s provisions and
policies with the underlying rationale of strict liability under 402A
and general tort law, differing policy considerations emerge which
essentially draw the contract/tort battle line.

From a procedural standpoint, certain mechanical differences
are immediately apparent. The statute of limitations in Kentucky

63. Id.
67. Id. at § 355.2-316(2).
damages for personal injury is prima facie unconscionable.
from three alternatives. Kentucky chose the most restricted privity view of the three.
71. See Franklin, supra note 23, at 996.
for breach of warranty under the Code is four years from the time
when tender of delivery is made, whereas the statute of limitations
for personal injury under tort law is one year, and for property
damage, five years. Additionally, the Code requires notice
of a defect or injury "within a reasonable time." Many critics of
this requirement contend that, while notice functions well in the
commercial environment because it encourages parties to cure
their defects in performance, it is ill-suited for the consumer situa-
tion and should therefore be abandoned. Strict tort liability,
however, has dispensed with the notice requirement altogether.
Privity is still an important consideration under the Code,
whereas 402 A abandons privity as long as the individual harmed
by personal injury or property damage was the "user or con-
sumer." The Code permits modification, limitation, and exclusion
of warranties, liability, and remedies; strict liability for manufac-
turers, on the other hand, generally cannot be limited or dis-
claimed, as provided under the Code, because manufacturers
would in effect be permitted to define the scope of their respon-
sibilities for dangerously defective products. Kentucky as well
has taken a dim view of tort disclaimers, stating that such contrac-
tual provisions are not favored, are strictly construed against the
reliant party, and require clear and explicit contract language to
effectively absolve one from liability.

Aside from these mechanical differences, the underlying pur-
poses of strict liability reveal that the Code and 402 A protect fun-
damentally diverse interests. Dean Prosser has posited that strict
liability developed to provide to remote consumers the same stan-
dard of quality that the warranty of merchantability ensures to
immediate purchasers; this quality would otherwise be denied by
the "intracacies of contract law." But this statement seems to im-

72. KY. REV. STAT. ANN. § 355.2-725(2) (Baldwin 1981).
73. KY. REV. STAT. ANN. § 413.140(1)(a) (Baldwin 1981).
74. KY. REV. STAT. ANN. § 413.120(6) (Baldwin 1981).
75. KY. REV. STAT. ANN. § 355.2-607(3) (Baldwin 1981).
76. See Note supra note 30 at 123-24.
77. RESTATEMENT (SECOND) OF TORTS § 402 A, comment m (1965).
78. See supra note 70.
79. See supra note 4.
82. City of Hazard Municipal Housing Comm. v. Hinch, 411 S.W.2d 686, 689 (Ky. 1967).
ply that the standard of quality demanded by both the Code and 402 A are otherwise the same. While both the Code, through its merchantability warranty, and 402 A address "quality" in the sense that they provide purchasers redress for defective products, it is the type of defect they protect against that differentiates the two. The Code addresses products that are not fit for the purpose intended, as where a toaster fails to toast bread, and it will provide a remedy when personal injury or property damage results from the defect.\textsuperscript{84} Strict tort, on the other hand, requires proof of a different element: the defect must render the product "unreasonably dangerous." Even if the use of a product produces physical injury or property damage, the plaintiff still must demonstrate its unreasonably dangerous defective condition in order to recover.

Because of the potentially harmful consequences of unreasonably dangerous products, many courts have recognized that a major purpose of strict tort liability is to deter manufacturers from marketing products that are hazardously defective.\textsuperscript{85} It is reasoned under deterrence theory that the manufacturer, rather than the injured consumer, should bear the risk of the unsafe products it places on the market because the consumer has a right to expect that a product will be safe for its intended use.\textsuperscript{86}

The Code allows the parties to negotiate over the allocation of certain risks and expectations relative to the product's function and performance. Peripheral hazards of injury, however, are generally beyond the scope of the risks which can be allocated through the bargaining process.\textsuperscript{87}

\textbf{B. Approaches Implemented To Resolve The U.C.C./Strict Tort Dilemma}

From a much broader perspective, the Code and 402 A exist to compensate injured parties consonant with the philosophies inherent in the laws of contract and tort, respectively. Contract law seeks to protect the non-defaulting party's interest in restitution, which envisions recoupment of benefits bestowed upon the

\textsuperscript{85} See Comment, supra note 16, at 42-43.
\textsuperscript{87} See Moorman, 91 Ill. 2d at 96-97, 435 N.E.2d at 455-56 (Simon, J., concurring).
defaulter prior to the breach of the contract; reliance, which pro-
tects the investments made or detriments incurred in reliance on 
the contract; and expectation, which puts the non-defaulter in the 
same financial position he would have been had the breach not oc-
curred, provided these gains were foreseeable when the contract 
was made. 88 Kentucky recognizes these interests. 89 Conversely, a 
person injured by tortious conduct is entitled to the actual 
pecuniary compensation for the injuries sustained, and, except 
where punitive damages are warranted, he is limited to such 
recovery. 90 Furthermore, property damage is within the ambit of 
compensable injury under tort law. 91

Due to these disparate theoretical approaches to compensation, 
many courts in products cases have employed a "type of harm" ap-
proach whereby the actual damages incurred are identified and 
then classified in an effort to determine whether the Code or 
strict tort will afford relief. 92 This approach generally recognizes 
several classifications of damages: personal injury, which compen-
sates for bodily harm; property damage; and economic damages, 
which include failure of purchaser expectations, lost profits, loss 
of use, etc. 93 The genesis of this analytical scheme is usually traced 
to Seely v. White Motor Co., 94 where the plaintiff's suit arose after 
he purchased a defective truck for use in his business. The truck 
had been repaired numerous times following its purchase until 
finally, on one occasion, the brakes failed and the truck over-
turned. No personal injuries were sustained. The plaintiff subse-
quently had the truck repaired and stopped his payments; soon 
thereafter the vehicle was repossessed. Based upon theories of 
strict liability and breach of warranty, the plaintiff sought to 
recover his expenditures for repairs, his purchase payments, and 
his lost profits.

In the momentous opinion which followed, Justice Traynor sum-
mari ly allowed recovery for the lost profits and purchase 
payments on the theory of express warranty. In what was ob-
vously dicta, however, Traynor went on to examine the strict tort

89. SEG Employees Credit Union v. Scott, 554 S.W.2d 402 (Ky. Ct. App. 1977).
90. Western Union Tele. Co. v. Guard, 283 Ky. 187, 139 S.W.2d 722 (1940).
91. Reed v. Mercer County Fiscal Ct., 220 Ky. 646, 295 S.W. 995 (1927).
92. See Franklin, supra note 23, at 980.
93. See Note, supra note 76, at 118.
94. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
doctrine he had announced in *Greenman*. Stating that strict tort liability was designed to "govern the distinct problem of physical injuries" suffered by plaintiffs out of privity with the manufacturer, Traynor denied that strict liability would afford relief for purely economic or "commercial" losses which he said were more properly remedied under commercial law. Therefore, the plaintiff's lost profits and purchase payments would not have been recoverable under strict tort. He did opine, however, that had the plaintiff shown causation he could have recovered for the damage to the truck under strict liability because "property is so akin to personal injury that there is no reason to distinguish between them." 97

The approach engendered by *Seely* directs its analytical focus to the particular type of harm incurred by the individual plaintiff. Injury to the person or the property of the plaintiff (which would include the defective product itself) is actionable under strict liability whereas economic losses are cognizable only under commercial or contract law.

Justice Peters, concurring and dissenting in *Seely*, advanced a contrary position, arguing that *Greenman*'s strict liability developed around the unequal bargaining positions inherent in manufacturer-consumer transactions. Under this "consumer approach," when innocent consumers are harmed in any way from manufacturers' defective products, all damages, including economic losses, should be recoverable as long as they proximately flow from the defect. Peters borrowed his reasoning from the pre-*Seely* case of *Santor v. A & M Karagheusian, Inc.*, where a plaintiff in a breach of warranty action sought to recover, directly from the manufacturer, the value of defectively streaked carpeting. The court's holding permitted the plaintiff to recover under an implied warranty theory despite the lack of privity. In dicta, however, the court stated that strict tort liability would also afford relief in this situation. Recognizing that strict liability had been principally applied in the personal injury context, the *Santor* court reasoned that the makers of products should have the same

96. *Seely*, 63 Cal. 2d at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.
97. *Id.* at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24.
98. 63 Cal. 2d at 26, 403 P.2d at 156, 45 Cal. Rptr. at 29 (Peters, J., concurring and dissenting).
responsibility regardless of what harm is actually incurred. In short, consumers are to be protected against all resultant harm because they "are ordinarily powerless to protect themselves." 100

Despite the inequality of bargaining positions inherent in the consumer transaction, Peters recognized, unlike the Santor court, that in some situations bargaining positions may in fact be equal. This equality is generally found where commercial entities negotiate for the purchase of certain products. In those situations, Peters contends that the Code's warranty and disclaimer provisions should govern the transaction and should also provide the remedy for all harm resulting from defective products. 101

Traynor's "type of harm" approach focuses upon the damages incurred by the plaintiff irrespective of his bargaining position, while Peters' "consumer approach" deems critical the plaintiff's ability to have bargained. When considering a literal application of either the Traynor or Peters approach in the context of modern products law, several weaknesses become readily discernible. First, the RESTATEMENT formulation of strict liability requires that a defective product be "unreasonably dangerous"; Seely's strict tort concept was based, however, upon the pre-402 A rule set forth in Greenman which did not explicitly require unreasonable dangerousness. Thus in jurisdictions such as Kentucky that have adopted 402 A, an application of either approach would in some situations produce anomalous results. Traynor's approach would allow recovery for a defective product's "loss" 102 and Peters' approach would allow recovery for all damages even though the defects causing these harms were not "unreasonably dangerous." Such a result in either case would nullify the strict tort policy of deterring manufacturers from marketing unreasonably dangerous products. 103

Second, both approaches fail to adequately consider the impact of the Code. Traynor's analysis, in always permitting a strict tort recovery for damage to the defective product, almost ignores the existence of the Code altogether. One must remember that the

100. Id. at 65, 207 A.2d at 312.
101. Seely, 63 Cal. 2d at 27, 403 P.2d at 157, 45 Cal. Rptr. at 29 (Peters, J., concurring and dissenting).
102. In Seely, Justice Traynor stated: "Under the doctrine of strict liability in tort . . . the manufacturer would be liable even though it did not agree that the truck would perform as plaintiff wished or expected it to do." Id. at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22.
103. See Comment, supra note 16, at 47.
Code permits parties to a sale of goods transaction to disclaim certain warranties and limit certain liabilities when products fail to perform commensurate with the parties' expectations.\textsuperscript{104} Moreover, when a defect results in "the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold," this loss is recognized as economic in nature.\textsuperscript{105} Thus when parties have effectively disclaimed certain warranties and liabilities in their sales contract with respect to the product's performance expectations, the Code would not provide a remedy for the resultant economic loss when a mechanical defect renders the product inoperable and worthless. Traynor's approach, however, would disregard the contractual agreements of the parties and would permit strict liability to provide the buyer with an avenue of recovery.\textsuperscript{106} In short, strict liability could be implemented to circumvent the terms of the bargain struck between the parties in a way that would supersede the relevant Code sections meticulously promulgated by the legislature to govern such situations.\textsuperscript{107}

The consumer analysis presents a similar problem. According to Peters' and Santor's\textsuperscript{108} formulation, consumers, due to their inferior bargaining positions, can recover in strict liability for all harm, including economic loss, which results from a defective product. But suppose a manufacturer disclaims certain warranties and economic liabilities in a contract of sale to a middleman buyer, who in turn disclaims the same warranties and liabilities to his buyer, and so forth through the distribution channel. If the ultimate consumer of that product suffers an economic loss as a result of a defect, the consumer approach would permit a direct strict liability claim against the manufacturer to recover that loss. This would essentially nullify the manufacturer's original disclaimers and would allow strict liability to undermine the protections afforded the manufacturer through the Code's provisions.\textsuperscript{109}

Due to the potential preemption of certain Code sections by the

\textsuperscript{104} See supra section IV-A.

\textsuperscript{105} Comment, Manufacturers’ Liability to Remote Purchasers for “Economic Loss” Damages - Tort or Contract?, 114 U. Pa. L. Rev. 539, 541 (1966); see also Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 288 (3rd Cir. 1980).

\textsuperscript{106} See supra note 102.

\textsuperscript{107} See 626 F.2d 280 (3rd Cir. 1980).

\textsuperscript{108} Santor, 44 N.J. 52, 207 A.2d 305 (1965).

\textsuperscript{109} Comment, supra note 16, at 48.
permissible recovery of economic damages under 402 A strict liability, the majority of courts have rejected the consumer approach's comprehensive damage recovery rationale in favor of an analytical scheme more consistent with Justice Traynor's *Seely* analysis. Most courts110 first will examine the plaintiff's losses and then classify them as personal injury or property damage, which are both recoverable under 402 A, or economic damage, which is recoverable only under the Code.111

The Code, through its breach of warranty provisions, sufficiently provides a remedy for economic loss; furthermore, economic loss includes a product's failure to conform to its contemplated expectations.112 Because of this, some courts reject that aspect of Traynor's approach which classifies a damaged defective product as property damage and instead contend that such loss is purely economic in nature.113 Accordingly, when a defective product damages or destroys only itself, regardless of the defect causing the harm, the argument advanced is that the buyer has lost only the benefit of his bargain and therefore may look only to sales law to recover his loss. When the transaction is commercial in nature and the parties occupy equal bargaining positions, this reasoning becomes even more compelling: the Code permits the buyer to protect himself by bargaining for a warranty and similarly contemplates that the seller will exact a higher price for providing one.114 Additionally, as Professor White115 posits, the parties to such commercial agreements are generally in the best position


111. See, e.g., Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 199, 364 N.E.2d 100, 104 (1977) ("The line of demarcation between physical harm and economic loss in our view reflects the line of demarcation between tort theory and contract theory.").

112. See supra text accompanying note 105.


114. See Brief for Defendant, supra note 1, at 5-6.

115. See Memorandum of Points, supra note 32. James J. White, author of the memorandum of points, was co-author with Robert S. Summers of HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (2d ed. 1980). He prepared this memorandum for use by defendant Clark in both C & S Fuel and Rudd.
to determine who should bear the risks of loss. Often the buyer will accept limited warranties to reduce his investment outlay and consequently he will purchase insurance to protect himself from any ensuing loss.\textsuperscript{116}

The inherent problem with drawing the strict liability/Code boundary through an application of this rigid 'bargain' analysis is twofold. First, the rule always categorizes the damaged defective product as "economic loss" and collateral property as "property loss." While seemingly simple in application, this division often makes it difficult for courts to reach logical and consistent results in subsequent cases that vary factually. For instance, in \textit{C & S Fuel}, had the tractor burned as a result of a defective engine purchased from a third party manufacturer, and had the operator suffered some minor injuries, in a products suit against the engine manufacturer the court would be faced with choosing between several alternatives.\textsuperscript{117} First, the court could determine that since physical injury was involved, the plaintiff could sue under strict liability to recover all his damages.\textsuperscript{118} Second, the court could separate the damages and allow recovery for the personal injury under strict tort and allow recovery for the other damage only under the Code. Third, the court could separate the damages and allow the plaintiff to recover under strict tort for the tractor itself, as "collateral property", and the physical injury, but allow recovery for the defective engine only under the Code. Thus, when the court selects one alternative over another, it fashions a rule that could prove illogical and unworkable in subsequent cases that differ factually.\textsuperscript{119}

Second, this analysis is flawed by the same weakness that plagued the Traynor and consumer approaches: it fails to evaluate the \textit{nature} of the defect. While both strict liability and the Code provide redress for damages resulting from defective products,

\begin{itemize}
\item[] \textsuperscript{116} Memorandum of Points, supra note 32, at 8.
\item[] \textsuperscript{117} Franklin, supra note 23, at 983, proposed this illustration.
\item[] \textsuperscript{118} Although unclear in the opinion, this appears to have been the approach implemented by the Supreme Court of Kentucky in Perkins v. Trailco Man. & Sales Co., 613 S.W.2d 855 (Ky. 1981), where the plaintiff brought a products liability action for "injuries" sustained when a trailer's defective hydraulic hoist assembly caused it to overturn. An examination of the appellant's brief reveals, however, that the injuries were not property damage but rather physical injuries to the plaintiff's head and back. See Brief for Appellant at 6, Perkins v. Trailco Man. & Sales Co., 613 S.W.2d 855 (Ky 1981).
\item[] \textsuperscript{119} For instance, if the court treated the tractor as collateral property with respect to the engine manufacturer, would the tractor's status as collateral property change with respect to the tractor manufacturer if he were also joined as a defendant?
\end{itemize}
402 A imposes upon plaintiffs the additional burden of proving the product "unreasonably dangerous." Conversely, the defect contemplated under the Code is qualitative in nature: it applies when the product is not fit for the purpose for which it was marketed and purchased. 120 Thus, when deciding whether damage solely to the defective product itself is actionable under 402 A or the Code, the best approach should focus upon an examination of the defect itself. 121

A few cases should illustrate the propriety of this approach. In Posttape Associates v. Eastman Kodak Co., 22 where a documentary filmmaker sued under strict liability for economic damages when film supplied by Kodak turned out to be scratched, a jury imposed liability under 402 A. The court of appeals reversed, holding that the defect posed a problem of quality and fitness for intended use rather than one of unreasonable dangerousness. Similarly, in Moorman Manufacturing Co. v. National Tank Co., 23 a food processor filed suit alleging, inter alia, 402 A strict liability when a grain storage tank developed cracks in one of the steel plates that composed its side wall. The Supreme Court of Illinois refused to allow recovery under strict liability, reasoning that the defect in the tank did not render it unreasonably dangerous. Rather, it held that the defect was one of quality which was actionalbe only under the Code. Finally, in Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 24 a case factually similar to C & S Fuel, a front-end loader caught fire and burned. The plaintiff sued under 402 A for the costs of repair and temporary replacement. The court of appeals permitted the recovery for the damage to the tractor under 402 A because the defect causing the destruction rendered the machine unreasonably dangerous: "[C]laims for damage to the defective product may be cognizable in tort law,

120. KY. REV. STAT. ANN. § 355.2-314, comment 2 (Baldwin 1981).
121. While recovery for defective product self injury under a negligence theory was not addressed in this writing, this author does not see that such an analysis would confuse the situation when a negligence claim is advanced. The Supreme Court of Kentucky in Nichols v. Union Underwear Co., stated that "the strict liability standard is no different from that of negligence . . . except that the seller is presumed to have knowledge of the actual condition of the product when it leaves his hands." 602 S.W.2d 429, 433 (Ky. 1980) (quoting Phillips, The Standard for Determining Defectiveness in Products Liability, the U. CIN. L. REV. 101, 103 (1977). Stripped of this knowledge presumption, the negligence inquiry would still require an analysis of the defect to ascertain foreseeability and risk of harm.
122. 537 F.2d 751 (3rd Cir. 1976).
123. 91 Ill. 2d 69, 435 N.E.2d 443 (1982).
124. 652 F.2d 1165 (3rd Cir. 1981).
and the items for which damages are sought are not determinative of the line between tort and contract. Rather, the nature of the defect and the type of risk it poses are the guiding factors.\textsuperscript{125}

This discussion of the defect-oriented analytical scheme demonstrated by these cases is not intended to imply that it is no longer necessary to determine whether the defective product itself is an economic or property loss; the interplay between 402 A and the Code requires this distinction.\textsuperscript{126} Instead, this approach seeks the same result but through a different channel. Unlike the 'bargain' rationale, which focuses upon the contractual relationship of the parties with respect to the purchased product, the 'product defect' approach concentrates upon the defect itself in an effort to draw the economic loss/property damage distinction. But distinguishing the nature of the loss in the context of the defect can prove problematic as the definitive line between 'dangerous' and 'qualitative' begins to blur. One commentator has proposed the following test: "When the defect causes an accident 'involving some violence or collision with external objects,' the resulting loss is treated as property damage. On the other hand, when the damage to the product results from deterioration, internal breakage, or other non-accidental causes, it is treated as economic loss."\textsuperscript{127} While several cases have applied this test,\textsuperscript{128} its application has generated some critical comment.\textsuperscript{129} The major criticism of this standard is that a court may have to engage in considerable judicial gymnastics in certain situations to determine whether a given product's harm resulted from an 'accident' or a 'breakdown.'\textsuperscript{130} Consequently, in an attempt to arbitrarily pigeonhole a particular occurrence, a court may find it has detoured into a collateral matter requiring time consuming analysis.

Despite this weakness, the accident/breakdown analysis at least recognizes the necessity of examining the damaged product in

\textsuperscript{125} Id. at 1174.
\textsuperscript{126} See Comment, supra note 16, at 49.
\textsuperscript{129} See generally Franklin, supra note 23.
\textsuperscript{130} Id. at 986-87.
light of the defect that caused its harm. Consistent with this focus, another writer has proposed this rule: "[A]ll damages are recoverable if the product is defective in the sense that it causes, or has a reasonable potential for causing, personal injury or damage to property other than the product itself."[131] Although allowing a recovery for all damages may be too expansive under this formulation, a variation of the rule might provide a workable solution in situations where recovery in tort is sought solely for damage to the defective product itself. This proposed rule variation would state: When a defect manifests itself in such a way that it has reasonable potential for causing personal injury or damage to property other than the product itself, but the only damage in fact incurred is to the defective product itself, the damage to the product should be actionable as property damage under 402 A strict liability. If this "manifestation of defect" rule were applied to the facts in C & S Fuel, the court would conclude that since the defect which destroyed the tractor manifested itself in the form of a consumptive fire that had a reasonable potential for harming the operator or other property that may have been in close proximity to the tractor, C & S should be permitted to maintain a cause of action to recover the value of the tractor under 402 A strict liability.

The adoption of such a rule would continue to advance the underlying objectives of 402 A. Manufacturers would further be deterred from marketing defective products that are unreasonably dangerous because the law would reinforce the policy that harm occasioned by hazardous products must be borne by the makers. Furthermore, purchasers could avoid the anomaly which requires them to have incurred personal injury or collateral property damage before a strict liability action could be maintained.[132]

Unlike the bargain approach which views the loss of the defective product occurring through any defect as an economic loss, this "manifestation of defect" approach recognizes that the law does not require purchasers to bargain for reasonably safe products because manufacturers have a legally imposed duty to furnish them.[133] Additionally, because purchasers are not expected to

132. Id.
bargain for safe products, the nature of the plaintiff should be irrelevant: both commercial buyers and consumers are legally entitled to products that are safe.\textsuperscript{134} Moreover, permitting tort recoveries for products damaged as a result of unreasonably dangerous defects would not encroach upon the Code because different interests are at stake.\textsuperscript{135} The Code provides redress for losses sustained because of a product's failure to perform as expected, whereas 402 A protects persons and property from unreasonably dangerous products.

Although this "manifestation of defect" rule employs a less rigid standard than the potentially cumbersome accident/breakdown test, it is contended here that 'accident' and 'breakdown' considerations would still be relevant factors in determining whether a particular loss was property or economic in nature. A major objection to implementing this rule, however, is that the "reasonable potential" test is essentially a negligence concept and it would impose upon manufacturers the duty to foresee a product's potential for causing personal injury or collateral property damage. Furthermore, liability would be imposed in situations where neither of these types of damage are in fact incurred. But the "reasonable potential" standard is not an evaluation separate from the "unreasonably dangerous" inquiry which Kentucky has recognized as negligence-based. In \textit{Ulrich v. Kasco Abrasives, Co.},\textsuperscript{136} Justice Palmore stated that "[t]hough strict liability does not depend upon negligence, a degree of kinship between the two does inhere in the term 'unreasonably dangerous.' Both utilize the concept of reasonable foreseeability."\textsuperscript{137} And Justice Lukowsky, in proposing his "risk versus benefit" analysis\textsuperscript{138} for design defect cases, recognized that one factor to be considered is "the likelihood that the product would cause the claimants [sic] harm or similar harms, and the seriousness of those harms."\textsuperscript{139} But this foreseeability is not boundless. As Justice Palmore stated in \textit{Sturm, Ruger & Co. v. Bloyd},\textsuperscript{140} "Whether a product is 'unreasonably dangerous' when put on the market is to

\begin{footnotesize}  
\begin{enumerate}
\item 134. \textit{Id.}
\item 135. \textit{Id.}
\item 136. 532 S.W.2d 197 (Ky. 1976).
\item 137. \textit{Id.} at 200.
\item 139. \textit{Id.} at 434.
\item 140. 586 S.W.2d 19, 23 (Ky. 1979) (Palmore, J., concurring).
\end{enumerate}
\end{footnotesize}
be assessed in terms of those persons 'who should be expected to use or be exposed to it.' 141

Practitioners in the products field may further object to this rule because plaintiffs would be more reluctant to settle cases if they have another theory of recovery in their arsenal, and more remote purchasers, both in chain of ownership and time, would be encouraged to file lawsuits when the product they have purchased destroys itself. But these objections must be considered in light of the practicalities of the situation.

First, the majority of purchasers who are in privity with either the seller or manufacturer will most likely first exhaust their remedies under the Code since the proof problems inherent in the "unreasonably dangerous" standard of 402 A will often make the cost in terms of both time and money far exceed the value of the item destroyed. Thus if a toaster blows up and destroys itself due to an unreasonably dangerous defect, most consumers will first look to the seller for replacement or refund. Second, while it is conceded that remote purchasers of relatively inexpensive products may have at their disposal a theory of recovery not otherwise available to them under the Kentucky Uniform Commercial Code's restrictive privity requirement, the same time and money cost factors will generally discourage new tort suits. 142 In short, it is doubtful that the courts will be deluged by a flood of new litigants seeking recovery for their damaged defective products.

The true beneficiaries of this rule are the remote purchasers like C & S who have made a sizeable investment in an expensive product that destroys itself due to a defect which renders the product unreasonably dangerous. Further complicating this plaintiff's chances of recovery, however, is the often-overlooked Product Liability Act of Kentucky. 143 The Act creates a presumption, rebuttable by a preponderence of the evidence, that products causing personal injury or property damage more than five years after the sale of the product to the first consumer are not defective. 144 This presumption, coupled with the necessity of proving unreasonable dangerousness, would operate to encourage settlement if not discourage litigation altogether.

141. Id. at 23.

142. Even if a remote purchaser at present has a legitimate tort claim, as where the toaster explodes and destroys the coffee maker next to it, the same prohibitive factors, i.e. attorneys fees, discovery, etc. probably already preclude the pursuit of this remedy.


V. Conclusion

When the Sixth Circuit undertakes an analysis of the issue presented in C & S Fuel, it is imperative that the court consider all the underlying policy considerations of 402 A strict liability and the Uniform Commercial Code, and interpret them consistent with the current state of Kentucky products liability law. Since Kentucky has adopted the RESTATEMENT formulation of strict liability with its 'unreasonably dangerous' requirement, the focus of any analysis should be directed at the nature of the defect itself and its potential for causing personal injury or collateral property damage despite the fact that only the defective product itself is damaged. When considering the nature of the defect, some courts have applied an 'accident' versus 'breakdown' test to determine if the harm that results to a product was property damage or economic loss. This writer, however, recognizing that an accident/breakdown analysis could be difficult to apply and could lead to arbitrary accident/breakdown classifications, proposes a "manifestation of defect" rule that would concentrate upon whether the defect manifested itself in such a way that a reasonable potential for personal injury or collateral property damage existed. If the defect did manifest itself in this manner, a cause of action under strict liability could be maintained. This rule would continue to serve the underlying purposes of 402 A, including protecting consumers from unreasonably dangerous products, without generating an onslaught of new litigation by plaintiffs seeking recovery for damaged or destroyed products.

JEFFREY T. ROYER

INTRODUCTION

On June 9, 1975, Tom Meadows suffered a back injury which necessitated absence from his employment at the Firestone Textile Co.¹ Tom sought and obtained workers’ compensation² for his employment-related injury.³ He returned to work approximately three months after his injury, but was off frequently during the ensuing nine months. At work, Tom was heckled by supervisors: “What are you going to try to get out of today?” “Here comes our workmen’s compensation case!” “Here comes the big faker.”⁴ In July, 1976, a department manager told Tom that he was his first workmen’s compensation case, and that he would be his last.⁵ On April 5, 1977, Tom Meadows’ employment with Firestone was terminated after he refused to do some assigned work which he claimed he could not physically perform.⁶

Tom Meadows filed suit against Firestone, alleging that his employment had been terminated solely because he had sought and obtained workers’ compensation.⁷ The circuit court jury found the reason for his termination was the filing of a compensation claim and awarded him $25,000 in compensatory damages.⁸

The appellant’s principal argument on appeal was that the trial court erred in refusing to dismiss the complaint since the plaintiff did not state a cause of action. The basis of this argument is the adherence in Kentucky to the common law rule that an employee not hired for a definite term is subject to dismissal at any time

⁴ Brief for Appellant, supra note 1, at 1.
⁵ Id.
⁶ Id. at 2.
⁷ Firestone, No. 81-CA-2460-MR, slip op. at 1.
⁸ Id. at 2. The jury had been instructed on punitive damages, but made no such award.
and for any reason. The appellee contended that the dismissal of an employee for asserting his rights under the Workers' Compensation Act is a violation of public policy and should give rise to an action of wrongful discharge. The Kentucky Court of Appeals held that the implied policies of the Workers' Compensation Act were "part of the employment contract between the parties so that if the primary motivating factor in the appellant's discharge of the appellee were in retaliation for asserting a compensation claim, then the contract of employment was breached." The court declared the evidence that the appellee had been dismissed for filing a compensation claim to be sufficient and affirmed the trial court's verdict of wrongful discharge.

In holding that the appellant's actions constituted a wrongful discharge of the appellee, the court has refused to follow the historical precept that an employee not under contract is an employee "at will" and as such may be discharged at any time and for any reason. This is a significant change in the employer-employee relationship and will have significant ramifications throughout the law. This note will examine the evolution of the "at will" rule and the recent development of exceptions to the rule. Attention will also be focused upon Kentucky's suspension of the "at will" rule in the feature case and the impact of this decision upon future litigation in the state.

I. DEVELOPMENT OF EMPLOYEE AT WILL RULE

The common law has not always treated the employee as harshly as it has in the last 100 years. Under the early English common law, an employee was protected from being capriciously discharged and could only be discharged for a reasonable cause. The English rules were adopted by the early American courts, but the rule was slowly transformed during the laissez-faire environment of the late 1800s. The courts tended to shy away from

9. Id.
10. Id.
11. Id. at 5.
12. Id. at 7-8. The court declined to review the trial instruction on punitive damages since no punitive damages had been awarded. Id.
regulating businesses, letting them have greater and greater control over their operations, with little or no legislative or judicial intervention. The employment relation was seen as one of a unilateral offer, or a series of unilateral offers, accepted by the employee through each day’s performance. The employee could easily be terminated by withdrawal of the offer. This “employment at will” doctrine was summed up by H.G. Wood in his treatise on master-servant relationships:

With us the rule is inflexible that a general or indefinite hiring is **prima facie** a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed or whatever time the party may serve.

The terminable at will rule was widely accepted by the American courts. The rule appeared to make sense because the employer was given total control over the work force and the employee had the advantage of being able to quit at any time it seemed suitable to do so. Freedom to contract and dismiss at will were seen as essential rights in the early industrial environment, and efforts to restrict those rights were struck down by the United States Supreme Court.

In the late 1930s, there was a shift in the judicial view of the employer-employee relationship. The weak bargaining position of the employee was recognized and the right of such employees to unionize was acknowledged. While the promulgated decisions granted more rights to the workers, the courts still espoused strict adherence to the terminable at will rule.

Development since the late 1930s has shown an increased

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17. See, e.g., Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1915). In both of these cases, the Court struck down statutes prohibiting dismissal of an employee for joining a union.
19. E.g., J. I. Case Co. v. NLRB, 321 U.S. 332 (1944) (an employer is free to select or discharge except as restricted by a collective agreement or unless the result is unfair labor practices such as discrimination).
awareness of the need for employee protection in the market place. Numerous statutes have been passed by both the federal and state legislatures to protect employee rights.\(^{20}\) Included are protection from discharge for union activity;\(^{21}\) discharge based upon race, sex, religion or national origin;\(^{22}\) discharge based upon age discrimination;\(^{23}\) discharge of returning servicemen;\(^{24}\) or discharge based upon numerous other protected rights.\(^{25}\) While the list of legislative exceptions to the employment at will doctrine continues to grow, the courts continue to hold that an employee who has not contracted out of the employee at will category, or who does not fall within one of the legislative exceptions, may be discharged "for good cause, for no cause or even for cause morally wrong."\(^{26}\)

II. MODERN AMERICAN TREND: LESSENNED VULNERABILITY OF THE EMPLOYEE

Collective bargaining, state and federal legislation, and the Civil Service Reform Act of 1978\(^ {27}\) have made significant advances in decreasing the vulnerability of the modern employee.\(^ {28}\) Sixty to sixty-five percent of all American workers,\(^ {29}\) however, are not covered by a collective bargaining agreement and do not hold civil

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25. For additional examples of statutes limiting employers' right to discharge see Estreicher, At-Will Employment and the Problem of Unjust Dismissal: The Appropriate Judicial Response, 54 N.Y. St. B.J. 146, 147 (1982).
26. Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), rev'd on other grounds, Hutton v. Walters, 132 Tenn. 586, 179 S.W. 138 (1915). Payne was one of the original pronouncements of the terminable at will rule. Other cases indicate modern adherence to the rule. See, e.g., Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977); Martin v. Tapley, 360 So. 2d 708 (Ala. 1978); Hinrichs v. Tranquillaire Hosp., 352 So. 2d 1130 (Ala. 1977); Segal v. Arrow Indus. Corp., 364 So. 2d 874 (Fla. Dist. Ct. App. 1978); Kelly v. Mississippi Valley Gas Co., 365 So. 2d 1130 (Ala. 1977); Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978). These are just a few of the various decisions adhering to the terminable at will rule. For others, see Annot., 12 A.L.R. 4th 544 (1982).
29. U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979, 427 (Table 704—Union Membership); id. at 392 (Table 644—Total Labor Force); id. at 313 (Table 509—Government Employees), cited in Note, supra note 15, at 1816, n. 2.
service positions. These workers' jobs continue to be perceived as terminable at the will of the employer, while their government or unionized counterparts are terminable only for good cause.

The last bastion of the terminable at-will rule is found in the United States. The other western industrialized nations, including Great Britain, France, Germany, Japan, Italy, Sweden, and Canada, have all enacted "just cause" legislation for private sector employees.\(^3\) The United States, while loosening its grip, still clings to the terminable at will rule. One author\(^3\) has cited three reasons for the adherence to the rule: 1) Every employer should have a choice of whom to employ and over the terms and conditions of employment; 2) There is a lack of consideration by the employee to enforce an expressed or implied promise of continued employment by the employer; and, 3) Mutuality of obligation: Because the employee is free to quit at will,\(^3\) the employer is under no greater obligation. While these reasons offer valid rationalizations for the existence of the at will rule, they fail to consider: 1) a balancing of the employee's interest with that of the employer's; 2) that any consideration may support many promises; and, 3) mutuality does not require "equivalence in the values exchanged."\(^3\)

The tenacity of the rule has produced some harsh results in the courtroom. In Hablas v. Armour & Co.,\(^3\) an employee who had been terminated after forty-five years of satisfactory performance, one year from his retirement, was held to have no cause of action. In Hinrichs v. Tranquitaire Hosp.,\(^3\) an employee dismissed for refusing to falsify medical records was denied any remedy by the Alabama Supreme Court. In Kelly v. Mississippi Valley Gas Co.,\(^3\) the Supreme Court of Mississippi denied a judicial remedy to a worker who was fired for refusing to dismiss a workers' compensation claim. These cases, and thousands like them, represent the inequity of the at will rule. While the legislatures have

\(^{30}\) Estreicher, supra note 25, at 148.

\(^{31}\) Id. at 147.

\(^{32}\) In fact, the employee is granted the right to quit at any time by the 13th amendment to the United States Constitution, which prohibits involuntary servitude. U.S. Const., amend XIII, sec. 1.


\(^{34}\) 270 F.2d 71 (8th Cir. 1959).

\(^{35}\) 352 So. 2d 1130 (Ala. 1977).

\(^{36}\) 397 So. 2d 874 (Miss. 1981).
responded to the employees' vulnerability, the courts have continued, until recently, to apply the at will rule. Recognizing the harshness of the at will doctrine and the balance of interests necessary between the employers' and the employees' rights, some jurisdictions have begun to make exceptions to the right to terminate at will.

III. RECENTLY RECOGNIZED EXCEPTIONS TO THE TERMINABLE AT WILL RULE

The majority of courts which have allowed recovery for an unjust dismissal have premised their holdings upon a violation of public policy. The public policy exception has been used where the employee has been discharged for not committing a crime requested by his employer; where the employee has fulfilled a public obligation or duty and as a consequence was fired; and where the employee has exercised a statutory right resulting in dismissal. An alternative line of decisions has accepted the at will rule based upon contractual notions of good faith and fair dealing and implied provisions of the contractual relationship.

A. Discharge For Refusing To Commit A Crime

One of the earliest cases accepting the employment at will rule was Petermann v. International Brotherhood of Teamsters Local 396. Petermann involved an employee who was requested by his employer to commit perjury at a legislative hearing. Failing to do as requested, the employee was discharged the following day. The lower court had held that the employee did not state a cause of action. The appellate court reversed, noting as a general rule that the employee could be terminated at will, but to "more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury."

The California supreme court recognized the public policy ex-

37. See supra notes 20-25 and accompanying text.
38. The term unjust dismissal is used here as analagous to wrongful discharge, retaliatory discharge, and other similar terms.
ception to the at will rule again in *Tameny v. Atlantic Richfield Co.* The *Tameny* court allowed a cause of action for an employee who was fired after he refused to be involved in a price fixing scheme. The supreme court reasoned that while there was no specific statutory provision which prohibited the discharge of a worker for such cause, the principles of the state's penal statutes "require the recognition of a rule barring an employer from discharging an employee who has simply complied with his legal duty and has refused to commit an illegal act."\(^{42}\)

In accord with *Petermann* and *Tameny* are numerous other cases from other jurisdictions.\(^{43}\) The employee in these cases is placed in a difficult situation—he must choose between committing a crime or losing his job. The courts have recognized the blatant injustice of such a situation and have circumvented the at will rule in order to allow the employee to recover. To hold otherwise would effectively license the employer's coercion of the employee for purposes of committing a criminal offense.

**B. Discharge For Fulfilling A Public Obligation Or Duty**

Some courts have recognized an exception to the at will rule when the employee has been dismissed for fulfilling a public obligation or duty. One of the first cases to make this exception was *Nees v. Hocks*.\(^{44}\) In *Nees*, the employee was summoned to jury duty. Her employer asked her to try to get out of serving. Instead, the plaintiff told the court she would like to serve as a juror. When her employer discovered that she had not asked to be dismissed, she was summarily discharged. The court held that there could be circumstances where an employer discharges an employee for such a socially undesirable motive that the employer must be liable for damages.\(^{45}\) The court stated that the jury system and jury duty were "high on the scale of American institu-

\(^{41}\) 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). The employer was asked to try to pressure private gas stations to lower their pump prices. *Id.*

\(^{42}\) *Id.* at 174, 610 P.2d at 1333-34, 164 Cal. Rptr. at 843.


\(^{44}\) 272 Or. 210, 536 P.2d 512 (1975).

\(^{45}\) *Id.* at 218, 536 P.2d at 515.
tions and citizen obligations" and that the defendants would be liable for discharging the plaintiff because she served on a jury.46

The Supreme Court of Illinois ruled that a cause of action for retaliatory discharge would lie where an employee was discharged for reporting a fellow employee's criminal theft to the police.47 The court in Palmateer v. International Harvester Co. alluded to the newly established tort of retaliatory discharge with its purpose of protecting public policy. The court concluded that there was no clearer public policy than one which favored investigation and prosecution of criminal offenses.48

While the courts recognize the desirability of encouraging citizens to fulfill public obligations and duties, they have been reluctant to acknowledge duties or obligations which were not a "clear mandate of public policy."49 This suggests that courts will be reluctant to interfere with the at will rule in situations where there is not a clear statement of public policy involved. Public policy is typically found in statutes and prior judicial decisions and is difficult to establish in a situation of first impression.50 This narrow public policy determination would tend to limit the use of the public obligation or duty exception to the at will rule.

C. Discharge For Exercising A Statutory Right

Another exception to the at will rule has frequently been found where an employee is discharged subsequent to exercising a statutorily granted right.51 This exception serves to effectuate the purpose of such legislation, while strict adherence to the at will rule would hinder the employee's ability to exercise rights granted by statute. Some jurisdictions have ruled, however, that

48. Id. at 133, 421 N.E.2d at 880.
50. See Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (court did not grant an action to an employee who was fired after he forced the company to take a defective product off the market); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (Hippocratic oath does not contain a clear mandate of public policy which prevents employees from continuing work on a possibly dangerous drug).
51. This generally refers to rights granted by statute to protect employees in the employment relationship, the most notable example being workers' compensation provisions.
no cause of action exists where the statute does not specifically call for one.\(^52\)

A leading case in this line of exceptions to the at will rule is *Frampton v. Central Indiana Gas Co.*\(^53\) The plaintiff was discharged from her employment after receiving a workers' compensation settlement. There was no allegation that the plaintiff had improperly filed or had given other cause for termination. The court stated that while under ordinary circumstances an employee at will may be discharged without cause, an exception should be made when an employee is discharged solely for exercising a statutorily conferred right.\(^54\) In a particularly insightful paragraph, the *Frampton* court summed up the reason for an exception to the at will rule:

The [Workmen's Compensation] Act creates a *duty* in the employer to compensate employees for work-related injuries (through insurance) and a *right* in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation—opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.\(^55\)

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54. *Id.* at 252, 297 N.E.2d at 428. Accord Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1979).

55. 260 Ind. at 251, 297 N.E.2d at 427 (emphasis in original).
D. Exception To At Will Rule Based Upon Contract Notions

While the "public policy exceptions" to the at will rule are the most common, there are some difficulties in their application. The problem of defining a public policy violation has led some courts to portray the at will employee as being involved in an implied contractual relationship with the employer. These implied covenants include a duty to act in good faith and fair dealing. Other courts have allowed a rebuttal of the terminable at will rule where the plaintiff can show a reliance upon implied-in-fact promises. Still others have relied upon the doctrine of promissory estoppel when the employer has induced action or forebearance of a definite or substantial nature by the employee. This class of exceptions has avoided the harsh consequences of the rule in areas which are not governed by a legislative or judicial public policy.

A case which reflects the court's willingness to apply the duty of good faith rule to an at will employee is Monge v. Beebe Rubber Co. The plaintiff in Monge contended that she was fired after she refused to go out with her supervisor. The trial court found the evidence sufficient to award the plaintiff a verdict of $2500. The Supreme Court of New Hampshire noted that the prevailing common law rule was that such a hiring was presumed to be terminable at any time by either party. The court went on to suggest that, in any contract, courts must seek a balance between the interests of the employee and the employer. The conclusion of the

56. See supra notes 49-50 and accompanying text. In determining whether a private cause of action should be granted under a statute, the courts could employ a test similar to the one proposed in Cort v. Ash, 422 U.S. 66 (1975). This test consists of three inquiries:

1) Whether the plaintiff is a member of the class of persons for whose benefit this statute was enacted.
2) Whether the legislature has implicitly or explicitly manifested any intent to create or deny such a remedy.
3) Whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy.

Id. at 78.


60. 114 N.H. 130, 316 A.2d 549 (1974).

61. Id. at 133, 316 A.2d at 551.

62. Id.
court was "that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."63

The implied duty of good faith has also been imposed in cases where the employee is terminated shortly before pension rights or other pecuniary gains are due. This exception to the at will rule was applied in Fortune v. National Cash Register Co. 64 The plaintiff in Fortune alleged that he had been discharged in order to avoid the payment of commission that was due him. The court stated that every contract has an implied covenant that neither party will injure the rights of the other and that in "every contract there exists an implied covenant of good faith and fair dealing."65

Some courts have side-stepped the terminable at will rule by implying terms into the contract. The RESTATEMENT (SECOND) OF CONTRACTS allows for supplying a term that "comports with community standards of fairness and policy."66 The court may find terms implied from the custom of the industry, personnel manuals, 67 the stated compensation rate68 or from other surrounding circumstances. For example, the implication of a term of employment for a fixed period of time allows the court to evade the terminable at will rule and would permit a judgment of breach of contract where strict adherence to the employment at will contract would create an injustice. As previously discussed, 69 the court will imply a duty of good faith and fair dealing in every contract so as to avoid injustice.

In addition to the implication of good faith and other terms to the agreement, the court may apply the contractual concept of promissory estoppel to situations where the employee has acted

63. Id.
65. Id. at 104, 364 N.E.2d at 1257 (emphasis in original). But see Moore v. Home Ins. Co., 601 F.2d 1072 (8th Cir. 1979) (employee was denied a cause of action even though he alleged he was terminated to deny him pension benefits).
66. RESTATEMENT (SECOND) OF CONTRACTS § 204, Comment d.
69. See supra notes 60-65 and accompanying text.
detrimentally in reliance upon a promise of the employer. Such a situation occurred in *O’Neill v. AAA Servs.*, where the court found that the plaintiff's relinquishment of his former employment was based upon a promise that the new employer would promote and retain him for a reasonable period. While the doctrine of promissory estoppel allows the court to find a breach of contract where no consideration exists, the doctrine is limited to those cases where the plaintiff can prove reliance and that the reliance was detrimental. These elements of reliance and detriment may be difficult to prove in many employer-employee situations.

IV. WRONGFUL DISCHARGE: CONTRACT, TORT OR A LEGISLATIVE FUNCTION?

The exact nature of the underlying cause of action is not clear in wrongful discharge cases. Plaintiffs have brought actions framed in either contract or tort, or sometimes both. Courts have both granted and denied recoveries in contract or tort based upon similar circumstances. Some courts, however, have refused to grant a remedy to any plaintiff in a wrongful discharge action. These courts have held that this is an area of legislative concern and not an area for judicial lawmaking. In *Kelly v. Mississippi Valley Gas Co.*, where an employee was dismissed for filing a workmen's compensation claim, the court held that it would not create an exception not expressed by the legislature and that the facts presented were questions fit for the legislature and not the

72. See Note, supra note 68, at 866 nn. 33-35.
74. See Green v. Amerada & Hess Corp., 612 F.2d 212 (5th Cir. 1980); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978).
75. 397 So. 2d 874 (Miss. 1981).
In another case involving an employee fired for claiming workers' compensation, *Christy v. Petrus*, the court stated that the lack of any indication that the statute provided for a civil action would imply the legislature's intention that no such cause of action should be allowed. This reluctance by some jurisdictions to interfere with a perceived legislative function has led several scholars to propose a broad statute prohibiting unjust dismissals. This would be primarily a gap filler: a means of protecting those rights not already protected by statute. The passing of this type of statute, however, is highly unlikely since the at will employee has marginal lobbying power.

Tort actions are usually brought when the discharge can be shown to be contrary to public policy. This is justified by the notion that tort actions are "created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties." The tort action of wrongful discharge might be analogous to other tort actions such as abuse of process or product liability actions. Another related area of tort law comes under the violation of the statutory provision of the *Restatement (Second) of Torts* § 874A.

A principle reason for framing the plaintiff's action in tort is the measure of damages. Tort actions for wrongful discharge could include a claim for punitive damages and damages for emotional

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76. *Id.* at 877.
77. 365 Mo. 1187, 295 S.W.2d 122 (1956). Accord supra note 74.
80. See Estreicher, supra note 25, at 173. Abusive discharge prevents the use of legal procedures to terminate an employee for improper purposes. A plaintiff in a tort case of wrongful discharge would need to show that the employer had an improper motive for the discharge. *Id.*
81. See Note, supra note 15, at 1832. Since at will employees are like product consumers in that they have no means of obtaining needed protection, they are covered by law to the extent that they would be if they were free to bargain for such protection. *Id.*
82. Under §874A, a common law right of action may be granted to a member of a class protected by a legislative provision when the provision does not provide a civil remedy for its violation.
distress. The courts have indicated a willingness to grant both of these remedies where justified. Where the need for deterrence can be shown, or where non-pecuniary damages such as emotional distress are inflicted, the tort action might be preferred. Possible drawbacks to the tort theory would include a shorter statute of limitations and the difficulties, previously discussed, in establishing a violation of a clearly mandated public policy. At least one author has pointed out that courts are hesitant to expand the public policy upon which a tortious cause of action might be based. Also, courts may be reluctant to grant punitive damages since this grants a remedy to non-contractual workers that is superior to the remedy available to contractual or unionized workers.

The cause of action based upon contract has advantages under certain circumstances. These situations are generally ones in which the courts have not recognized a public policy exception to the terminable at will rule. Contracts principles, as discussed previously, will allow recovery in some of these situations where a tort action would not state a cause. Another advantage of proceeding under a contract theory is that generally there is a longer statute of limitations. Disadvantages of the contract theory would include the slight chance of receiving punitive damages. In fact, Monge v. Beebe Rubber limited recovery to only lost wages, ignoring the cost of finding new work, loss of future income and mental suffering. Another problem which might hinder recovery under the contract cause of action is the possibility of expressed or implied waiver of the plaintiff's right to an action of wrongful discharge. Such a waiver could be required by the employer thus eradicating any benefit that might have been gained from the implied contractual terms.

83. Kelsay v. Motorola, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (both of these cases held that punitive damages may be available in wrongful discharge cases, although not awarded in the cases at bar); Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976); M.B.M. Co. v. Counce, 596 S.W.2d 681 (Ark. 1980) (in these two cases the courts granted damages for infliction of mental suffering).

84. See Note, supra note 68, at 871.

85. The court's concern is that these two groups should have equal protection. The non-union worker does not have the bargaining power to achieve the job security enjoyed by the worker who is covered by a collective bargaining agreement.

V. TAKING A NEW LOOK AT AN OLD LAW IN KENTUCKY

The case of *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows* has clearly laid the terminable at will rule upon the judicial chopping block and the Kentucky Court of Appeals has sliced off a public policy exception to the rule. It remains to be seen whether the Kentucky Supreme Court will let the pieces lie or will make the rule whole again.

The appellate court noted that case law in Kentucky had long held that an employee not hired for a definite term was subject to discharge at the discretion of his employer. In *Gambriel v. United Mine Workers of America,* the court stated that when the term of employment is left to the discretion of either party, either party may terminate it at any time with no cause alleged or proven. The *Gambriel* court then cited cases going back more than one hundred years to support its conclusion. A more recent Kentucky decision, *Scroghan v. Kraftco Corp.*, reaffirmed the adherence to the rule. The plaintiff in *Firestone* claimed that his discharge for claiming his right under the Workers' Compensation Act was a violation of the public policy of the Commonwealth because the state protects workers' freedom to exercise their rights under the Act. This contention places the common law right to discharge and the established public policy of the state clearly at odds in an issue of first impression in Kentucky.

The court acknowledged the appellee's recognition of a trend of decisions which have allowed a cause of action for retaliatory discharge. The court also acknowledged the appellant's view that there was no such trend and that allowing such an action amounted to judicial legislation. The court then ruled that in their view the court had a duty not to become "a static body of

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88. Motion for discretionary review was filed Dec. 17, 1982. At time of this writing the Kentucky Supreme Court had not ruled on the motion.
89. *Firestone*, No. 81-CA-2460-MR, slip op. at 2.
90. 249 S.W.2d 158 (Ky. 1952). *Accord* Production Oil Co. v. Johnson, 313 S.W.2d 411 (Ky. 1958).
91. 249 S.W.2d at 160.
94. Id. at 3.
95. Id.
The court reasoned that a hiring at will allows for the same expressed or implied contractual rights that exist in every other contract and where the “contract of employment falls within the coverage of the Workers’ Compensation Act . . . the provisions of the act are deemed to be part of the contract.” The court further stipulated that the Workers’ Compensation Act benefitted the public as well as the workers, since the workers did not end up as public charges. The court held that the worker’s right to claim benefits without retaliation is a part of his contract. Therefore, the retaliatory discharge by the appellant constituted a breach of contract for which appellee could claim damages.

The court stated that this was a case of first impression before the appellate courts of Kentucky. While Firestone is the first case to bring an action based upon a public policy exception of statutory right, Scroghan addressed the same principle issue of the viability of the terminable at will rule. The plaintiff in Scroghan was discharged after he announced that he would attend night law school. He argued, like Meadows, that a trend had developed which prohibited employers from discharging employees for engaging in a lawful activity in which the community has an interest. The court held that the plaintiff’s interest was private rather than public and only public interests would be granted protection.

The ruling in Scroghan seems to suggest that the court would have allowed an action for wrongful discharge had the plaintiff shown a true public policy exception. As discussed previously, one of the most commonly recognized public policy exceptions to the at will rule is the exception based upon a statutory right. Tom Meadows was discharged for claiming his statutory right to workers’ compensation. It would seem logical that the Scroghan court would have granted a cause of action under Meadows’ circumstances.

96. Id.
97. Id. at 4.
98. Id. at 5.
99. Id.
100. Other cases have raised the issue, but the courts have avoided making a decision as the plaintiff’s contract was found to be for a fixed term, instead of at will. See Higdon Food Service, Inc. v. Walker, 641 S.W.2d 750 (Ky. 1982); Humana, Inc. v. Fairchild, 603 S.W.2d 918 (Ky. Ct. App. 1980).
101. 551 S.W.2d at 812.
102. Id.
Faced with a true public policy problem, the Firestone court had the dilemma of following the logic of Scroghan and granting an exception to the at will rule or claiming that the at will rule was in the legislative province and, therefore, not a matter for the courts. In creating the public policy exception to the terminable at will rule in Kentucky, the court acted responsibly. Changes in society have put the employee in a weak bargaining position which can result in harsh and unjust treatment. The employer's interests in being free to make business decisions must be balanced against the employees' right to some degree of job security. Society's interest in maintenance of established social policy must be added to the employees' side of the balance. When social policy is strongly opposed to the discharge of the employee, the balance will swing towards the employee and the employer's right to discharge will be limited. This is an appropriate response by the courts. The legislature has taken away the power of the employer to discharge for certain reasons. A discharge which frustrates other statutory policy or is blatantly unjust must be met with a response by the judicial system. It has long been the tradition of the common law that the courts will alter old rules or employ new remedies where circumstances have changed. "The common law is not now, nor was it ever a static body of law." The Firestone court found that the employer had committed a breach of contract by discharging an employee for filing a workers' compensation claim. This is an interesting holding since the plaintiff's complaint sounds in tort. The plaintiff based his cause on the violation of public policy and asked for punitive damages, both indicative of a tort theory of recovery. The court's use of the somewhat more conservative approach of contractual recovery may indicate its unwillingness to deal with the issue of punitive damages. Firestone v. Meadows has created a new cause of action in Kentucky, the wrongful discharge of an employee hired at will. How the Kentucky Supreme Court will handle this issue remains to be seen. It will be just as important to see how the marketplace will handle the result. Because the court has made it more difficult to discharge employees, it may have increased the inefficiency of the

103. See supra notes 20-25 and accompanying text.
104. Firestone, No. 81-CA-2460-MR, slip op. at 3.
105. Id. at 5.
106. See supra notes 72-85 and accompanying text.
marketplace. It would seem that this is a probable result in view of the prospect of litigation on each and every discharge. This would have the added result of burdening the court system with an immense increase in discharge cases. On the other hand, some efficiency might be gained by the restriction of arbitrary dismissals in the workplace. Unjustified dismissals tend to hamper the morale of the work force and their restriction could result in a boost to productivity.

Many other questions remain in light of the *Firestone* decision. For example, what will constitute public policy in Kentucky decisions? How will the court handle dismissals based upon more than one reason where one is contrary to public policy but the others are not? What about a case where the employee thinks he is acting for the good of public policy, but his belief is unfounded? How many of these rights will the Kentucky courts allow the employee to waive? Whatever the results of these unanswered questions, the Kentucky Court of Appeals has taken a progressive step in keeping the rights of the at will workers in line with those of the unionized workers and other protected workers.

**CONCLUSION**

The Kentucky Court of Appeals has responded to the need to balance the inequitable bargaining position of the at will employee together with the interest in the maintenance of proscribed public policy, against the legitimate business interests of the employer. This balancing process has led courts in other jurisdictions away from the harsh terminable at will rule which allowed an employee at will to be terminated for any reason or for no reason at all. Kentucky has followed this trend in the *Firestone* decision and future litigation or legislative action will delineate the scope of the wrongful discharge restrictions in Kentucky.

**J.L. SALLEE**

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107. For a discussion of some of these foreseeable problems, see Estreicher, *supra* note 25, at 174-75.
INTRODUCTION

A prospective client enters your law office for the purpose of initiating a procedure to recover damages against his employer for a work-related injury. He is also interested in retaining your services for his forthcoming divorce. His employer is covered by workers’ compensation insurance, but the prospect of a successful tort action is also supported by your client’s description of the events leading to his injury. Should the fact that your client is seeking a divorce have any bearing upon the election of remedies which are in your client’s best interest? In Kentucky, the answer is not clear, but the choice may be significant. In Johnson v. Johnson,1 Kentucky’s highest court has ruled that a lump-sum workers’ compensation award received by the husband shortly before the decree of divorce was marital property subject to equitable distribution.

The Johnsons were married August 13, 1969. Mr. Johnson was injured at work early in 1977. The injury required corrective surgery for a herniated disc. The Johnsons separated by mutual agreement on November 17, 1978. Mr. Johnson received an initial award of workers’ compensation on February 12, 1979, and he petitioned for dissolution of the marriage in June of that year. Although Mrs. Johnson made efforts to prove the award, neither the report of the special commissioner nor the findings of the trial court mentioned the award in constructing a decree of dissolution of the marriage.2 On appeal, appellant Mrs. Johnson asserted it was error to exclude evidence of her husband’s workers’ compensation award.

Accepting the issue of whether workers’ compensation benefits are marital property as one of first impression in Kentucky, the court of appeals3 turned to the relationship between such benefits and the marital union. The Workers’ Compensation Act defines the award as representing lost earning capacity,4 and provides that such benefits are not assignable and were exempt from the

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1. 638 S.W.2d 703 (Ky. 1982).
3. Id.
claims of creditors.\textsuperscript{5} The court concluded that there was no relationship between the compensation system and the marital union: such benefits were personal to the injured worker and represent remuneration for present and future losses of earning power. The court of appeals held that the lump-sum award was Mr. Johnson’s separate property.\textsuperscript{6}

In a seriatim opinion a mere eight sentences in length, the Kentucky Supreme Court reversed the court of appeals on the issue of the character of workers’ compensation benefits.\textsuperscript{7} Without referring to the Workers’ Compensation Act, and instead focusing upon KY. REV. STAT. § 403.190(2) which defines marital property, the court held that such benefits were marital property.

We need not look beyond the plain language of the statute to find the answer. It defines marital property as all property acquired by either spouse subsequent to the marriage, with five listed exceptions. Though an award of workers’ compensation may be intended to replace lost wages which otherwise would have been earned in the future, it nevertheless is money in hand and it is not within the exceptions to KRS 403.190, which is the controlling statute. The trial court erred in denying movant the right to prove the award.\textsuperscript{8}

The court proceeded to reverse the court of appeals on the workers’ compensation issue, but affirmed the child custody award (not germane to this note).\textsuperscript{9}

This note will examine how Johnson fits into the framework of reported Kentucky decisions which relate to the disposition of property under Kentucky’s present divorce laws. Further, the note will compare these decisions to cases from states which have undergone an evolution of divorce law comparable to Kentucky’s. The final focus of the note will concern a prediction of how Kentucky will respond to certain questions related to the issue before the Kentucky Supreme Court in Johnson.

The primary concern presented by Johnson is not so much what was said but, rather, the salient absence of all that could have been said. In this, the formative period of Kentucky’s new divorce laws, at a time when lower courts are grappling with the radical

\textsuperscript{5} KY. REV. STAT. § 342.180 (1983).
\textsuperscript{6} Johnson v. Johnson, No. 81-CA-399-MR.
\textsuperscript{7} Johnson v. Johnson, 638 S.W.2d 703 (Ky. 1982).
\textsuperscript{8} Id. at 704.
\textsuperscript{9} Id.
departure from the common law doctrine that equitable distribution involves, Kentucky's highest court has passed up an opportunity to enunciate and elaborate upon the meaning and effect of KY. REV. STAT. § 403.190. To dismiss the Johnson case as resolved under the 'plain language' doctrine may be too much judicial restraint in deference to too great a change in divorce doctrine too soon.

I. STATUTORY BACKGROUND

In 1972, Kentucky became one of the first states to adopt the provisions of the Uniform Marriage and Divorce Act (hereinafter referred to as UMDA). In the prefatory note to the UMDA, the Commissioners state that one of the principal purposes behind the UMDA is to eliminate the traditional concept that divorce is a remedy granted an innocent spouse based upon the marital fault of the other spouse. This notion of "no fault" extends into the UMDA's treatment of property division at divorce: such a division should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership.

Section 307 of the UMDA, as originally promulgated, defined all property of the spouses as presumably marital property and subject to an equitable division upon dissolution. This presumption could only be overcome by showing that the property in question fell into one of five listed exceptions defining separate property. It is this wording of section 30 which Kentucky enacted as KY. REV. STAT. § 403.190, with the added limitation to the last exception which provides that the increase in the value of property acquired before the marriage is separate property only "to the extent that such increase did not result from the efforts of the parties during marriage."

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11. UNIFORM MARRIAGE AND DIVORCE ACT Commissioners' Prefatory Note, 9 U.L.A. 93 (1979) [hereinafter cited as UMDA].
12. Id.
13. UMDA, § 307, Commissioners' Comment, 9 U.L.A. 144. The five exceptions are 1) property acquired by gift, bequest, devise or descent; 2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent; 3) property acquired after a decree of legal separation; 4) property excluded by agreement of the parties and 5) increase in value of property acquired before the marriage. UMDA, § 307, 9 U.L.A. 144 (amended 1973).
14. KY. REV. STAT. § 403.190 (Supp. 1982) provides:

Disposition of property.—(1) In a proceeding for dissolution of the marriage or for
Section 307 of the UMDA was subsequently separated into two alternate sections, apparently to satisfy both community property and common law property states. As amended, section 307 neither listed exceptions from marital property nor otherwise defined separate property. Although case law from other states adopting the same Uniform Act is normally highly persuasive authority, it may not be so in this instance due to variations in the three formulations of section 307. There is little purpose in examining the treatment of workers' compensation at divorce in states adopting an alternate provision of UMDA section 307 unless the enacted legislation reflects a purpose to enumerate and limit separate property in a manner consistent with KY. REV. STAT. § 403.190(2).

The hazard of comparing Johnson to cases from other states is compounded by a conflict of views over the purpose of workers' legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

(a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
(b) Value of the property set apart to each spouse;
(c) Duration of the marriage; and
(d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

(2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:
(a) Property acquired by gift, bequest, devise, or descent;
(b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
(c) Property acquired by a spouse after a decree of legal separation;
(d) Property excluded by valid agreement of the parties; and
(e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

(3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

15. UMDA, supra note 11, § 307.
16. Id. Alternative A makes no allowance for separate property. Alternative B provides that each spouse's separate property shall be assigned to that spouse but does not define separate property.
17. 2A STATUTES AND STATUTORY CONSTRUCTION § 52.05 (4th ed. 1973).
compensation. Whereas many states see such benefits as standing in lieu of lost earnings as measured by reduced earning capacity, other states have defined workers’ compensation benefits as a statutory substitute for the proceeds of a common law personal injury claim. Although liability under the Kentucky Workers’ Compensation Act is based upon injuries, computation of benefits is from a measure of earnings. It is the ‘lost earnings’ (or occupational disability) concept which the Kentucky courts have embraced as the characterization of workers’ compensation benefits, rather than the personal injury definition.

If the award represents lost earnings, it is not difficult to understand the Johnson decision that such benefits were marital property. If wages are marital property then compensation for wages lost during marriage would likewise be marital property. A different conclusion might have been reached if the benefits had been characterized as more akin to personal injury proceeds. The argument has been made, although unsuccessfully, that the portion of an award for personal injuries which compensates for pain and suffering is separate property because it redresses the loss of the well-being that the injured spouse brought into the marriage and, hence, is “property acquired in exchange for property brought into the marriage.”

In Johnson, the Kentucky Supreme Court did not address the court of appeal’s conclusion that the non-assignability provisions of the Worker’s Compensation Act prevented Mrs. Johnson from claiming a portion of the award. The Act itself is silent on the question whether it is meant to benefit only the worker or both

22. Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968). While noting that the arbitrary fee schedule of benefits for loss of body members was inconsistent with the occupational disability concept, Commissioner Cullen, writing for the majority, observed in a footnote that “[c]onsistency of the theory or philosophy has never been a feature of our workmen’s compensation law.” Id. at 802 n.1.
23. KY. REV. STAT. § 403.190(2) (Supp. 1983).
26. KY. REV. STAT. § 342.180 (1983) provides: “No claim for compensation under this chapter shall be assignable; and all compensation and claims therefor shall be exempt from all claims of creditors.” See 100 C.J.S. Workmen’s Compensation, § 387 (1958).
the worker and his dependents in the event of injury. Indeed this
distinction has proven pivotal when other states have considered
the issue whether such benefits were divisible at divorce. In the
case of Richards v. Richards,27 the New Mexico Supreme Court
concluded that such benefits were the separate property of the in-
jured spouse since the very title of its workers' compensation act
stated that its purpose was to provide benefits to the injured
worker, and, only in the case of his death, to his dependents.28 It is
implicit in Johnson that workers' compensation benefits, at least
at divorce, are meant to benefit the employee's spouse as well as
the employee.

II. RELATED KENTUCKY DECISIONS

In the wake of the divorce reform undertaken in most of the
states over the past two decades, it is an understatement to say
that much is yet unresolved. Attendant to a "no fault" concept of
divorce are pressing questions of how to characterize and dis-
tribute innumerable types of property rights and interests which
posed little difficulty under the abandoned common-law title and
its fault approach. At the heart of these questions are divergent
philosophies concerning the definition of "property" and the
related issue of when property is "acquired".29 In the same class as
workers' compensation benefits are personal injury awards and
pending claims, state and federal retirement and disability
benefits, and vested and nonvested pension plans.30 Whether pro-
fessional degrees and licenses are property is also a topic of cur-
cent legal debate.31 The lack of uniform treatment in this area,
within and among the states, is just as striking as the paucity of
attention it has received in the reviewing courts generally. Ken-
tucky is no exception in this respect.

The day Johnson was decided, the Kentucky Supreme Court
may have been unaware that the Kentucky Court of Appeals had,
just two weeks before, rendered an opinion on the same issue in
the case of Quiggins v. Quiggins.32 The facts of Quiggins are
remarkably similar to those of Johnson. The parties had been married for thirteen years, had three children, and the principal question for the court was whether a workers' compensation award received during the marriage for an injury which occurred during marriage was divisible as marital property at dissolution. The husband in Quiggins raised the same arguments as Mr. Johnson: the nonassignability provision of the Workers' Compensation Act prohibited his wife's claim to his workers' compensation award, and therefore the award fell outside the ambit of marital property defined in KY. REV. STAT. § 403.190(2). The court of appeals could easily have disposed of the question with the money-in-hand, not-within-the-exceptions analysis applied in Johnson. Instead, and perhaps with an aim to clarify matters and dispel perceptions of an inequitable characterization of such benefits, the court gave considerable attention to the issue. After reciting the provisions of section 403.190(2), the court took notice that there was no exception which defined workers' compensation benefits as separate property. Not satisfied that this ended the matter, and because it was a case of first impression in Kentucky, the court sought persuasive authority to buttress the principal that such benefits could indeed be considered marital property. This search revealed that Illinois, which defined marital and separate property the same as Kentucky, had addressed the issue in Lukas v. Lukas. Lukas similarly found that a workers' compensation award, to the extent it accrued and was actually paid over to the injured worker during marriage, was marital property since it did not fall into any exception from marital property.

The Quiggins court went on to consider the husband's contention that because such benefits could not be assigned and were exempt from the claims of creditors, the benefits were also exempt from distribution in spite of section 403.190(1). Although the appellant in Lukas raised the familiar arguments that the Illinois Workmen's Compensation Act was designed to benefit employees and not dependents, except in the event of the employee's death,
and that benefits were exempt from attachment or garnishment,\textsuperscript{40} the Illinois Court of Appeals resolved the issue by concluding that the commingling of the award with marital assets and the parties' treatment of the monies as marital property had the effect of transmuting the award into marital property regardless of the character it might have had otherwise.\textsuperscript{41}

The court in Quiggins could not so easily avoid the issue of whether the Workers' Compensation Act was controlling or, in the alternative, whether the UMDA should prevail. In Quiggins, there was no evidence that the award was ever commingled with marital assets or ever treated as marital property. The search for instructive authority led the court to Larson's Workmen's Compensation Law.\textsuperscript{42} The court noted that a trend has developed toward distinguishing between the claims of ordinary creditors to compensation benefits and the growing tendency to allow a spouse and children of a compensation claimant to reach such benefits to satisfy obligations of support.\textsuperscript{43} Apparently adopting this view, the court ended its investigation of the merits of the husband's contentions, reiterated that the Kentucky General Assembly in adopting section 403.190(2) showed a legislative intent not to exclude such benefits, and affirmed the trial court's finding that workers' compensation benefits are marital property.\textsuperscript{44}

As Quiggins was not mentioned by the supreme court in Johnson, it is a matter for speculation whether the court accepted its rationale as well as its holding. Read broadly, Johnson stands for the proposition that KY. REV. STAT. § 403.190 is controlling where it conflicts with other code sections, e.g., KY. REV. STAT. § 342.180 (workers' compensation benefits cannot be assigned and are exempt from the claims of creditors). The tenor of the opinion is such that a lower court, in interpreting it, may reason that any property not enumerated as separate property in section 403.190(2) is marital property.\textsuperscript{45} Applying this mechanical approach, the Johnson reasoning would include property such as the proceeds of an interspousal tort action as divisible marital property, exten-

\textsuperscript{40} 83 Ill. App. 3d at 613, 404 N.E.2d at 551 (citing ILL. REV. STAT. ch. 48, §§ 138.1-138.28 (1977)).

\textsuperscript{41} Id. at 616, 404 N.E.2d at 552.

\textsuperscript{42} 637 S.W.2d at 668 (citing 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 58.47, (1982)). 2 A.

\textsuperscript{43} Id.

\textsuperscript{44} Id. at 668-69.

\textsuperscript{45} See supra note 14.
What is the meaning of the label "marital property" at dissolution? To say such property is subject to equitable apportionment does not necessarily mean there is a presumption that it be divided equally. The Kentucky Supreme Court expressly ruled in Herron v. Herron that there is no presumption concerning the division of marital property. The court of appeals had held that, in the absence of contrary evidence, a presumption existed which supported equal distribution under section 403.190(1). In reversing, the supreme court found significant the absence of language indicating any presumption in section 403.190(1), and the detail of the factors that the section set forth to be considered in determining a division of property which is equitable under the circumstances.

The rule of Herron tempers any seeming harshness of Johnson (and Quiggins). Rather than a dark vision of courts' snatching half the subsistence benefits of a crippled worker to satisfy the greed of a wicked spouse, we see the matter as not much more than semantics. Indeed, KY. REV. STAT. 403.190 merely indicates whether property is eligible for distribution and does not direct a particular division. The fact that Mr. Johnson is disabled will weigh heavily in the trial court's evaluation of the factors it must address in making a division that is equitable, as directed by section 403.190(1). There is nothing contained in the language of section 403.190 that purports to prevent a court from awarding a spouse all the marital property.

46. Kentucky has not recognized inter-spousal tort immunity for at least thirty years. Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953) (construing KY. REV. STAT. § 404.020 (1952) (amended 1974). 47. 573 S.W.2d 342 (Ky. 1978). 48. Id. at 343. 49. Id. at 344. 50. See supra note 14. 51. See supra note 14. Occupational disability is obviously an economic circumstance. An Illinois court, interpreting ILL. REV. STAT. ch. 40, § 503 (1977), which is substantially the same as KY. REV. STAT. § 403.190, observed that: "Such consideration [of economic circumstances] may well sustain a decision to apportion all of a workmen's compensation award to the injured party." In re Marriage of Dettore, 86 Ill. App. 3d 540, 542, 408 N.E.2d 429, 431 (1980). 52. Although no reported decision has squarely met the issue whether awarding all marital property to one spouse is permitted by the statute, there is some support for this theory. See, e.g., Johnson v. Johnson, 564 S.W.2d 221 (Ky. Ct. App. 1978) (no relation to the
III. OTHER MARITAL PROPERTY IN KENTUCKY

It is noteworthy that no reported Kentucky decision since the enactment of KY. REV. STAT. § 403.190 has determined the status of personal injury proceeds at dissolution nor answered whether a pending award of workers' compensation or personal injury damages is marital property. Also, to say that the issues presented here by such things as pensions, benefits, and awards are "related" is not to say they will be treated similarly at dissolution. Money in hand is clearly property under the statute, but Johnson gives no clue as to what less tangible assets the Kentucky Supreme Court may find to be divisible marital property.

In the celebrated case of Inman v. Inman, the court of appeals held that a professional license could under certain circumstances have an ascertainable value capable of division as marital property. On appeal on other grounds after a re-trial, however, the Kentucky Supreme Court indicated by way of dicta its disenchantment with the court of appeals' conclusion. It is therefore not clear at this time whether a professional degree or license is marital property in Kentucky.

In Ratcliff v. Ratcliff, the Kentucky Court of Appeals held that unvested amounts in a noncontributory pension fund were too speculative to be considered marital property, but were properly an "economic circumstance" for the court to consider in arriving at an equitable division. Curiously, the court of appeals determined that the property division was just "whether or not contingent pension amounts were considered." This is perhaps indicative of the difficulty in assigning a value to a pension interest prior to vesting. In Foster v. Foster, decided the same day as Ratcliff, but before a different panel, the court of appeals deter-

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53. Budig v. Budig, 481 S.W.2d 95 (Ky. Ct. App. 1972) (Proceeds of a personal injury suit were held to be the separate property of the injured spouse. Budig was decided, however, months before section 403.190 was enacted into law and its continuing viability remains to be tested).
54. What is meant by "related" is merely the difficulty they each pose in determining whether they are divisible marital assets.
55. 578 S.W.2d 266 (Ky. Ct. App. 1979).
56. 9 FAM. L. REP. (BNA) 2131, 2133 (Ky. Nov. 23, 1982).
58. Id. at 293.
59. Id.
60. 589 S.W.2d 223 (Ky Ct. App. 1979).
mined that a noncontributory pension plan which had fully vested under the Employee Retirement Income Security Act (ERISA) represented a divisible marital asset. The court upheld an award of one-third of the pension benefits to the non-employee spouse, but denied her request to receive them except as the benefits became payable, i.e., upon her husband’s retirement. In Foster, we see a willingness to find a divisible marital asset in a right to receive future benefits.

While one should exercise caution in predicting future court responses in this largely uncharted area, one is nevertheless tempted to cast Johnson in the same light as Foster. If Foster is given teeth, a workers’ compensation claimant’s tactic of delaying settlement until after obtaining a dissolution will not prevent the court from making a prospective allocation of any eventual compensation award between the spouses. It boils down to a question of when the benefits were “acquired”. If the eventual benefits include compensation for earnings lost during the marriage, the argument that it was acquired during the marriage is somewhat analogous to finding that amounts of a pension plan which vested during marriage were “acquired” within the meaning of KY. REV. STAT. § 403.190(2).

Returning to the hypothetical situation posited at the beginning of this note, the Foster-Johnson dichotomy severely limits an election of remedies designed to prevent our client’s spouse from reaching his injury compensation. It is apparent that after Johnson a lump-sum compensation award received before dissolution will be marital property. Likewise, the proceeds of a personal injury claim received before dissolution will be marital property, since it would also be money in hand. After Foster, it is not unlikely that even a pending compensation or personal injury claim would be marital property and subject to prospective division. The tort election may be even less attractive when one considers that there should be no presumption of an equal division of marital property. Let us assume that our client’s marriage has

61. Id. at 224.
62. Id. at 225.
63. See supra note 14.
64. KY. REV. STAT. § 342.730 (1983) provides the formula for determining weekly benefits of workers’ compensation and sets the maximum allowable benefits and benefit period. The argument that the benefits roughly correspond to wages lost during the week the benefits are received is supported by the lower benefit limits allowed for permanent partial disabi- lity than for total disability.
produced significant marital assets. The court, in weighing heavily our client's pending tort claim as an "economic circumstance," could conceivably award almost all of the other marital property to his wife in lieu of awarding her a portion of eventual tort proceeds. Should the tort claim prove fruitless, it goes without saying that our client will be less than satisfied with our efforts.

The remaining alternative is an election of periodic benefits of workers' compensation. The argument here is that any such payments received after dissolution should be characterized as separate property because they roughly compensate for the lost earnings of the week in which they are paid. Professor Larson strongly recommends that workers' compensation should be paid periodically and that the indiscriminate use of the lump-sum device is undermining the purposes of the workers' compensation system. In his discussion, he points to the self-interest of the parties to the process (including the client's fee-seeking attorney) as the real reason for resort to the device rather than a determination that a lump-sum is in the client's best interest. All too frequently a lump-sum award is dissipated by the claimant long before his disability has passed and before the equivalent periodic benefit period would have lapsed. At least one court has heeded these warnings in an opinion aimed at cutting back the use of the lump-sum device. An indirect result of Johnson may be to further discourage resort to the lump-sum award in workers' compensation settlements.

IV. WORKERS' COMPENSATION AT DISSOLUTION IN OTHER STATES

In comparing Johnson with the disposition of workers' compensation benefits in other states, this note will focus upon other equitable distribution states. Even though the UMDA has not been widely adopted, equitable distribution of property is the rule, at least to some extent, in all but two common law property

66. Id.
67. Id. at 15-574.
68. See, e.g., Kentucky's Workmen's Compensation Board v. Alexander, 562 S.W.2d 670 (Ky. Ct. App. 1978) (where the court held that a lower court could not use the lump-sum device as a means for settling an appeal without prior approval of the Workman's Compensation Board).
states (Mississippi and West Virginia) and three community property states (California, Louisiana, and New Mexico). The search for precedent need not exclude decisions from community property states. Although the difference between community property and common law property doctrines can be significant, the distinction may be reduced, at dissolution, to the label used to signify property eligible for dissolution. By way of example, the community property state of Idaho defines separate property similarly to Kentucky, even to the extent of excluding appreciation of separate property resulting from joint efforts. Idaho law embodies a presumption that all property is community property, and directs that community property should be divided toward the end of achieving a just result, and not necessarily equally. Community property in Idaho, then, is defined similarly to marital property in Kentucky (at dissolution). This should not be interpreted to mean that all equitable distribution statutes are similar. An examination of the cases and statutes (where equitable distribution has been codified) reveals that there are nearly as many formulas for equitable distribution as there are states subscribing to that theory. In some comparisons, the differences are significant. The only common thread is that discretion rests in the dissolution court to divide certain property.

While acceptance of equitable distribution may be widespread, in contrast, the number of decisions clarifying the character of certain types of property (e.g., workers' compensation) is small. Perhaps the very nature of the benefits involved and the tenets of equitable distribution are at the core of why these issues evade review. In the case where the compensation benefits at stake are comparable to the costs of an appeal, there is little mystery why the matter is not pressed beyond the trial stage. In a marriage where marital assets are substantial, the likelihood of a successful

71. Id. at § 32-906.
74. See supra note 14 for comparable Kentucky provisions.
75. Some states, unlike Kentucky, allow marital misconduct to be considered in equitable division. See, e.g., Annot., 86 A.L.R.3d 1116 (1978). No-fault and equitable distribution are separate concepts.
appeal may be less attractive when faced with the real possibility that on remand the marital property will merely be redistributed with no net gain for the appellant. Appeals are not often pursued where the results will be of purely academic importance to the litigants.

Of the jurisdictions which have addressed the issues of workers' compensation as divisible property at divorce or dissolution, opinions have been nearly unanimous in holding that it is divisible if accrued and received during marriage. However plain the language of the relevant property disposition statutes, this is not a foregone conclusion. Were courts so inclined, they could find such monies to be the separate property of the injured spouse by a number of rationales. Such a result would follow a finding that workers' compensation is not for the benefit of the employee's dependents, or that the provision of the state's workers' compensation act which forbids assignment of benefits and makes them exempt from the claims of creditors prevents their characterization as a divisible marital asset.

It is suggested that such unanimity may in part be the result of a lesser-of-two-evils approach to the issue. If such benefits were deemed separate property, they would be unavailable for distribution to the other spouse even in the occasional case where equity would call for division. On the other hand, the reason for labeling them marital property may be that in the typical case the injured spouse would receive all such benefits because the economic circumstances of that spouse would require such a result, yet the compensation benefits would be eligible for division in the occasional case where equity demanded a division. As indicated earlier, New Mexico, as stated in the case of Richards v. Richards, has not yet subscribed to a theory of equitable distribution and thus community property in New Mexico is still


divided equally between the spouses. It is perhaps not surprising that New Mexico's characterization of workers' compensation benefits runs counter to that of equitable distribution jurisdictions.\(^{80}\) In \textit{Richards}, the majority conclusion that such benefits are separate property, and its attempt to buttress this with the argument that such benefits compensated for the injury and not for lost earnings, was met with a forceful dissent.\(^{81}\) Could it be that the true reason for the majority's holding was that under a lesser-of-two-evils analysis it was more equitable in the typical case that the injured spouse receive the entire award?

\section*{V. Beyond Johnson}

The discussion to this point justifies, to some extent, the seeming indifference of the Court in \textit{Johnson} to the issue before it. Mr. Johnson's award, being money-in-hand, is too clearly separate property under KY. REV. STAT. § 403.190(2) to warrant extensive judicial inquiry. That inquiry must await the hard or difficult case such as the \textit{pending} compensation claim. Although equitable distribution states of both the community property and common law property varieties agree that workers' compensation, to the extent it compensates for injuries during the marriage, is a marital asset if received prior to dissolution, there is a sharp division between the two camps as to the category for such benefits when they are not received until after dissolution. Even within the community property camp there is disagreement. In Arizona, for example, the benefits are the separate property of the injured spouse,\(^{82}\) while in Texas there is only a presumption that such benefits are separate property.\(^{83}\) This presumption is overcome by showing that the later benefits or a portion thereof compensate for pre-dissolution lost earnings.\(^{84}\) In Idaho, such post-dissolution benefits are to be divided by the dissolution court into a marital component (compensating for lost earnings of the community), and separate property (representing post-dissolution earnings).\(^{85}\)

In the few common law property states which have squarely met this issue, there is unanimous agreement that the pending

\(^{80}\) Id.
\(^{81}\) Id. at \__, 283 P.2d at 883.
\(^{83}\) Hicks v. Hicks, 546 S.W.2d 71 (Tex. Civ. App. 1976).
\(^{84}\) Id. at 74.
claim is subject to equitable division as marital property.\textsuperscript{86} No allowance is made for any portion which may represent post-dissolution earnings.

The reason for the discrepancy between the community property and common law property views is not clearly revealed in the opinions themselves. The separate property defined in KY. REV. STAT. § 403.190(2) typifies what is called separate property acquired by lucrative title in community property law; \textit{i.e.}, property acquired by gift, devise, or descent. Community property, on the other hand, has traditionally been defined as that acquired by onerous title; \textit{i.e.}, by labor or industry of the spouses.\textsuperscript{87} Some of the opinions from community property states, in addressing their equitable distribution statutes, make reference to the onerous/lucrative distinction in their analysis of whether the right or interest with which they are confronted is community or separate.\textsuperscript{88} It is apparent in these states that courts are addressing the spirit of the legislation in decisions concerning property at dissolution and are applying the maxim \textit{ejusdem generis} to find other types of separate property than those specified in the property disposition statutes. This may partly explain why the demarcation is so clear between equitable distribution states rooted in a tradition of community property and those from a common law property past. That is, the states from the latter camp, like Kentucky, without a lucrative/onerous doctrine from which to draw, are more apt to regard the exceptions defining separate property as limited to those expressed (in accordance with the canon of construction \textit{expressio unius est exclusio alterius}).

If one were to search for precedent which Kentucky courts would be most likely to follow, reason suggests the search would occur in those states which, like Kentucky, have abandoned a concept of property division rooted in common law title doctrine. Besides being an equitable distribution jurisdiction, prime candidates must define separate property similarly to Kentucky as


\textsuperscript{87} See generally W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY, § 62 (2d ed. 1971); 2 A. COSNER, AMERICAN LAW OF PROPERTY § 7.16 (1952); 15A AM. JUR. 2d, Community Property, § 3 (1976).

well as the factors the court is directed to examine in reaching a property division that is equitable. Among such states, Illinois' experience is instructive.

Although Illinois only recently adopted the UMDA, the Illinois legislature evidently rejected the 1973 amendment to section 307 and instead enacted a property disposition law substantially the same as KY. REV. STAT. § 403.190. Illinois courts have wasted little time characterizing a number of property rights and interests under their new statute.

The Foster-Johnson dichotomy, suggesting that a workers' compensation claimant's tactic of delaying settlement will not prevent a Kentucky court from determining that the claim is marital property, is strongly supported by the Illinois Court of Appeals' holding in the case of In re Marriage of Dettore. After lamenting that the marriage and divorce act "being relatively new to both the bench and bar, was being defined and refined almost daily by the reviewing courts of this State," the court went on to address the issue whether a pending workers' compensation claim was property subject to division as marital property. After noting the absence of case law of instructive value, and recognizing that the issue was not clearly met in the language of the new act, the court proceeded to determine that the pending claim was indeed marital property. The decision was reached not so much upon the merits of such a designation as it was by reference to the greater evil of the alternative:

We cannot condone a result which invites workmen's compensation claimants to protract the arbitration for their award so as to shield that award from equitable division by the dissolution court. We must hold that if a claim for a compensation award accrues during the marriage, the award is marital property regardless of when received.

Less than three months after Dettore, which concerned a workers' compensation claim based upon lost earning capacity, the same court held that a claim based upon that section of the Illinois Workmen's Compensation Act relating to loss of a specific body

90. See supra text accompanying note 63.
91. 86 Ill. App. 3d 540, 408 N.E.2d 429 (1980).
92. Id. at 541, 408 N.E.2d at 430.
93. Id. at 541-42, 408 N.E.2d at 431.
member was likewise marital property. The court found appellant's argument that such a rule amounted to a judicially imposed assignment in contravention of the compensation act no more convincing than the Kentucky Court of Appeals did in Quiggins.

Kentucky may find other Illinois decisions instructive. In In re Marriage of Musser, an Illinois Court of Appeals determined that 217/240 of the husband's military retirement benefits were marital property, representing the ratio of the length of marriage to the length of military service. In re Marriage of Hunt held that a vested noncontributory pension and profit sharing plan was a chose in action which was "property" and "acquired" within the meaning of the property disposition statute. Likewise, In re Marriage of Donley held that a contributory nonvested pension plan was marital property. Both a private disability pension and the proceeds of a loss-of-license insurance policy were held to be marital property in the case of In re Marriage of Smith. As to personal injury awards, Illinois decided that proceeds actually received before dissolution are marital property. Apparently no Illinois decision has involved a pending personal injury action since they adopted the UMDA. It is noteworthy that all the above Illinois decisions were decided in the years 1979 and 1980. Having laid a foundation in these cases, Illinois would seem to be well prepared to broach the subjects of whether pending personal injury claims or professional degrees and licenses constitute marital property.

Illinois and Kentucky are but two of at least sixteen equitable distribution jurisdictions which define and limit separate property and have a presumption of marital property in their statutory scheme. Although they add little to the Illinois line of cases,

95. Id. at 84, 411 N.E.2d at 553-54.
98. 83 Ill. App. 3d 367, 403 N.E.2d 1337 (1980).
99. 84 Ill. App. 3d 446, 405 N.E.2d 884 (1980).
decisions from these states are included here to buttress the notion that Kentucky is likely to follow the example set by Illinois. In Missouri, the proceeds of a personal injury action received before dissolution are marital property.\textsuperscript{102} The same is true in Pennsylvania, a relative newcomer to the equitable distribution arena.\textsuperscript{103} The Pennsylvania court found little merit in the argument that personal injury proceeds are separate property because they represent property acquired in exchange for property possessed before marriage.\textsuperscript{104}

In a survey of the decisions from states with a property disposition scheme similar to Kentucky's and a history rooted in common law property doctrine, there can be but one conclusion: any property, right, or interest not clearly defined as separate property and which has or will soon have a definite and ascertainable value is marital property subject to equitable division. The Kentucky Supreme Court in Johnson has at least implied, if not clearly expressed, that court's willingness to interpret KY. REV. STAT. § 403.190 in a manner consistent with the decisions from Illinois.

CONCLUSION

The summary manner in which the Kentucky Supreme Court addressed the issue it was confronted with in Johnson can be interpreted to mean a number of things. Perhaps the opinion should not be read to say more than is actually said: that a workers' compensation lump-sum award is marital property since it does not fit an exception defining separate property. Read broadly, however, the decision may indicate that the court embraces fully the concept of equitable distribution; that the division of property should be at the discretion of the dissolution court and be based upon such factors as merit and need instead of title, superior claim, or origin of the property. It would be speculative now to determine that Johnson should be construed either broadly or narrowly. The answer awaits a later decision with a similar property issue, but a more elaborate court response.

On a final note, Johnson can also be read as sending up a red flag for the Kentucky General Assembly to see. The court may be asking if this is the effect the legislature intended KY. REV. STAT.

\textsuperscript{102} Nixon v. Nixon, 525 S.W.2d 835 (Mo. App. 1975).
\textsuperscript{104} Id. at _, 454 A.2d at 1061.
§ 403.190 to have. There is nothing in the legislative history of the statute to indicate that workers' compensation benefits (or personal injury awards) were contemplated by the legislature when they enacted section 403.190. After a decision like Johnson, the General Assembly may decide that such proceeds should not be left to the discretion of the dissolution court and amend section 403.190 accordingly. Not without interest in this respect is New York's new equitable distribution statute. It was not until 1980 that New York joined the ranks of equitable distribution jurisdictions. The New York act is similar to Kentucky's with one striking exception. Although the list of property defined as separate includes everything section 403.190(2) defines as separate, the New York law includes "compensation for personal injuries" as separate property. That this exception includes the proceeds of a personal injury award is clear, but the New York courts have yet to address whether this exception includes workers' compensation benefits or other benefits payable as a result of injury. In Pennsylvania, the legislature considered adding such an exception but purposely left it out of the law they eventually enacted. The Pennsylvania legislature evinced a clear intent that such monies should be available for division.

This note has attempted to analyze, in reference to Johnson, what types of property are eligible for distribution in Kentucky and what types are likely to be ruled eligible in the future. There are much larger issues surrounding equitable distribution which remain to be studied, requiring investigation which may be premature at the present time. Has equitable distribution solved the problems for which it was designed? In theory, discretion to divide the assets of a marriage without regard to marital misconduct is a worthy ideal. In practice, however, discretion may be abused. The factors the court is to examine in arriving at an equitable division are amorphous. The weight to attach to each factor is largely in the trial judge's discretion. Although in Kentucky, he or she is directed to disregard marital misconduct, this may be expecting too much objectivity from the judge. Few

106. Id. at § 236(B)(5)(d), (B)(8)(2) (McKinney 1977 & Supp. 1982).
110. KY. REV. STAT. § 403.190(1) (1972).
people will be more aware of the marital misconduct of the parties than the trial judge. The discretion the judge has in dividing the marital property is not immune to a charge of being "unbridled" to some degree. In addition, the division the judge arrives at will not be disturbed unless "clearly erroneous". Whether in fact abuse of discretion is commonly occurring under equitable distribution is difficult to establish with such a standard for review. At any rate, if Kentucky does follow the path of Illinois, the removal of certain types of property, such as workers' compensation benefits and personal injury awards, from this discretion of the dissolution court will likely not be accomplished by anything short of legislative fiat.

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