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A PREFACE TO ADMINISTRATIVE LAW*

E.P. KRAUSS**

There can be little doubt that the business of the federal government in this day and age is conducted primarily by administrative agencies. The sheer volume of work-product generated by the administration dwarfs by comparison the combined output of the legislative and judicial branches. Yet despite the awesome magnitude of its power, there remains a good deal of uncertainty about how, or indeed whether, administrative authority is or can be justified. For the most part, we are abandoned to rely on our emotions in choosing between alternative rhetorical characterizations of the administration as either an imposing behemoth or a benevolent god. Such unreflective emotionalism is counterintuitive to a prerequisite of democratic order, which is that the people determine the manner of their own governance on the basis of informed choice.

In denominating this essay "A Preface," it is the author's intention to address the foregoing concern by reconsidering some basic issues in administrative law.¹ Specifically, attention will be focused on the doctrines of separation and delegation of powers. Though the force of these doctrines may not always be acutely felt in contemporary controversies in administrative law, they cast an aura over the entire field that is ubiquitous.

The problem posed by the doctrines of separation and delega-

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* This essay is dedicated to Professor Al Katz.

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1. Since the body of legal doctrine (the rules of law and leading judicial decisions) to be discussed herein is pretty basic stuff, I have taken the liberty of borrowing a number of illustrations and examples from Ch. 2 of B. SCHWARTZ, ADMINISTRATIVE LAW, A CASEBOOK (2d ed. 1983) 87-186. I have adopted this text for use when I teach the course on administrative law and have found it to be a lucid and carefully researched and prepared volume that is especially appropriate for introducing this subject matter to my students. I am indebted to Professor Schwartz for facilitating my teaching of this course and for providing a wealth of source materials for this essay. I am also indebted to my students for providing the occasion to contemplate these issues at a level that time would not otherwise permit. The analysis, of course, is my own.
tation of powers can be simply stated in the form of two syllogisms. First, as to separation of powers, consider the following:

i. It is axiomatic that "the doctrine of separation of powers ... is 'at the heart of our Constitution.'"\(^2\)

ii. Administrative agencies perform both legislative and judicial functions. Therefore,

iii. Administrative power is unconstitutional.

The usual rejoinder to this line of argument is that practical necessity requires this extraordinary admixture of powers to be vested in administrative agencies. Otherwise, the ends of government cannot be efficiently achieved.\(^3\) It is incongruous at best to assert that a principle is so fundamental that it lies "at the heart of our Constitution," yet maintain that it need not be followed when it is inconvenient to do so.

The argument with respect to delegation of powers is this:

i. It is a rule of law that a delegated power cannot be re-delegated.\(^4\)

ii. The sovereign power of the people to legislate is delegated to the Congress by the Constitution. Therefore,

iii. A re-delegation of legislative power from Congress to an administrative agency is void.

Typically, this line of argument is also met with autonomic withdrawal into the refuge of practical necessity.\(^5\)

The central task of this essay will be to confront the two arguments outlined above in order to uncover a principled resolution of the apparent conflict between guiding principles and prac-

\(^2\) Id. at 89 (quoting Buckley v. Valeo, 424 U.S. 1 (1976)). Professor Schwartz goes on to say:
If the doctrine were (in Cardozo's phrase) a doctrinaire concept to be made use of
with pedantic rigor, the rise of the modern agency would have been an impossibility.
For the outstanding characteristic of such agency is the possession by it of powers
that are both legislative and judicial in nature. The powers so vested in these agen-
cies are comparable to those traditionally exercised by the legislature and the courts.

\(^3\) See id. at 89-90.

\(^4\) Id. at 90.

\(^5\) See id. Today we rely almost exclusively on procedural justice as the only guard against
pragmatism leading us down the slippery slope to administrative absolutism. See Pound,
tical reality. The present endeavor is a limited one. It aims only to reconcile abstract principles, as they are understood in contemporary juristic practice, with the realities of institutional necessity as they are currently perceived within that practice. An examination of the concrete content of those principles and the historical significance of those realities must await consideration in a different form and another forum. Within the limitations of the present effort the main conclusion will be that although the doctrines of separation and delegation of powers are perhaps described with unfortunate choices of words, those doctrines do have meanings which when clarified can serve as effective standards for the critical evaluation of the performance of our government representatives and public officials. Moreover, once clarified, these standards can themselves be subjected to informed criticism and rejected or retained through democratic decision-making processes.

I. Separation of Powers

As previously noted, it is axiomatic that the doctrine of separation of powers is embedded in our constitutional order. The textual support for this proposition found in the Constitution is the introductory language of each of the first three articles. Article I provides: “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” 6 Article II provides: “The executive power shall be vested in a president of the United States of America.” 7 Article III provides: “The judicial power of the United States, shall be vested in one supreme court, and such inferior courts as the Congress may from time to time ordain and establish.” 8 Each of these three articles contains further descriptions and specifications of the aforementioned powers. 9 However, there is no explicit text of the Constitution providing for the separation of powers. All that is written is that the government shall consist of certain institutional structures, that they shall be constituted in a specified manner, and that they may exercise enumerated powers. Hence, when we inquire into the meaning of the separation of powers, the Constitution does not aid us in deter-

7. U.S. Const. art. II § 1.
8. U.S. Const. art. III § 1.
mining whether there shall be a separation of different kinds of power, a separation of different objects of power, or some other possibility.

It is my contention that state power is conceptually irreducible to essentially different varieties, and that therefore any theory based on a notion that the different branches of government are distinguishable according to the kinds of power they possess is illusory. It is my further contention that the three branches of government may legitimately direct their powers at the same objects. Consequently, any theory based on the notion that the separation of powers is a functional division of labor with each branch performing its function with application to a distinct class of objects is likewise illusory. The alternative that I shall propose distinguishes the three branches of government on the basis of the importance of three distinct methodologies for legitimation of governmental acts performed by each branch.

The argument of Part I shall proceed in three stages. First is a review of the evolution of the conventional notion of separation of powers. This shall be followed by a digression on constitutional interpretation. This part then concludes with a general statement of the theory of the methodological separation of powers.

A. Evolution of the Conventional Notion of Separation of Powers

The English background to the American experience provided a model of government consisting of three parts, but it is difficult to find in that model a meaningful precedent for our doctrine of separation of powers. The 18th century English state, consisting of the King in Parliament, mirrored the contemporaneous English social structure. The person of the King was at the head of society and at the head of state as well. The aristocracy and the commoners who made up the rest of society each had their own house in Parliament. The theory of the English government was that each segment of society had its own interests, and that those disparate interests posed threats to one another. By their representation in the Crown and the two houses of Parliament all members of

10. Unless otherwise indicated, when the word “state” is used as a noun or adjective in this paper, it refers to the political existence (as opposed to the culture, economy or social existence) of the nation, and not to one of the several states of the Union.
society were deemed to be present, and their interests were accommodated through the process of political deliberation. This has been called the theory of virtual representation.\(^{11}\)

The English system afforded representation to diverse interests so that through political deliberation they would arrive at the consensus needed for strong central government. The founders of the American republic, having rejected the social institutions of monarchy and aristocracy, took precisely the opposite tack. They adopted a system that intentionally created diverse interests within the government itself in order to guard against the possibility of a strong central government becoming oppressive to the people.\(^{12}\) The Constitution distributed state power to be exercised by three coequal branches of government.\(^{13}\) The theory was that a greedy human nature would result in each branch jealously protecting its own power, thereby providing a check upon the expansion of any one branch’s power beyond its constitutionally permissible sphere. Hence, the doctrine of separation of powers became an integral part of a system of "checks and balances."\(^{14}\)

In adding specificity to the general powers conferred on the three branches of government by the first three articles, the Constitution makes explicit reference to a variety of governmental functions.\(^{15}\) The power of Congress to make laws is delimited by express grants of authority over taxation, regulation of commerce, establishment of post offices, and so on. The President, in addition to his duties as commander in chief of the armed forces, is given the


\(^{12}\) See The Federalist No. 51 (J. Madison).

\(^{13}\) The reference here is to the national government, or the "general government" as it was then called. It was, of course, well recognized that the several states also possessed power, but the source of that power was to remain a controversial question for some time to come. Compare Justice Story’s opinion for the Court with Justice Johnson’s dissent in Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816). Professor Katz suggests that the controversy was “more or less settled by the Civil War.” Katz, supra note 11, at 396 n.16. In a similar vein, Professor Duncan Kennedy is rumored to have once said, “The fourteenth amendment overruled the states.”

\(^{14}\) It should be noted that although the English constitution conferred a degree of autonomy on each of the constituent parts of government, it did not incorporate a system of "checks and balances." By 1787, the year of our constitutional convention, the process of piecemeal transfer of executive power from the Crown to the Parliament had already been in progress for nearly a century. Similarly, though the British judiciary retained its independence in matters of private law adjudication, in matters of public right they were bound by the doctrine of legislative supremacy.

\(^{15}\) See supra note 9.
pardoning power and the power to make treaties and appointments with the advice and consent of the Senate. The judicial power extends to cases and controversies described in article III.

These explicit references to particular governmental functions engendered a theory that explains the separation of powers as a functional division of labor. According to this theory, the Framers determined that each function of government is peculiarly suited to the institutional form of one of the three branches. Implicit in this theory is the idea that the three branches exercise essentially different kinds of power. Legislative power, for example, was deemed appropriate for the regulation of commerce; executive power was deemed appropriate to the appointment of public officers; and judicial power was deemed appropriate to the decisions of cases in law and equity. Thus, the functional division of labor theory of separation of powers implies not only that there are different kinds of power, but also that the Constitution directs the deployment of such powers to attain essentially different objectives.

One fallacy of this theory can be easily demonstrated. If the functions of Congress and the courts were truly separated, then Congress' power to regulate commerce would seem to preempt the courts from deciding cases affecting commerce. This has never been seriously asserted, nor could it be. Given the historical evolution of the meaning of the commerce clause, the courts today would be left with very little to do. Indeed, this evolution by and large took place within the context of judicial decisions which effectually expanded the jurisdiction of the federal courts. An accommodation of the deficiencies of the division of labor theory was a somewhat reluctant recognition of a degree of overlap of the powers exercised by each of the three branches of government. It would seem that any notion of overlapping powers is plainly in conflict with the notion of separation of powers. This incongruity was submerged in judicial equivocation between the "checks and balances" theory based on the independence of each of the three branches, and the division of labor theory based on the separate functions of each branch.  

The task-oriented nature of the division of labor theory, together

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16. A second fallacy of the functional division of labor theory, that there are essentially different kinds of state power, shall be treated infra.

17. See, e.g., Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 47-50 (1825); see also B. Schwartz, supra note 1, at 91.
With the notion of overlapping powers made palatable by judicial equivocation, created the framework for a pragmatic approach to the doctrine of separation of powers. Since the constitutional distribution of functions was believed to be based on an efficiency argument—the best branch for each function—efficiency could be invoked to soften the rigor of the doctrine of separation of powers. Moreover, the willingness of the courts to equivocate on important questions of constitutional interpretation provided the soil in which a mood of deference would take root and flourish. This mood adopts the axiological position that it is preferable to defer to the judgment of others than to decide indecisively.18

With efficiency (practical necessity) and deference relaxing the rigors of the doctrine of separation of powers, the delegation of rule-making and adjudicatory authority to administrative agencies became less problematical. Instead of determining whether one branch of government had usurped the powers constitutionally consigned to another branch, the constitutional question could be couched in terms of whether Congress’ delegation of power to the administration was “excessive.”19

Once the separation of powers problem was avoided by focusing attention on a rule prohibiting excessive delegations of power, all that remained was the need to elaborate the content of that rule. This elaboration took the form of a debate over the extent to which Congress must articulate standards to guide the exercise of administrative discretion. While accepting the proposition that only excessive delegations were unconstitutional, the Supreme Court, in 1935, nevertheless required exacting standards to be imposed.20 Though writing in dissent, Justice Cardozo cast the epithet that has ever since accompanied the debate over standards. The discretion of administrative agencies must be, in Cardozo’s words, “canalized within banks that keep it from overflowing.”21

Experience since 1935 has shown that the canals of discretion have continuously grown in depth and width.22 While it is today

19. See B. Schwartz, supra note 1, at 92.
21. Id. at 440 (Cardozo, J., dissenting).
maintained that administrative discretion must be guided by an "intelligible principle" that provides a standard for judicial review, that standard may be found outside of the statutory text or even the legislative history of the act. For example, one court purported to find an intelligible principle confining the President's discretion under the Economic Stabilization Act of 1970 in the history of price controls under different acts of Congress in 1942 and 1950. This is reminiscent of a statement in another context of then Judge Cardozo: "What is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done." This may be well and good when an innocent party relies on an oral agreement required to be in writing by the Statute of Frauds, but it ought not to be sufficient for an unrestricted delegation of power to be upheld simply because the way in which the power was exercised would have been consistent with conceivably valid restrictions had there been any in place. Since the standards requirement can thus be met simply by conjuring post hoc justifications, it gives little comfort to anyone interested in a principled resolution of the apparent conflict of administrative authority with the doctrine of separation of powers.

The debate about standards has strayed so far from the constitutional doctrine of separation of powers that it has permitted the rise of one other theory of administrative power deserving mention. This may be called the "headless fourth branch" of government theory. This theory is attributable to a peculiarity in the constitutional concept of the presidency combined with the existence of so-called independent administrative agencies. The office of the President of the United States is unique among modern governments in that the President plays the dual role of head of government and head of state. In the United Kingdom, for example, the Prime Minister is the head of government and

26. These are agencies that fall outside the jurisdiction of any of the departments of government whose heads sit in the President's cabinet. Among the largest and most familiar to the general public are the Federal Communications Commission (FCC), Federal Trade Commission (FTC), Interstate Commerce Commission (ICC), and Securities and Exchange Commission (SEC).
the Queen is the head of state. The real power is in the head of government, who is the one who commands a majority in the Parliament. The rest of the leadership, the cabinet ministers, are selected from the membership of the Parliament. The role of head of state is largely ceremonial.

The President of the United States is at the head of the government by virtue of the appointment power and the power to "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 . . . ."\(^7\) The President is the only head of the United States government that we can point to as such, but we must take care to remember that presidential leadership in this capacity is limited by constitutional checks and balances that do not hinder the prime ministers of other nations. It is easy to lose sight of the limited nature of the President's role as head of government because the same office represents the head of state. As such the President has the capacity to represent the United States in foreign affairs and must ultimately take responsibility in the community of nations for the conduct of all persons undertaking to act on behalf of the United States. Of course, this need not have any more practical consequence than the same statement would have as applied to the Queen of England. However, because of the dual role of the presidency, the illusion is created that the office of the President is at the head of government in the same sense that the President is the head of state. Fortunately, this is not the case. If we carry the comparison of the American presidency with other modern governments to its logical conclusion, we can surmise that the President as head of government has real power that is limited, and as head of state the President has only slight power that is pervasive.\(^8\)

Nevertheless, because of the illusion that the President is a boss with control over the entire executive branch of government, the existence of independent administrative agencies that function beyond the grasp of presidential control suggests the theory that

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\(^7\) U.S. Const. art. II § 2.

\(^8\) The power of the President as head of state in, for example, foreign affairs, is slight even though his influence has often been irresistible. Though the President is usually the central figure in the initiation of international relations, governmental acts associated with the treaty power require the advice and consent of the Senate, and usually congressional appropriations, which must first be introduced in the House of Representatives.
the administration is really a headless fourth branch of government. This theory is both wrong and undesirable.

The headless fourth branch theory is wrong on two counts. First, it is wrong because the so-called independent agencies cannot be distinguished from the departments represented in the cabinet solely on the basis of their independence. Even the department heads, though they may be compelled to provide the President with their written opinions, are under a duty to exercise their ministerial functions independently in accordance with established legal standards. Neither administrative discretion nor loyalty to President Jefferson could justify Secretary Madison's refusal to seal and deliver Mr. Marbury's commission as Justice of the Peace for the District of Columbia. The relative autonomy of the Secretary of State in no way removes the State Department from the executive branch of government. The same ought to hold true for the FCC.

Second, the headless fourth branch theory is shown to be mistaken when we determine that the personnel of independent administrative agencies are officers of the United States. In the entire federal government there are only four classes of personnel: elected representatives, judges, officers of the United States, and employees. Elected representatives are found only in the Congress. Judges are found only in the courts. Employees are, of course, found in every branch of government; but officers of the United States, who are not directly responsible to the Congress or the courts, are found only in the executive branch. The top personnel of independent administrative agencies have been held to be officers of the United States and their appointments are

30. A possible exception is the President who is arguably an elected representative. The Vice President is also a special case, but that office presents no difficulty because the Vice President is indeed found in the Congress presiding over the Senate.
31. Judges in administrative tribunals are clearly officers of the United States. There is another class of judges who sit in courts constituted pursuant to article I rather than article III of the Constitution. Article I courts are conceptually troublesome because they appear to all the world as indistinguishable from article III courts. When this has occurred the Supreme Court has held that Congress had in reality created a court with article III judicial power, even though by the terms of its creation the court was nominally an article I court. See Glidden Co. v. Zdanok, 370 U.S. 530 (1962). Since article III judicial power by any other name remains the same, we may conclude that article I judges are really judicial judges so long as they sit in article I courts that are really article III courts.
therefore controlled by the appointment power of the President.\textsuperscript{32} Since the staff of independent agencies are officers of the United States just like the staff of the executive departments, it seems reasonable to conclude that the independent agencies are not a headless fourth branch but rather, are included in the executive branch of government.\textsuperscript{33}

Aside from the similarities of agencies and departments suggesting they are parts of the same branch of government, the notion of a fourth branch of government is repugnant to the Constitution which provides for only three. To tolerate the existence of an extraconstitutional fourth branch would work even more grievous harm than playing fast and loose with the doctrine of separation of powers in the interest of practical necessity. Hence, it behooves us either to constitutionally explain administrative power, or to abolish it.

The preservation and progress of a constitutional order requires a non-arbitrary application of constitutional precepts to the problems of governance that are wont to arise. The doctrine of separation of powers, when filtered through the rhetoric of "intelligible" principles and the debate over standards, has failed to supply the key to restraining administrative discretion. Indeed, in contemporary administrative law the only practical restraint on administrative discretion is the right of interested persons and parties to procedural due process. Procedural justice may be more or less effective for guarding constitutional rights, but it is at best an indirect and incomplete method of restraining governmental powers within constitutional limits. By contrast, the doctrine of separation of powers furnishes a practical tool and meaningful standards for the substantive evaluation of agency performance.

\section*{B. Constitutional Interpretation}

The search for meaning is a difficult one that can proceed along widely diverging paths.\textsuperscript{34} It is all the more so when we search for the meaning of that which is only implied. Such is the case with

\begin{itemize}
\item \textsuperscript{32} See Buckley v. Valeo, 424 U.S. 1 (1976).
\item \textsuperscript{33} This conclusion is further supported by the Supreme Court's invalidation of congressional supervision of agency performance by means of the legislative veto. See Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).
\end{itemize}
respect to the constitutional meaning of the doctrine of separation of powers. It will therefore be useful to set out some considerations underlying the interpretative strategy employed herein.

Any interpretation must begin with what was said. Thus, an investigation of the doctrine of separation of powers must therefore begin with an examination of the text of the Constitution itself. The present method of interpretation shall proceed from the text to conclusions that attempt to conserve an original wish that is the text's inherent virtue, while simultaneously clarifying the development of the text's meaning as it is expressed or implied by actual juristic discourse.

Constitutional scholars and lawyers have grown so accustomed to thinking about the Constitution as a written expression of fundamental law that they sometimes forget that it is also a charter for the establishment of a government. This emphasis has contributed to a bias that favors the analysis of governmental powers in relationship to individual rights. While constitutional rights circumscribe otherwise legitimate exercises of state power, the Constitution limits the scope of legitimate power before any reference to rights is made. Consequently, exercises of state power may be constitutionally impermissible even when no clearly defined individual rights are at stake. The doctrine of separation of powers is important in this regard because it prohibits usurpation by one branch of the powers delegated by the Constitution to another. Exactly what is meant by a usurpation of power remains to be developed. At this point it is necessary first to develop principles of interpretation that recognize the dualistic character of the Constitution as a charter of government and as a written expression of fundamental law.

35. See supra text accompanying notes 6-9.
36. This bias was introduced into constitutional adjudication as early as Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). However, it did not begin to dominate the field until the exponential growth of the due process clause that began with Lochner v. New York, 198 U.S. 45 (1905).
37. Indeed, the Constitution of 1787 makes no explicit reference to "rights." There are two references to "privileges." U.S. Const. art. I § 9, art. IV § 2. Rights can be inferred from various provisions, such as U.S. Const. art. I §§ 9, 10 and art. III § 2. The articulation of constitutional rights has occurred primarily through the process of amendment. Most important in this regard is the Bill of Rights adopted as the first ten amendments. See U.S. Const. amend. 1-10.
38. Another possibility, that of ultra vires governmental acts (that are not usurpations of another branch's power), is implicit in the notion of limited powers.
As a charter of government the Constitution determines the political form of the nation. It contains a definitive expression of the form of the state, without which the state could not exist. The constitutional establishment of three branches of government is not merely a set of ideas. The sum total of all of the government's buildings and bureaucracies, leaders and employees, is not enough to constitute the state, as a state. No state can exist as formlessness. The persons and things that are the physical attributes of the state do not constitute the state until they are organized into some determinate form, whether that form be an hereditary absolute monarchy or some definite organization of elected representatives of the people or some other possible form. The United States Constitution defines in more or less general terms what that form shall be for the United States of America. The constitutional provisions that concretely determine the form of the state are the only basis for political continuity and therefore ought to be strictly construed.

By contrast, when the Framers undertook to set forth the rights of the people in the Bill of Rights, they were neither creating nor defining anything. They sought only to provide a constant reminder that the rights of the people were prior to the state and were based on the inherent virtue of the people themselves. Hence, constitutional rights are abstract expressions of ideals to guide us along the path of social progress, and therefore the content of those rights ought to be developed on the basis of historical experience.

Interpretation of the concrete determinations and abstract ideals of the Constitution can be reduced to a single hermeneutical principle. It can be stated in the form of a Rule of Fixed Proportions: The Constitution must grow in proportion to the growth of the government. When the government grows beyond what the Constitution permits, or performs less than the Constitution requires, governmental authority becomes oppressive.

The growth of the Constitution is not an arbitrary accommoda-

39. For example, the Constitution is more general in its provisions regarding the form of government for each of the several states: "The United States shall guarantee to every state in this Union a Republican form of government ...." U.S. Const. art. IV § 4. It is less general when it provides for such things as the manner in which the President shall be elected. See U.S. Const. art. II § 1.
tion of the exigencies of state power. Rather, it is a developmental process of the fulfillment of an original wish that progresses through the application of non-arbitrary means. The Constitution establishes institutions (the three branches of government) and commits them to advancing that developmental process through methodologically distinct means. Specifically, the Constitution requires the decisions made by Congress are to be based on a political methodology; the decisions made by the judiciary are to be based on a legal methodology; and executive decisions are to be based on an administrative methodology. 41

The distinct methodology available to each branch of government is the real significance of the constitutional specifications regarding each branch’s power. The force of state power may vary in degree but its essence is the same whenever, wherever, and however it is applied. State power is nothing other than compulsion through official sanction. It is pointless to attempt to distinguish the three branches on the basis of the effects, or even the circumstances, of the application of their powers. What matters is whether the exercise of power is legitimate. By specifying the methodologies available to each branch of government, the Constitution supplies the acid test for determining the legitimacy of governmental acts, 42 and a practical meaning of the doctrine of separation of powers as well.

C. Methodological Separation of Powers

As previously stated, the three branches of government are constitutionally committed to contribute to the developmental process of national fulfillment. They do this through the application

41. This content of the constitutional text has been developed over the course of nearly two centuries. It should be remembered that the meaning of constitutional provisions is historically determined. See supra note 13; see generally Nedelsky, Book Review, 96 Harv. L. Rev. 340 (1982). The methodological requirements of the Constitution are implicit in contemporary juristic discourse. They are not posited here as some suprahistorical necessity. See text following note 5 supra.

42. In an oft-quoted passage Chief Justice Marshall stated:

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that
of methodologically distinct means. The three basic methodologies have been previously denominated political, legal and administrative. A further elaboration is in order.

The political methodology implicitly assigned to Congress by the Constitution is political deliberation. It is by nature conciliatory; its hallmark is compromise; and its most important guiding principle is majoritarianism. The legal methodology implied by the constitutional grant of judicial power over cases in law and equity is the methodology of common law adjudication. It is characterized by particularism; its most striking feature is adversarial process; and its guiding principles include traditional notions of fair play and substantial justice, *stare decisis*, and so on. The methodology consigned to the executive branch was referred to above as "administrative." A more descriptive rubric is "technical rational administration." It is characterized by instrumental rationality; it is inquisitorial; its mission is efficient management; and its guiding principles are the strictures of scientific method and deference to the opinions of experts. 43

It may be objected that nowhere in the Constitution are these methodologies described. However, the constitutional text sets forth the abstract concepts within which they have been developed. With regard to the legislative and judicial powers the implication is fairly obvious that a bicameral legislature with power to make laws may be expected to engage in political deliberation, and that a court empowered to decide cases is likely to employ those methods of adjudication that are most familiar to judges. As concerns the executive we can surely surmise that Hamilton and Madison did not have "technical rational administration" at the forefront of consciousness. Neither did they imagine that any President of the United States would ever be as busy as Abraham Lincoln or Franklin Delano Roosevelt. Nevertheless, even in the 18th century the President was authorized to obtain the opinions of the various department chiefs, 44 and to gather information relative to

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43. The archetype for systematic presentation of the principles of technical rational administration is the work of Frederick Winslow Taylor. See, e.g., F. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1967). See also H. AITKEN, TAYLORISM AT WATERTOWN ARSENAL: SCIENTIFIC MANAGEMENT IN ACTION, 1908-1915 (1960).
44. U.S. CONST. art. II § 2.
his duty to report to the Congress on the state of the union, "and recommend to their consideration such measures as he shall judge necessary and expedient." 45 Thus, the essential elements of modern administrative functioning—information gathering, reliance on expert opinion, and instrumentalism—are all supported by explicit constitutional language. Moreover, when the institutional structure of the executive hierarchy is contrasted with the forms of the other two branches, the incipiency of a methodology of technical rational administration in embryonic form seems more plausible than at first could have been perceived or even imagined.

It is further implicit in the Constitution that each branch of government shall develop the means of its functioning through the rigorous practice of its constitutionally prescribed methodology. No one ever expected the conduct of public affairs to become stereotyped. It was left to Congress to develop the methodology of political deliberation. In earlier times the process included occasional fisticuffs in addition to decorous debate. Happily for the less athletic representatives, that is no longer the practice. More importantly, a two-party system was invented, and legislative committees were created (and abolished), as were seniority rules, and the like. The Supreme Court, under the leadership of John Marshall, set the precedent for judicial responsibility for developing its constitutionally determined methodology. Very early on the Court extrapolated from its legacy derived from English courts by adapting the particularistic methodology of the common law to public law controversies in addition to its traditional application to private law adjudication. The judiciary developed a federal common law in its diversity jurisdiction,46 and after nearly a century reversed course.47 There are countless instances of the federal judiciary developing its own methodology in the course of its practice. Indeed, the development of technical rational administration and the rise of the so-called "regulatory welfare state" has proceeded in tandem with concomitant developments in the other branches.

Now, who is to say that we might not be better off if the presidency were filled by a doughty, if somewhat feeble, old gentleman who receives ambassadors and makes a speech to a joint session

45. U.S. CONST. art. II § 3.
47. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
of Congress every now and then? Well, anyone who cares to, I suppose. But the question of whether the developments of the last two centuries have taken place within the confines of the Constitution is another matter entirely. To demonstrate that for the most part they have, it will be necessary to show how the methodological separation of powers relates to the legitimation of exercises of state power.

The doctrine of separation of powers can be restated as the following legitimating principle: An act of government is legitimate only if it is arrived at through the rigorous application of the methodology that is constitutionally consigned to the branch of government performing the act. Thus, it is clearly legitimate for one member of Congress to support an appropriation for highway construction in another member’s district in exchange for that other member’s support of an education bill sponsored by the first member. Such pork barrel politics may not be particularly rational when measured by the standards of legal or administrative methodologies, but it is certainly a permissible kind of conciliation within the process of achieving a majority through political deliberation. Hence, it is legitimate. By the same token, no matter how rational or just either of the aforementioned bills may be, it goes almost without saying that neither can be legitimately enacted without the support of a Congressional majority.

If it is clear that pork barrel politics is legitimate, it is equally clear that pork barrel adjudication and administration are not. If one justice were to say to another, “I’ll let you keep abortion if you give up the exclusionary rule,” no one would seriously maintain that they are engaged in the rigorous application of legal methodology. For that reason, judicial decisions to retain a woman’s right to receive an abortion and to abolish the exclusionary rule arrived at in such a manner would be clearly illegitimate. Similarly, if the Environmental Protection Agency were to distribute Super Fund monies to clean up toxic waste dumps only to politically friendly districts, it would not be acting in accordance with the principles of technical rational administration, and such acts would be clearly illegitimate. Such misapplications of an inappropriate methodology would be usurpations of power in violation of the doctrine of separation of powers.

It is true that the alien methodologies of the other branches may be incorporated into the process of any branch. This commonly occurs as a consequence of deference or through outright borrow-
ing. For example, when a court refuses to rule on a political question, it has incorporated the politically legitimate judgment of Congress into its own process. However, the legitimacy of the court's decision to abstain depends upon the rigorous application of the "political question" doctrine according to the general principles of the methodology of common law adjudication. Thus, the legitimating basis for the judicial decision is the faithful application of judicial methodology and not the political legitimacy of the judgment of Congress to which the court has deferred.

The requirement that the legitimating basis for a decision must be found in the constitutionally appropriate methodology is not upset by the practice of borrowing the methods of some other branch. For example, when a court borrows the administrative technique of scientific investigation in the fact-finding process, scientific conclusions become evidence within and controlled by the methodology of common law adjudication. Likewise, when members of Congress use scientific conclusions, they use them as vehicles of persuasion within the methodology of political deliberation.

Thus, despite the deference to and the borrowing of methodologies among the branches of government, when we require the legitimating basis for exercises of state power to be located within the constitutionally determined appropriate methodology, we have a doctrine of separation of powers that can be applied in a non-arbitrary manner. The rigor of the doctrine combined with the implicit power of each branch to develop its own methodology is an instance of the Rule of Fixed Proportions—the Constitution must grow in proportion to the growth of the government. The Constitution "grows" insofar as it accommodates the expansion of powers through the development of each branch's methodology. The proportions remain "fixed" insofar as the determinate form of the state is preserved by the rigorous application of the doctrine of separation of powers. This is a principled alternative, based on the Constitution itself, to arguments based on practical necessity, which ultimately are based solely on the bona fides of those who rely on them.

II. DELEGATION OF POWERS

Against the backdrop of the previously described resolution of the separation of powers problem, the rule prohibiting re-delegation

of a delegated power becomes less troublesome. To determine whether a statute that authorizes administrative action is a legitimate exercise of legislative power or an invalid delegation of that power, it is necessary to examine the means that it authorizes the agency to use. If the act sets forth a cognizable administrative task, one that can be accomplished through the rigorous application of the methodology of technical rational administration, then it is legitimate. If it fails to define the task adequately, so that the agency must make a political judgment as to just what the task happens to be, then it is invalid. Additionally, if the task is one that the Constitution expressly assigns to the political or judicial branch of government, then the authorization of the use of administrative methodology is invalid.

The administrative methodology, technical rational administration, has been previously described as an inquisitorial process that is characterized by instrumental reason, the application of scientific method, deference to expert opinion, and managerial efficiency. Agency action is always either rule making or adjudication.49 Different aspects of the methodology of technical rational administration motivate Congress to avail itself of these two kinds of agency action to carry out legislative objectives. Agencies are authorized to make rules because of their scientific expertise and skill. It can be said that agencies are empowered to make rules because they are smart. The grant of agency adjudicatory authority is usually motivated by a desire to take advantage of the managerial efficiency of administrative agencies. It can therefore be said that agencies are empowered to decide cases because they are efficient. Since there are different motivations for authorizing different kinds of

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49. The Administrative Procedure Act defines "rule" as the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations; costs, or accounting, or practices bearing on any of the foregoing . . . .
5 U.S.C. § 551(4) (1982). "Order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing . . . ." 5 U.S.C. § 551(6) (1982). Thus, anything that is not a rule is an order. The administrative process that concludes with the formulation of a rule is called "rule making." 5 U.S.C. § 551(5) (1982). The administrative process that concludes with the formulation of an order is called "adjudication." 5 U.S.C. § 551(7) (1982).
agency action, each kind of action presents special problems relative to the rule prohibiting improper delegations of power. Therefore they will be considered separately.

A. Rule Making

The question of whether a statute is a valid authorization of agency rule making or an illegitimate delegation of legislative power has two parts. First, since the agency is authorized to make rules purportedly because it is smart, the legislation must specify some task to which the agency's intelligence can be applied. When Congress has made a political judgment that some problem is one for which technical rational administration promises to supply the right answer, or at least the best guess that the state of the art affords, that judgment is entitled to a presumption of validity. However, it is not within the power of Congress to create a roving commission that is charged simply to do good. 50

The second part of the question concerns whether Congress has authorized administrative consideration of a problem for which the Constitution expressly requires political deliberation. For example, the Constitution expressly delegates the regulation of commerce to the political branch. Congress is at liberty to use any constitutional means to carry out its political will in this regard, but it must first determine its will through the process of political deliberation. Once it has determined, for example, that prevention of unfair trade practices is necessary for the regulation of commerce, it may carry out its will by conferring jurisdiction on the federal courts, as it did in the Sherman Antitrust Act, or it may authorize an administrative agency to take action as it did in the Federal Trade Commission Act. The point is that the constitutional directive that Congress form a political judgment cannot be ignored, but once the Congress acts by narrowing the field of inquiry to something less than the constitutional specification of congressional responsibility, Congress has discharged its obligation. This does not mean, however, that the agency is free to base its decisions on political considerations. As set forth in Part I, the agency is bound by the general principles of its legitimating methodology.

Agency rule making proceedings do not always produce clear

answers. Modern science concerns itself with statistical probabilities rather than certainties, and the many experts in any given field are apt to disagree. This does not, however, mean that in choosing among the available alternatives, the agency is, as Justice Rehnquist has suggested, exercising legislative power. Rather, the agency is bound in good faith to determine which of the alternatives is most likely to be scientifically correct. In this context, the good faith requirement admits of no greater caprice than it does as applied to judges and legislators. The administrator is bound to make a good faith judgment according to the strictures of technical rational administration, just as a judge is bound to follow the law in good faith. It would be a breach of faith for either to decide hard cases solely on his or her judgment about what is good. So long as administrative rule making is conducted in accordance with these principles, it is not an exercise of legislative power, and therefore there is no invalid delegation of that power.


The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.


Justice Rehnquist took the position that the italicized language rendered the entire standard merely precatory. The meaning of this language becomes somewhat clearer when compared to the standard of the Communications Act of 1934, which is: "as public convenience, interest, or necessity requires" 47 U.S.C. § 303 (1982); see also B. SCHWARTZ, supra note 1, at 133-35. The difference between the general mandate to regulate in the public interest, and to establish standards that will to the extent feasible prevent a particular kind of harm, is analogous to the difference between a preponderance of the evidence and clear and convincing evidence in legal methodology, and the difference between a simple majority and a two-thirds majority in political methodology. Though the OSHAAct standard may not be reducible to a mathematical formula, it does provide an intelligible guide to the exercise of administrative discretion.

B. Adjudication

The preceding section argued for the proposition that agency rule making differs from legislative rule making in that its method is designed to approximate scientific accuracy, while the latter’s method is controlled by the overriding need for political accommodation. A parallel proposition may be advanced regarding adjudications. Unlike courts, which strive for justice, agency adjudications strive for accuracy. This can be stated in the form of two general propositions: courts are right because they are final; and agencies are final only if they are right.

This last proposition is inverted in practice by the mood of deference. A reviewing court will not overturn an agency decision, or even entertain objections to such a decision, unless the court can say with certainty that the agency was wrong. However, the mood of deference is tempered by law. The court will not defer to the agency’s judgment unless the agency follows the rules that entitle it to deference. These rules are found in three sources: the Constitution, federal statutes, and the agency’s own regulations. Agency action that violates constitutional rights, or that is ultra vires (relative to its authorizing statute), or that is arbitrary (not in accordance with regulations) will not be judicially upheld. Consequently, the practice of administrative law in the courts is usually absorbed in issues of procedure. So long as the agency follows the prescribed procedures, the agency’s substantive decision must be clearly wrong (i.e., irrational) for the courts to refuse to defer.

Many agency adjudicatory proceedings bear little resemblance to court proceedings. In accordance with the principles of technical rational administration, they are inquisitorial rather than adversarial. The judges may be active participants, interrogating witnesses and arguing with parties in a manner that judicial courts shy away from. Formal rules of evidence may be dispensed with, and the burden and quantum of proof need not be the same as in similar matters heard by courts.

There are many other agency adjudications that very closely resemble court proceedings. The administrative law judge may be a neutral detached arbiter very much like a federal judge or magistrate. Notice, record-keeping, the opportunity to examine witnesses, and other procedural safeguards often closely approximate those found in court actions. The reason for this is that agency adjudications are authorized by Congress because they are more
efficient than court proceedings. Indeed, to the extent that agency procedures are streamlined compared to court procedures, they certainly are more efficient. But to reap the benefits of these efficiencies in matters where it is likely that interested parties will appeal, it is essential that the agency's determination will be subjected to only limited review. Where an individual's substantial constitutional rights are at stake, the Constitution requires certain minimal procedural safeguards in the adjudicatory process. If they are made available at the administrative level, then there can be no complaint on this count on appeal.

Regardless of the degree of procedural safeguards made available at the administrative level, agency determinations are generally not final. Many agencies must rely on judicial enforcement of their orders, and they are typically subject to judicial review. The scope of review may be limited, and the Congress may deprive the courts of jurisdiction. Even in such a case, the federal courts will always have jurisdiction to consider the jurisdictional issue. Additionally, there is at least some doubt as to whether the Congress can constitutionally deprive a potential litigant of ever having any opportunity to have his or her constitutional claim adjudicated by a court. Moreover, there are some rights that are so sacred that due process means court process, and some official misconduct so reprehensible that the Constitution itself provides a remedy. There are matters that are by law committed to agency discretion and are not reviewable. Such matters are far more likely to involve rule making than adjudication, but in either case it is dif-

52. The availability of full de novo court review of facts does not necessarily mean that every party who loses at the administrative level will pursue an appeal. Private parties will avoid protracted appeals for the same reason that Congress authorizes administrative adjudication in the first place. Litigation is expensive and time-consuming, and it holds out no assurances of success.


55. "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Const. art. I § 9.

ficult to see how administrative discretion guided by the principles of technical rational administration amounts to an exercise of judicial power.

As is the case with administrative rule making, administrative adjudication is a thing unto itself. It has its own methods which are informed by the principles of technical rational administration. Its objectives and procedures are different from those found in courts, and the meaning of finality in the administrative context is markedly different from the finality of a decision by a court of last resort. Administrative adjudication is not an exercise of judicial power, and it therefore is not a violation of the rule prohibiting delegation of a power to one branch that has been delegated by the Constitution to a different branch of government.

CONCLUSIONS

The logic of the two arguments set forth at the outset is usually dismissed on grounds of practical necessity. Practical reality is inescapable, but we need to remember that official misconduct is a part of that reality. Hence, we must have standards against which performance can be judged. Standards based on an extra-constitutional pragmatism are undesirable. Administrative agencies are in the best position to determine whether or not practical necessity requires them to act. Consequently, the mood of deference preempts any substantive evaluation of performance. The only remaining bulwark against oppressive aggrandizement of administrative power is procedural justice, which, as has been previously stated, is indirect and incomplete.

This essay set out to develop an alternative rationale for administrative power, one which would be based on the Constitution itself. The theory of the methodological separation of powers was the result of that endeavor. That theory is not the product of abstract speculation. Rather, it is descriptive of a normative order that, more or less, is currently in operation. In contemporary doctrine it is obscured by mistaken reliance on practical necessity as an independent legitimating principle, and by the absence of any clearly expressed systematics governing the doctrine of separation of powers. Thus, the nature of the enterprise has been unashamedly apologetic.

One might justly ask, what is the point of bothering with an exercise in apologetics when the case for practical necessity has been pretty well tolerated up to now? The answer is that we need
more and better apologetics to develop intelligible norms that will control the exercise of state power. The theory of the methodological separation of powers points to principles of law, politics, and administration as the appropriate sources of such norms.

Moreover, improved apologetics may clarify a hazy status quo, providing a basis for informed criticism and sensible reform. Without even pretending that the present effort is the best apology for administrative power that can be made, the valiance of the effort alone, such as it is, would seem sufficient to stimulate inquiry on a more critical plane. The highest aspiration for an essay of this kind is that it may encourage respect for the Constitution and prompt consideration of more important questions, such as: are agencies really efficient? are they smart? are any of the three methodologies really rigorous? are they desirable? is scientific knowledge truth? do we want to be ruled by it?
ADVISERS AND SECRETS: THE ROLE OF AGENCY CONFIDENTIALITY IN THE FEDERAL ADVISORY COMMITTEE ACT

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The Federal Advisory Committee Act (FACA) imposes mandatory requirements for public "oversight" upon the use of advisory committees by federal agencies. The oversight takes the form of advance notice prior to meetings, attendance by the public at meetings unless a special exemption is applied, and public access to most documents utilized by the committees. A basic public participation aspect is the disclosure that an advisory committee exists, with formalities of chartering, and action by an independent governmental office (currently in the General Services Administration). There can be no "secret" advisory committees, though there are often advisers whose work falls in the grey area of being or not being an "advisory committee."

Membership of the committee cannot be confidential, though the timing of the disclosure may be affected by a legitimate agency interest in announcing the results of a recommendation together with the identities of the persons who made the recommendation. The agency cannot keep the agenda of a meeting secret since the public has a right to advance notice of the existence of the meeting, and in the case the meeting is to be closed to public attendance,

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1. 5 U.S.C. App. I (1972) [hereinafter cited as "FACA § ___."]

2. See FACA § 10.


6. FACA § 10(c).

the public receives some general statement of the topic which could not be addressed without incurring some special harm.\textsuperscript{8}

Confidentiality of an agenda item may be grounds for closing a portion of a meeting, but the legal advisers to the federal agencies which sponsor committees have cautioned that agendas should be arranged, whenever possible, to segregate the non-public from the generally public portions of a meeting.\textsuperscript{9} For example, a general discussion of a theme in military procurement should precede the specific discussion of classified weapons system acquisition, with the former open and the latter segment of the meeting closed.\textsuperscript{10}

Custody of the agency memoranda which fed into a committee's policy discussion remains with the agency staff; the documents are not considered to be made "public" until the agency disseminates them without control.\textsuperscript{11} A closed-session advisory committee discussion of an agency briefing paper does not constitute public release of the agency paper.\textsuperscript{12}

I. POLICY ISSUES

A. The Protectability of Members' Input to an Agency

The confidential status of recommendations of committee members to an agency which formed their committee is governed by Government in the Sunshine Act (GISA) exemptions.\textsuperscript{13} Separate and broader exemptions apply to written "agency record" items,

\begin{itemize}
  \item[8.] The agency Committee Management Staff must prepare an agenda, which will usually be public, FACA § 10(a)(2), 10(f). A summary of the agenda must be published in the daily Federal Register prior to the meeting, 41 C.F.R. § 101-6.1015(b)(iii). The detail in this summary may be restrained by secrecy considerations. But there will always be notice that a certain defined group will meet, and that their discussion concerns an exempted and confidential subject matter, 41 C.F.R. 101-6.1023(d)(2).
  \item[9.] The agenda of a meeting should be arranged to facilitate disclosure, Letter of Deputy Ass't Att'y Gen. L. Ullman to General Counsel, Nat'l Endowment for the Humanities, Aug. 18, 1980.
  \item[10.] For example, Defense Department meetings are more frequently closed than those of any other agency, with 350 totally closed, 46 partially closed and 93 open in fiscal 1984. Table I. Thirteenth Annual Report of the President on Federal Advisory Committees at 123 (GSA, 1985).
  \item[11.] An agency "record" may be withheld from public disclosure only under the terms of the Freedom of Information Act, 5 U.S.C. § 522(b) (1982).
  \item[12.] See discussion infra at note 62 regarding waiver of exemption status under exemption (b)(5).
  \item[13.] 5 U.S.C. § 552b(e).
\end{itemize}
under the internal agency memoranda exemption in Freedom Of Information Act.\textsuperscript{14}

There is a natural tension of values involved in the agency choice to try to protect from disclosure the information which the agency receives from its advisory committee members. An agency staff may desire a closed meeting so that frank and premature ideas can be offered in their rough form.\textsuperscript{15} It can be argued that closing the discussion of such preliminary concepts helps to prevent misunderstanding, avoiding chilling of the discussion of economic and other alternatives. The desire to close a session may be balanced against the agency's recognition that secrecy may reduce the perception of legitimacy of the recommendations because agency conclusions based on "secret" advice do not enjoy one of the benefits of advisory committee work, i.e., the legitimacy arising out of "public" input.\textsuperscript{16}

In past years, agencies have tried to opt for the closure of meetings to such an extent that Congress responded with a rider on the 1976 Government in the Sunshine Act\textsuperscript{17} which narrowed the legal exemption powers of an agency and forced the decision to be made in writing by the head of the agency,\textsuperscript{18} a more accountable level of decision-makers than had been required for withholding of general types of documents under the Freedom of Information Act.\textsuperscript{19}

It is virtually impossible to predict which topics will always be open or closed. The context of the particular meeting determines the assessment of the relevant harms which might flow from

\textsuperscript{14} Exemption 5, 5 U.S.C. § 552(b)(5). This is an important historical differentiation arising out of 1976 amendments to the FACA. See Pub. L. 94-409, 90 Stat. 1247-48 § 5(c) (1976). The amendments leave documents within FOIA standards but make the closing of meetings subject to narrower Sunshine Act standards. FACA §§ 10b, d.

\textsuperscript{15} This protective attitude for internal discourse has been recognized under the Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1982), and accepted by the Supreme Court, see NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

\textsuperscript{16} Courts have recognized that on controversial topics, advice received by an agency from its advisers may be especially sensitive to disclosure problems. See Soucie v. David 448 F.2d 1067 (D.C. Cir. 1971).

\textsuperscript{17} Pub. L. 94-409, 90 Stat. 1247-48 § 5(c) (1976).

\textsuperscript{18} The agency head and the general counsel must be involved in the decision and public notice of the closure of any advisory committee meeting because of the roles imposed on them by the amendments in 1976, id. (amending FACA § 10(d)).

\textsuperscript{19} The Freedom of Information Act does not specify the level of official who is empowered to withhold documents, and frequently this role is subdelegated to a minor official with appeal to a management person within the agency. 5 U.S.C. § 552(a)(6)(A)(i) (1982).
disclosures. Attendance by the public at an advisory committee session is generally small, but size is not an indicator of potency in an audience composed of representatives of the trade press, associations, advocacy groups, lawyers for affected persons or industries, and sometimes the general press. Permitting public attendance cannot lawfully be done on a selective or invitational basis except where the person attending is a consultant to the committee or an employee of the agency. General public attendance is an all-or-none question. If the advisory committee's sponsoring agency is legally able to close a meeting and decides to do so, the agency cannot selectively open the meeting to public non-members without opening it to all members of the public.

The basis for withholding of information under the internal agency memoranda exemption of the Federal Freedom of Information Act is the traditional privilege of government agencies to develop policy documents without public disclosure until the documents are adopted as agency policy. This common law philosophy was carried directly into the Freedom of Information Act upon its creation in 1966. A document developed within the agency staff and widely discussed by its employees remains exempt until it is disseminated to the public by the agency, or explains an adopted policy of the agency as a documentation of the agency's conclusion, or otherwise loses its privileged status. The FOI Act retained the common law's theory that disclosure protects against "chilling" free

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20. There has never been a single detailed list of closure reasons on a topic by topic basis. For example, Congress did not undertake an analysis of advisory committee subject matter that could be closed, but it referenced the Government in the Sunshine Act agency meeting closure exemptions, so that rationales for closure described in the legislative history of the Sunshine Act are the basic rationales which agencies must use in deciding whether to close an advisory committee session. S. Rep. 94-1178, Government in the Sunshine Act Conference Report, 94th Cong., 2d Sess. 12-15 (1976).

21. Attendance by consultants and agency staff is permissible, but it becomes legally difficult to subordinate the "public" which can attend a meeting into invited and uninvited guests once members of the public are admitted. Similarly, an agency cannot allow some favored members of the public to see its internal document of proposed agency plans and then to deny the same document to other public requesters, see North Dakota v. Andrus, 581 F.2d 177 (8th Cir. 1978).


25. Adopted policies need no such predecisional protection, see, Taxation with Representation Fund v. IRS, 646 F.2d 666 (D.C. Cir. 1981); Brinton v. Dep't of State, 636 F.2d 600 (D.C. Cir. 1980).
dialogue\textsuperscript{26} about options and considerations which would be less frequently offered by agency employees if it were known that internal memoranda making proposals were always disclosed.\textsuperscript{27}

Neither the FOI Act exemption nor the traditional agency "deliberative process" privilege would apply if a meeting to discuss the agency internal document were to be open to the public.\textsuperscript{28} So, when the 1976 Government in the Sunshine Act was adopted, its drafters included a special additional provision that narrowed the basis on which an agency could claim confidentiality of a meeting of the heads of the commission or board, such as the NLRB, and refused to allow meetings of the agency itself to be closed for discussion of deliberative memoranda. Instead, the drafters allowed only a narrow exemption for certain topics which would, if prematurely disclosed, harm the agency's ability to act immediately and without notice against some problem. As a result of the Sunshine Act's rider amending the Advisory Committee Act, this same restraint applies to advisory committees.\textsuperscript{29}

Thus, the "chilling of discussion" rationale which applies to documents cannot be applied to the meetings of advisory committees.\textsuperscript{30} Indeed, when the members have representative status, it could be argued that chilling is less likely.\textsuperscript{31} Public oversight of the input of a member who is "representative" in status will be unlikely to chill that person's provision of ideas to that agency because the group represented often expresses the same ideas willingly to all.\textsuperscript{32} Exceptions exist; e.g., a premature disclosure of an

\textsuperscript{26} Federal case law recognized a privilege to guard against chilling effects. See, e.g., Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir. 1966), cert. denied, 389 U.S. 952 (1967).

\textsuperscript{27} The common law exception is now included in the Federal Rules of Evidence, and is available if a private litigant seeks discovery of an internal agency deliberative policy document. Fed. R. Civ. P. 26, Fed. R. Evid. 509.

\textsuperscript{28} This is so because the internal document lost its internal-only status upon dissemination outside the bounds of control of the agency, see County of Madison v. United States Dep't of Justice, 641 F.2d 1036 (1st Cir. 1981) and North Dakota v. Andrus, 581 F.2d 177 (8th Cir. 1978).


\textsuperscript{30} This is the consequence of § 5(c)'s amendment in 1976, id. which did not cover documents.

\textsuperscript{31} That is because a representative is not a special government employee, so the logic of preserving intra-government dialogue is absent. See the representative versus employee distinction discussed at supra note 28, at § E.

\textsuperscript{32} The representative members can be expected to carry to the advisory committee a consensus position for the group which they represent.
"acceptable" level of regulatory action, or a division within ranks of an industry which become manifest at such a meeting. But these disputes are typically thrashed out in private industry meetings and not before such federal committees. On the contrary, it could be argued that representatives of one faction within a divided industry are chilled by a fear that disclosing weaknesses they see in their business would help an opposing faction, and thus would be more candid (candid, however, only if the opposing faction has no members on the federal committee). 33

Open sessions provide a check and balance function which might not be available with wider confidentiality of such meetings. Rejecting a confidentiality option would allow monitoring by the public of the forces at work in the dynamics of the committee. If there were inordinate domination of a committee by one person, lack of public attendance might conceal a factor underlying the disclosed set of recommendations. 34 It can be argued that public oversight is even more important to assure that the balance is working when the agency has assembled a committee comprised of representatives. 35

More of the "chilling" of an individual idea or proposal is probable with committee members who are not representatives, but speak as individual advisers. For them, disclosure of a premature idea in the form of advice to a federal agency can result in personal criticism rather than adversaries' criticism of the institutional view of the institution or organization for which they speak. 36

33. See the discussion of industry "balance," at supra note 28, at § E.

34. "Domination" of the committee output is relative; there can be no inordinate control by any private sector member since each meeting is limited by the statutory command that the agency liaison must submit public notice, must be present at all meetings, and may terminate a meeting at his or her discretion. FACA § 10(e). It is possible that work product of the committee may be influenced by other organizations or subcommittees, National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Controls, Civ. 82-3592 (D.D.C. 1983), aff'd, 711 F.2d 1071 (D.C. Cir. 1983).

35. This secret influence process was attacked in the legislative history of the Advisory Committee Act; H. R. REP. No. 92-1017, H. R. REP., 92-1403, S. REP. No. 92-1098, 92d Cong. 2d Sess. (1972). But a perception of dominance, at least from the member perspective, is unlikely since in a comprehensive survey 95% of committee members felt that their committee had been balanced, which "enhanced effectiveness by ensuring that a variety of viewpoints and expertise was considered." R. Wegman, The Utilization and Management of Federal Advisory Committees, at 192 [Kettering Foundation 1983] [hereinafter cited as Wegman].

36. The result of revealing individually attributable comments, rather than a committee consensus document, could be to give rise to bitter personal challenges to the individual
The role of a confidentiality provision in the representative committee meeting context is analogous to the debate over disclosure of certain governmental committees' actions: the temporary protection of a special action-initiating decision, which will become known in the future, was the basis for invocation of FOIA exemption (b)(5) in *Federal Open Market Committee v. Merrill* in 1979. A committee of bank economists affiliated with the Federal Reserve Board, an agency of the federal government, withheld its action decisions for such time as was needed to execute the orders. (The committee has a special exemption from the Federal Advisory Committee Act.) A Supreme Court decision allowed the closing of the results of the meeting from public view for a period of time. In that case, the committee input was governmental; it was an action committee because of its power to direct action of the Federal Reserve, and had disclosure occurred, there would be direct frustration of a governmental function.

The Supreme Court decision in *Federal Open Market Committee* created a form of hybrid FOIA exemption allowing government commercial exemptions for a defined period of time. This combination of contemporaneous governmental action arising out of the meeting, and the unique nature of that committee made for a better disclosure situation than a normal advisory committee setting.

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See *Wu v. National Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). For example, names of the reviewers who advised the agency on grant applications have been withheld in a contract lawsuit, *see* Deuterium Corp. v. United States, 4 Ct. Cl. 361 (1984). The court should look to whether the adviser expected the identity and advice to be disclosable, Martin Marietta Aluminum, Inc. v. Administrator, General Services Administration, 444 F. Supp. 945 (C.D. Cal. 1977). The Justice Department has found no reason to publish findings of the group while agency action is still pending, and this time delay may be helpful to the agency's preservation of confidential status. 43 Op. Att'y Gen. 742, 744 (1980). (On file at *Northern Kentucky Law Review*).


38. The decisions on purchase or sale made by the committee were executed for it by an official of the Federal Reserve. Decisions of the committee would be of great interest to investment firms who could plot their investment strategies with knowledge of the government's buying or selling plans before and during the activity.

39. The Federal Reserve's committees are specifically excluded by FACA § 4(b)(2).

40. This hybrid decision allowed the government to claim that government-generated commercial data created in the process leading up to a contract or other quasi-commercial action was confidential, *Merrill*, *supra* note 36. The Supreme Court differentiated between policy advice, which remains confidential, and commercial advice, which can (as in *Merrill*) be disclosed at the end of the month or other short period during which the decision is executed.

41. All members of the Open Market Committee are employees of the Federal Reserve, *Merrill*, *supra* note 36.
In a routine committee, harm would be less certain or less visible than it would be in the case of dissemination of the Open Market Committee's financial purchase plans.\(^4^2\)

Historically, the 1976 change of the FACA exemptions,\(^4^3\) which had been based on the documentary withholding power of the FOIA,\(^4^4\) over to the narrower exemptions in the Sunshine Act,\(^4^5\) meant an end to routine agency abilities to exclude the public from the advisory meetings. The agency has a greater burden now than it had prior to 1976. Because the Sunshine Act is oriented to exemptions for inhibition or compromise of agency action,\(^4^6\) not necessarily of input to the agency by advisers,\(^4^7\) its exemptions are not easy to apply for confidentiality of FACA meetings.\(^4^8\)

Finally, even with the legal right to exemption or closure of the meeting as an option, an agency must recognize that other considerations may be troublesome. Committee members have first amendment rights to discuss their advice outside of the agency meeting, if they choose to do so and absent a special contractual agreement not to disclose agency matters.\(^4^9\) That agreement typically would not be given by a member who served as a group's repre-

\(^{42}\) But an analogy might be drawn to leasing or purchase advice given as to specific projects, disclosure of which advice would undercut the negotiating posture of the federal agents charged with implementation of the final decision after such recommendations are considered by agency officials.


\(^{45}\) 5 U.S.C. § 552b(c) (1-10) (1982).


\(^{47}\) The Sunshine Act applies to meetings of the agency, usually a multi-member body such as a commission or board, 5 U.S.C. § 552b(a), and is not directed to the flow of paper into these meetings of the heads of the agency.

\(^{48}\) The difficulty of applying Sunshine Act exemptions is explained in detail in subsection B. infra.

\(^{49}\) The special government employee may be covered by an obligation not to discuss the work of the government agency which is not already public. This would be subject to challenge as an unreasonable restraint on freedom of speech if the individual had not been subject to a contractual agreement or other sound legal barrier to dissemination of information. Presumably the individual member who is a special government employee could still be prosecuted for dissemination of military secrets or for leaking confidential commercial documents which are nonpublic under 18 U.S.C. § 1905 (1982). At least one agency has restricted attendance at closed advisory committee meetings to non-"representative" members, who are special government employees, so that the agency can, if necessary, prosecute any attendee who leaks commercial secrets which come before the committee. Food and Drug Administration, Advisory Committee Regulations, preamble discussion at 41 Fed. Reg. 52152 (1976).
sentative to an advisory committee and who would routinely relay agency views to the group. Because the committee advises and does not decide action steps, there is no finality to the advice given; thus, the exemption serves no long-term function and does not preserve the content of the advice unless a separate exemption such as for military classified secrets, would apply. Therefore, while advice to the agency may be important, it is not easy to protect that advice from demands for public access.

None of the access and attendance provisions require the committee to always hear or pay attention to private persons who want to use the committee as a vehicle to influence the agency. The privilege to be heard is not a statutory right for those who have rights to attend or submit statements.

B. The Protectability of Agency Documents Going to the Advisers

In general, Section 10(b) of the Federal Advisory Committee Act extends the openness of attendance at meetings into openness of the documents used as well. Much of the discussion which follows will focus on the clause in Section 10(b) which makes the advisory committee openness "subject to" the disclosure limitations of an important federal statute, the Freedom of Information Act (FOIA). The "protectability" of agency documents going to an advisory committee may be illusory. It may be that no FOIA exemption applies.

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50. As a relay point for the information needs of an organization, but also as a member of an agency input body, the representative member has an allegiance problem. It would be unreasonable to burden the representative member with the obligation to not report on what the committee had advised.

51. The content of the advice does not carry weight after the agency decision to accept it, for it then becomes the agency's task to defend the agency's decision. If the agency rejects the advice it likewise has no further value as advice. The FACA does not compel an agency to accept advice offered.

52. The FACA does not provide authority for a private person to speak at a committee meeting without consent of the committee, 5 U.S.C. App. I § 10(a)(3) (1982); 41 C.F.R. § 101-6.1021(d). Some agencies routinely permit public comments by advance arrangement, subject to committee approval, see, e.g., Food and Drug Administration, 21 C.F.R. § 14.29(b).

53. 5 U.S.C. App. I § 10(b) (1982): "Subject to section 552 of title 5 . . . records . . . which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the . . . agency to which the advisory committee reports."

54. The nine exemptions of the FOIA, 5 U.S.C. § 552(b), cover such matters as internal agency deliberative documents and confidential commercial submissions from private persons to the agency.
applies, and so the agency may not be able to lawfully deny requests from the public for copies of committee-reviewed documents.\textsuperscript{55} Or, the documents may already be publicly available in part, in which case the FOIA compels segregation and release of the nonexempt portions.\textsuperscript{56} Or, for political and policy reasons, the management of the agency above the level of the operating staff may decide not to withhold a document because exemptions are invoked at the agency's option and their invocation exposes the agency to litigation in which the agency must bear a heavy burden.\textsuperscript{57}

Practical considerations in the question of non-disclosure may be important. It does not necessarily follow that a closed meeting will have its accompanying documents withheld, though this often occurs. Sometimes, oral presentation by the agency staff to its advisers will be more general (and hence observable by the public) than the detailed written presentation transmitted to the members. Sometimes a confidential oral briefing builds upon an innocuous or already public document.

The level of agency activity on the topic is also important. The head of the agency must make the decision to close an advisory committee meeting while lower-level officials of the agency are free to make FOIA withholding decisions.\textsuperscript{58} If the topic is not one on which the agency's upper management cares to spend its efforts, then closure of the meeting may be more difficult for the staff members than merely withholding the documents from public or press requests.\textsuperscript{59}

The Freedom of Information Act exemptions are sometimes over-utilized by an agency's operating staff,\textsuperscript{60} which realizes that the

\textsuperscript{55} If the FOIA did not apply, then the mandate of access under FACA would force dissemination because records of the advisory committee would not be "subject to section 552." FACA § 10(b).

\textsuperscript{56} 5 U.S.C. § 552(b); Mead Data Central v. United States Air Force, 566 F.2d 242 (D.C. Cir. 1977), aff'd on remand, 575 F.2d 932 (D.C. Cir. 1978), and see Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975).

\textsuperscript{57} Although an exemption may apply, the agency has the option not to invoke it but to release the documents anyway unless some other statute bars disclosure. EPA v. Mink, 410 U.S. 73, 80 (1973).

\textsuperscript{58} 5 U.S.C. App. I § 10(d); this high level closure decision is comparable to the decision made for multi-member agency meeting closures, 5 U.S.C. § 552b(d), and both were created by the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1247 (1976).

\textsuperscript{59} The FOIA does not specify which employee may decide to withhold a document, 5 U.S.C. § 552(a)(6)(A).

\textsuperscript{60} Over-utilization is a frequent charge during oversight hearings, see, e.g., Freedom of Information Act Oversight: Hearings Before the House Comm. on Gov't Operations, 97th
Act is not self-enforcing and that it poses transaction cost barriers against the person who wishes to force disclosure of a particular document. But in the present context, matters of some public or trade group attention discussed before an advisory committee are likely to be subject to some notoriety or press attention which may lead to a FOIA controversy.

In general, FOIA exemption (b)(5) protects the agency's policy papers which contain deliberative discussions, selections of key policy points, or legally-privileged documents. Beyond the deliberative issue, the agency could protect advisory committee documents under exemptions related to the content of documents. Private commercial or personal privacy documents may be shared with advisory committees and still be exempt under exemptions (b)(4) or (b)(6). Law enforcement agencies sometimes discuss strategies which are exempt under exemption (b)(7), and the Pentagon frequently invokes exemption (b)(1) for classified documents shared with a committee of advisers each of whom had "secret" clearances.

The primary FOIA exemption related to advisory matters, exemption (b)(5), covers "intra-agency" memos which would be privileged in a litigation context. The provision of this exemption originated as a recognition that the long-standing legal privilege for internal agency deliberations would need to be continued when, upon the 1966 enactment of the FOIA, agency "records" became

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Cong., 1st Sess. (1981). Agencies vary tremendously in their ability and willingness to meet the FOIA disclosure policies and deadlines.

61. Costs of attorneys and fees for litigation could be recouped if one substantially prevailed after months of effort, but transitory benefits to knowing the advice given to an agency on a particular issue make it very unlikely that FOIA litigation will produce a quick and favorable result.

62. The larger the economic benefit of learning the advisory committee results, the more likely that legal action will occur to press the agency for disclosure.

63. 5 U.S.C. § 552(b)(5); NLRB v. Sears, Roebuck, & Co., 421 U.S. 132 (1975); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). As with the other exemptions, however, claims of exemption (b)(5) are permissive and the agency need not make them if it chooses not to do so. EPA v. Mink, 410 U.S. 73, 80 (1973).

64. The content of the advisory committee documents could merit an exempt status so long as the disclosure occurred without general public release of the documents.

65. 5 U.S.C. §§ 552(b)(4, 6).

66. 5 U.S.C. §§ 552(b)(7, 1).

67. This tie to civil discovery privileges is important, NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975), in that it defines the shape of "predecisional" privileged items.
subject to public requests for disclosure. Agency policy documents which are still under internal development can be withheld except in limited circumstances. The limited exceptions in which disclosure can be required are applicable to advisory committee settings. First, documents which explain or discuss an "adopted" decision are disclosable since the agency no longer is deliberating. These are rarely within the advisory committee category because the committee is not asked to advise after the final decision has been made and announced. Second, documents which are factual only are not "deliberative" unless they are selective of certain key facts in support of an agency deliberation. Third, documents which the agency has already made public cannot be exempt since they are no longer internal to the agency.

68. "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public." H.R. REP. NO. 1497, 89th Cong., 2d Sess. 10 (1966).


70. These are records of the agency because of their control by and involvement with the work of the administrative agency. But a private organization could show a private document to agency staff or advisory committee members without delivering control of the document itself, in which case it remains a non-"record" until and unless the agency accepts the record into its files. Forsham v. Harris, 445 U.S. 169 (1980); Kissinger v. Reporters Committee on Freedom of the Press, 445 U.S. 136 (1980).

71. If the agency adopted a policy and then explained it in the document, that document would be required to be released. Afshar v. Dep't of State, 702 F.2d 1125, 1142 (D.C. Cir. 1983).

72. It is possible that an agency document given to a committee could discuss current strategy options in light of past efforts; these could remain part of a current decision. Ashley v. United States Dep't of Labor, 589 F. Supp. 901, 910 (D. D.C. 1983).

73. Factual portions of the memo presented to the committee must be segregated and disclosed upon a public request because the FOIA requires segregation of disclosable portions and the privileges which underlie exemption (b)(5) do not cover non-deliberative materials unless they are "inextricably interwined." Center for Auto Safety v. EPA, 731 F.2d 16 (D.C. Cir. 1984). To withhold the factual materials, the agency shows that the factual material is available in some other form, that release would reveal an aspect of the decisional process, and that the document supports a particular identifiable agency decision. Ashley v. United States Dep't of Labor, 589 F. Supp. 901, 910 (D. D.C. 1983).

74. Once public, they are no longer intra-agency except for cases in which a selection of publicly-known facts is presented to the decisional official and the selection document would itself disclose the decisional process of the agency, Mead Data Central v. United States Air Force, 566 F.2d 242 (D.C. Cir. 1977). In one case, advisers selected facts about a program being evaluated; the exemption applied because choices "must be made by some-
Case law under the exemption for deliberative documents has occasionally discussed advice received by the agency.\textsuperscript{75} As a general rule, advisory committees may receive deliberative documents without waiver of the agency's right to withhold the document from other persons. Such committees are treated as a functional part of the agency for this purpose.

In the 1976 \textit{Washburn} case,\textsuperscript{76} the United States Court of Appeals for the District of Columbia Circuit upheld secrecy of documents which disclosed the future plans of the travel promotion arm of the Commerce Department. A public interest group asked for documents distributed at an advisory committee meeting and sought to enjoin the closing of the meeting. The court quoted extensively from the legislative history of the Federal Advisory Committee Act which tied the power of closure of meetings to the power to withhold related documents. Senator Percy had said: "Under the conference version . . . meetings can be closed to the public, and documents can be withheld under the exemptions in the Freedom of Information Act."\textsuperscript{77} The court expressly rejected the claim that advisory committee members are members of the "public" and that disclosure to them required disclosure to the public at large.\textsuperscript{78}

\textit{Washburn}'s importance to advisory committees was its instigation of legislation, not simply its precedential value. The losing side in the District of Columbia Circuit obtained legislative reversal of the decision as to closing meetings in the form of an addition to the then-pending Government in the Sunshine Act.\textsuperscript{79} The amendment was explained as overruling \textit{Washburn} and was "intended to end agency reliance upon the 'full and frank' discussion rationale for closing advisory committee meetings."\textsuperscript{80} The resulting change

\textsuperscript{75} For example, names of the reviewers who advised the agency on grant applications have been withheld in a contract lawsuit, Deuterium Corp. v. United States, 4 Ct. Cl. 361 (1984). The court should look to whether the adviser expected the identity and advice to be disclosable, Martin-Marietta Aluminum, Inc. v. Administrator, General Services Admin., 444 F. Supp. 945 (D.C. Cal. 1977).


\textsuperscript{77} \textit{Id.} at 107, n.6.

\textsuperscript{78} \textit{Id.} at 108.


was partially accomplished; closing meetings requires use of the
Sunshine Act, but there was no change to the use of the Freedom
of Information Act for documents. Congressional action to reverse
the use of FOIA to close the meeting in Washburn did not reverse
the court's separate holding relating to document withholding—
that members of the advisory committee are not members of the
"public" for purposes of finding a waiver of the FOIA exemptions.

The issue of "individual" versus "representative" status remains
important as a result of Washburn because the court left open the
potential that in a particular case there could be "public
disclosure." Once the advisory committee obtains the documents,
there probably is a valid rationale for excluding the public from
access, if the member of the committee is acting as a special govern-
ment employee or otherwise has an obligation not to disclose. There
is much less expectation when the committee member is not a
special government employee, is under no specific confidentiality
pledge, and is being asked by the agency for reactions or responses
from the organization with which the member is affiliated.

Consultant reports are often subject to challenges seeking
disclosure, and agencies have won more often than they have lost.
Panels of advisers to the National Endowment for the Humanities
have been protected from disclosure of their identities so that there
would not be inhibition of the reviewers' advice concerning govern-
ment functions. This issue was especially sensitive for the National
Institutes of Health, so the drafters of the Sunshine Act amend-
ments to the advisory committee statute included a special
reference endorsing protection of personal privacy.

81. Closure requires compliance with FACA § 10(d) as amended, a process comparable
to that of the Sunshine Act, 5 U.S.C. § 552b(d).
82. The FOIA remains applicable because documents are covered by FACA § 10(b) and
the 1976 amendments altered only FACA § 10(d).
84. This can be inferred from the court's rather tentative approach to the holding in
that case. Id. at 108.
85. This is not to say that an agency could not create an expectation by its dealings
with a particular person or committee, but expectations in general are lessened when the
committee receiving the documents has a known allegiance to some represented body.
86. See Martin-Marietta Aluminum, Inc. v. Administrator, General Services Admin., 444
Land Bank v. GSA, 671 F.2d 663, 666 (1st Cir. 1982), Hoover v. Dep't of the Interior,
611 F.2d 1132 (5th Cir. 1980).
Some courts have forced the agency consultants to defend their reports in public through a grant of FOIA access requests, and a consultant's recommendation which is accepted is perhaps an "adopted" agency decision so that exemption (b)(5) may become unavailable.

Under the Sunshine Act amendments to the Federal Advisory Committee Act, the agenda of the agency meeting must be disclosed and the meeting must be open to the public unless openness would "be likely to significantly frustrate implementation of a proposed agency action." This exemption, (c)(9)(B), governs agenda withholding and closure of meetings from the public. The agency's documents remain under FOIA exemption (b)(5) but this narrow exemption covers other aspects of the disclosure area. Even this narrow "frustratability" test is eliminated in the case of required rulemaking or formal actions because the exemption cannot be claimed when a law requires the agency to make public "the content or nature of its proposed action . . . prior to taking final agency action on such proposal."

The narrowness of the agenda protection and meeting-closing language, coupled with the proviso forcing disclosure if an agency must make its action public, means that few advisory committees would be able to claim total secrecy just because of potential frustration of agency action. Some will have personal privacy reasons for closing medical discussions, or nuclear weapon topics

89. See, e.g., GSA v. Benson, 415 F.2d 878 (9th Cir. 1969).
90. Adoption by the agency may terminate the predecisional privilege because the document becomes the equivalent of a final opinion. Federal Open Market Comm. v. Merrill, 443 U.S. 340, 360-61 n.23 (1979). And Justice Department advice has recognized that subsequent to an advisory committee completing a project for the agency, identities of the advisers and the recommendations may be disclosable. Letter of Deputy Ass't Att'y Gen. L. Ulman to General Counsel, Nat'l Endowment for the Humanities, Aug. 18, 1980, 43 Op. Att'y Gen. 742 (1980). (On file at NORTHERN KENTUCKY LAW REVIEW).
92. 5 U.S.C. § 552b(c)(9)(B).
93. If the exemption applies, FACA subsections 10(a)(1) and (a)(3) are affected, but not the document disclosure portions in § 10(b).
94. 5 U.S.C. § 552b(c)(9).
95. The frustratability standard was intended to limit the use of exemption (c)(9). S. REP. No. 94-1178, Conference Report, Government in the Sunshine Act, 94th Cong., 2d Sess. 15 (1976). Only a significant amount of frustration was acceptable, with a balance of public interests required. R. BERG & S. KLITZMAN, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 26 (Administrative Conference, 1978).
which are classified and exempt;96 but agency agendas are unlikely to be protected under the "frustratability" test on its own.97 Few agency decisions will qualify, and even fewer instances will exist, in which an advisory committee is convened prior to an instant action for which no public notice is required.98

There remains one specific type of document which can be considered exempt on a routine basis—the assessment of the meeting by an agency insider.99 The transcript or minutes of an advisory committee are routinely reviewed and released on request, except for closed meetings, and related documents are protected only if an FOIA exemption applies. It is theoretically possible that a committee liaison person within the agency could invoke exemption (b)(5) for her or his report which explains or comments upon the recommendation of the committee to the agency.100 The factual portions would be segregated in the event of an FOIA request and it is possible that a court could find that disclosure of the content of the document would inhibit internal frank discourse by the author, as liaison, whether or not members of the committee would have been "chilled" by disclosure. There is virtually no chance that a court would permit withholding if the document factually and objectively recounted the subject matter and findings of a meeting which had been open to the public.101 To the extent that an agency lawyer reports on the meeting, some work product or attorney privilege claim might be made.102

A final note on attitudes is appropriate: agency managers fear the trouble and time consumed in lawsuits. If a request for dis-

96. These are permitted under 5 U.S.C. § 552b(c)(6).
97. Note that a "summary" of the agenda is published, and this may in some cases be generic. See GSA advisory committee rules, 41 C.F.R. 101-6.1015(b)(iii) (1985).
98. There are few agency situations in which an advisory committee would be convened to discuss a "regulatory action which must be imposed without notice in order to prevent forestalling action by the regulated community." This is the setting in which exemption (c)(9)(B) could be invoked. R. BERG & S. KLITZMAN, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 24 (Administrative Conference, 1978).
99. FACA § 11(a) permits public access to any transcript, and if none is kept, FACA § 10(c) allows access to detailed minutes.
100. This summary would be protectable either as an internal deliberative process document or as a selective factual summation, which can be made and exempted even though the public has had access to the factual event which is reported in the summary. Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974).
101. For example, a list of attendees and written recommendations from an open meeting would be clearly disclosable.
closure of documents is strident enough, the agency may surrender the documents as a means of offering settlement. The legal ability to protect does not necessarily lead to actual withholding.

C. The Special Case of Business Information

The preceding discussion has applied the legal confidentiality standards to a discussion of agency-related policy or deliberative documents. Because agencies sometimes ask advisory committees to consider commercial confidential data, it is prudent to examine that special case as well. Disclosure questions about military secrecy or criminal law matters fit the same statutory pattern, but very rarely have been litigated.

Business confidential information in federal agency files of documents submitted from the private sector can be protected from disclosure if the federal agency holding the records invokes one or more of the four distinct categories available for protection of such data.

First, a pure “trade secret” is exempted from required disclosure *per se* under both the Freedom of Information Act, which governs documents,103 and the Government in the Sunshine Act, which governs meeting discussions.104 Defining the category and measuring the applicability of the category to a particular piece of technology may be difficult, but the agency may then claim that it is a trade secret. Common law definitions apply this status to technology developments, formulations, research data and customer lists.105 The trade secret may be rather simple, but it remains exempt from public disclosure so long as the conditions of secrecy, utility and security remain in place.106

Second, a specific statute may provide that an agency will not publicly disclose a piece of information about some private commercial matter. If the statutory protection satisfies the legal standard of compelling the agency to withhold, or defining the categories

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103. The FOIA exemption, 5 U.S.C. § 552b(c)(4), is stated in the alternative, i.e., a matter is either a trade secret or it is commercial confidential data. A trade secret owner need not show that there is also confidential commercial data coverage, but may wish to do so.
104. 5 U.S.C. § 552b(c)(4).
106. These are the general criteria followed by the common law since IV RESTATEMENT OF TORTS § 757 comment b. (1938), and see case law described in 1 R. MILGRIM, TRADE SECRETS ch. 2 (1985 Supp.).
for which withholding is directed, as the Census Act does, no disclosure may be made and the advisory committee documents will not be in jeopardy.\textsuperscript{107} One option for a private group wishing to enhance the confidentiality of advisory committee meetings would be to amend the specific statute under which the committee meets to provide for the closing of advisory sessions and confidentiality of the documents used with that committee. Such special statutory arrangements, if they can be made, exempt the commercial discussion under FOIA exemption (b)(3) for specific statutory confidentiality provisions.\textsuperscript{108}

Third, a piece of confidential commercial or financial information may be withheld if disclosure would make it unlikely that the same information would be available to the agency in the future.\textsuperscript{109} The deterrence of future cooperation which would result from disclosure must be significant,\textsuperscript{110} not merely a minor incidental problem in rare cases. The agency has the burden of showing that dissemination of private data would harm the agency’s ability to collect similar data in the future.\textsuperscript{111}

Finally, a document could be shown to be confidential commercial or financial data which is “likely” to cause substantial harm to the competitive position of the owner if disclosure occurs.\textsuperscript{112} The agency usually shifts the fact-gathering burden to the owner of the information, who establishes that the information is not known to its competitors and would give them an advantage if disclosure oc-


\textsuperscript{108} Such a specific statute would qualify under 5 U.S.C. § 552(b)(3), and thus would allow exemption from disclosure of the agency records flowing to the committee, FACA § 10(b).


\textsuperscript{110} For example, the sharing of private technology data with a federal advisory committee, upon request of an agency in circumstances in which the private firm is not required to report to the federal agency, is exempted from disclosure because a forced disclosure would end the future sharings of such data. Foundation on Economic Trends v. Heckler, 87 F.Supp. 753 (D. D.C. 1985).

\textsuperscript{111} The deterrence can be claimed by the agency on the basis of its need for full cooperation or its lack of authority to demand certain voluntarily submitted private documents. National Parks, supra note 108, and see also Timken Co. v. United States Customs Service, 3 Gov’t Disclosure Ser. (P-H) ¶ 83234 (D. D.C. 1983) and Comment, National Parks & Conservation Ass’n v. Morton, 88 HARV. L. REV. 470, 476 n.30 (1974). (Timken is on file at NORTHERN KENTUCKY LAW REVIEW).

In the advisory committee context, the use by the committee for its discussion purposes of the formulation or statistical data of one firm may assist discussion on a topic such as standard setting for which the agency wants advice. But the agency must have an understanding with the members that confidentiality is intended to continue. If a member leaks the information, there may be substantial damage to the information owner as well as deterrence of future sharing of similar data.

Each of these four commercial withholding options relate to commercial information disclosure at the meeting or in related documents. But there should also be protection against breaches of secrecy by the members' own interests in related products. If a member is not a special government employee, there may be conflict problems if the member engages in a review of the non-public commercial data of a firm which is in actual or indirect competition. The agency does need some safeguards against the discomforting appearance that an industry member of a committee dealt improperly with a regulated firm's confidential data.

Disputes under the Sunshine Act exemptions have been relatively rare, and none squarely address the ability of an advisory committee to safeguard commercial confidential data. Because the Sunshine Act commercial exemption is comparable to the FOIA standard, legal precedents will apply uniformly to both meetings and documents where commercial confidentiality is concerned.

D. The Role of the Press

Confidentiality of advisory committee discussions must be seen in light of the trade and general press reaction to government

113. 5 U.S.C. 552b(c)(4); National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974); Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979).

114. The shift is not required but may be imposed on private firms by the agency since the competitive position is better known to the firm which is actually in competition. See, e.g., Burke Energy Co. v. Dep't of Energy, 583 F.Supp. 907 (D. Kan. 1984). The shift is required by agencies such as the EPA, 40 C.F.R. pt. 2 and the FDA, 21 C.F.R. § 20.53 (1985).

115. The agency usually will take precautions in the event that commercial secrets are to be disclosed by the agency to the committee members. See, e.g., Food and Drug Administration policy, 21 C.F.R. §§ 14.27, 14.86(a), (1985) discussed at 41 Fed. Reg. 50,152 (1976).

116. Agencies could use the conflicts provisions to bar such persons from attendance in the portion of the committee session which considered the trade secrets of the competitor firm, to avoid problems or conflicts under 18 U.S.C. § 208. Davis, Special Govern-
secrecy. Strong congressional representation of the organized publishers, editors and reporters organizations has been a fact of life for many years. There is no prospect that amendment of advisory committee legislation would fare any better than the long-pending suggestions for changes to the Freedom of Information Act.

The press position on advisory committee confidentiality standards may be extrapolated from press arguments in the field of FOIA reform. There is no strong argument that injury to commercial enterprises might not occur, and indeed commercial television interests have been involved with the FOIA commercial exemption. But press representatives have argued that a strong case for legislative restraint of openness has not been made. The amendment of FACA would, at a minimum, require showing to the satisfaction of the press organizations that openness deters useful interchange and that the dissemination of information from committee meetings hurts the public interest. Since the press and public interest groups have established their power in the FOIA oversight committees, such a showing would be a necessary prerequisite to entering the process of legislative change, if change is ever desired.

E. The Role of Perceptions

Confidentiality of advice and input is not strictly a legal issue. Policy and perception problems must be considered. The fact that an agency is rarely sued for closing innocuous committee meetings may lead agency managers to over-claim confidential status. But well-publicized challenges are expensive to the agency in terms of cost, management and legal time consumed, and press credibility of the agency. Any decision to change the agency policy about advisory committee confidentiality must begin with legal powers and move into policy options.

119. Few FACA cases have come to court and few FOIA cases have been filed. According to recently reported statistics only 1.2% of denials of FOIA access (including partial denials) were litigated. 418 suits were filed and 536 rulings were issued in cases pending before the courts. 11 Access Reports 2 (July 3, 1985). No statistics for suits challenging closure of advisory committee meetings have been kept but there are believed to have been fewer than 25 reported cases in the 13 years of the Act’s existence.
Some of the perception and policy issues which must be considered include:

1. Does the agency increase the chance of litigation against a rulemaking or policy formation process by closing advisory sessions? Does the litigious atmosphere which surrounds EPA and other agencies' policy formation affect the willingness of an agency to close meetings, where the opponent may seize upon that step as a weapon against the policy decision?\(^\text{120}\)

2. Can one generalize that the universe of advisory committee members perceives lesser quality dialogue occurs from closed meetings? Wegman's study of members of committees found overwhelming responses that openness policy was not a problem.\(^\text{121}\)

3. The "consumers" of agency policy, notably, regulated industry, may perceive that policies are better justified when the affected persons can watch the policy take shape. Is there a perception of policy "improvement" through the committee system? If so, observation of the committee by the affected industry (as members of the open public) aids the legitimacy of the policy exercise.

4. The current case law sets an ill-defined "substantial harm to competitive position" as the standard for showing exemption of business data from required disclosure under the Freedom of Information Act.\(^\text{122}\) Does an advisory committee's access create any threat of loss of competitive position? It may be perceived that committees increase the potential of a "leak" of business data.\(^\text{123}\) Are agencies doing all that they should to remind members of the need for confidentiality and to monitor their compliance with nondisclosure promises?\(^\text{124}\)

5. An alternate test for confidential business data is whether disclosure by the agency deters future cooperation from private

\(^{120}\) A challenge might assert that the record of the agency decision is not complete until the agency releases information concerning the advisory committee consideration of the rule.

\(^{121}\) Wegman, supra note 35, at 204.

\(^{122}\) National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

\(^{123}\) A prudent firm will know prior to the presentation which members of the committee have competitive ties; there presumably would be an informal request for recusal in such a conflicts case. The submitting firm is in much better position than the agency to know where conflicts exist.

\(^{124}\) Wegman, supra note 35, urged greater training of committee members by the agency staff and this would be an apt subject for presentation.
persons.\textsuperscript{125} Is the prospect that voluntarily submitted statistics or designs will be aired before a closed session of a committee deterring those who submit business data from cooperation with the agency? This subject is speculative because no one admits the loss so as not to highlight to competitors that damage has occurred.\textsuperscript{126}

6. If one assumes that the press will favor openness and criticize secrecy, is the press criticism of secret sessions of advisory committees an opinion shared by the general public as well as the press? Or, does the public discount the "conspiracy theory" sometimes associated with bureaucratic agency policy formation? Is "sunshine" of discussions a widely accepted value among the general public when the government's work is considered?

7. New members are instructed about FACA and agency procedures, and they recognize bureaucratic complications. Does the red tape of closing a committee session, including the delays and management clearance steps, produce a perception among committee members that the struggle to close a meeting is not worth the benefits? Conversely, might some advisers not participate in the federal process because of distaste for the forced mechanism of disclosure and reporting and publication? It may be that perceptions of the burden of openness are greater among advisers than among the agency staff who learn to live with or avoid the burdens of openness.

II. CONCLUSIONS ABOUT CONFIDENTIALITY

Closure of an advisory committee meeting requires action by the head of the agency and its general counsel, and must be premised on narrow grounds which are more restrictive than the exemptions available under the Freedom of Information Act. As a result, it is unlikely that an agency could lawfully close an advisory meeting for the purpose of improving the committee's discussion of policy matters.

It is somewhat more likely, though not certain, that advisory committee meetings can be closed in order to protect privacy of individuals or of commercial plans. The commercial data presented to a committee must be either trade secret information, or of a

\textsuperscript{125} National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

\textsuperscript{126} Typically, a submitter who learns of a single competitor's FOIA access does not announce the loss so that other competitors are not alerted to the availability of the information. This phenomenon is noted in W. CASEY, J. MARTHINSEN & L. MOSS, ENTREPRENEURSHIP, PRODUCTIVITY AND THE FREEDOM OF INFORMATION ACT (1983).
type which would cause substantial competitive harm. The personal data would be protected if disclosure would be a clearly unwarranted invasion of personal privacy. The first category requires some effort by the data owner or a special statutory protection for the class of documents. The second category requires heightened sensitivity by the agency to medical, personnel or other potentially sensitive individual information.

The specific context of the committee's scope, the factual basis for the claim of confidentiality, and the status of "special government employee" members must be considered before the meeting itself can be closed. Confidentiality is a hurdle, a barrier, and a burden. Openness is the agency norm, confidentiality the exception.

Documents are treated differently than the meetings to which they relate because of the wording of the 1976 amendments to the Federal Advisory Committee Act. Documents themselves can still be protected under the Freedom of Information exemptions. There is a small body of case law concerning the waiver of FOIA exemptions when a document leaves the agency insiders and is shared outside, or when a document begins with a consultant and is considered inside the agency. Although the case law is not strong precedent for all future settings, it can be asserted in general terms that no waiver of FOIA exemption status occurs when an agency document is shared with an advisory committee.

Documents shared with an advisory committee which contain commercial or personal privacy information are more likely to remain confidential if the agency has a contractual assurance of secrecy with committee members or if the committee members are special government employees who are limited in their redisclosure rights. Perceptions that a committee "leaks" would be destructive of its value as a partner in the regulatory process.

There are no statistical bases for concluding that committees have been better, or worse, than any other aspect of the regulatory process in terms of unwarranted disclosure of confidential documents. It is a matter of perceptions, and the resolution of doubts will depend on one's own perceptions rather than on statistics.

Finally, the only way to assure the legal status of confidentiality for a federal agency's deliberative policy document is to keep it within the agency's exclusive control. The best means of preserving confidential status of personal privacy or commercial data is not to share it with advisory confidentiality.
THE MEDICAL DIAGNOSIS AND TREATMENT EXCEPTION TO HEARSAY—THE USE OF THE CHILD PROTECTION TEAM IN CHILD SEXUAL ABUSE PROSECUTIONS

SALLY A. MOORE*

INTRODUCTION

The need for reform of laws regarding child sexual abuse has received widespread attention of late due to an increase in the number of incident reports and the fact that these reports are finally reaching the criminal justice system throughout the nation. One need only listen to the nightly news to learn of yet another incident of molestation, assault, rape or pornography involving a child or children. In Ohio, Hamilton County Prosecutor Arthur Ney and Eighth District Senator Stanley Aronoff have formulated proposed legislative changes to deal with various problems associated with the investigation and prosecution of persons involved in child sexual abuse.1 There is no question that reform is needed, par-

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1. The draft submitted to the Ohio legislators for their consideration would make several fundamental changes in Ohio law with regard to child sexual abuse, most notably the following:
   Adds "endangering children" to the list of crimes that constitute felony murder.
   Expands the felony murder aggravating circumstance to include the crime of endangering children.
   Specifically excludes persons under the minimum statutory age for marriage who have not married with consent of a juvenile court from the definition of "spouse" used in certain sex offenses.
   Requires a person who commits rape or felonious sexual penetration against a person under the age of seven to be sentenced to life imprisonment.
   Expands felonious sexual penetration to include a prohibition against inserting an object into a person's urethral cavity.
   Eliminates the existing corroborating evidence requirement for convictions for sexual imposition and makes it a misdemeanor of the first degree.
   Specifies that if a child under 13 is the victim of a specified sex offense or otherwise is involved in such an offense other than as a participant or conspirator, the court in which the case arising out of the offense is pending may admit certain videotaped pretrial statements of the child or order that the child's testimony be taken outside the courtroom and broadcast into or videotaped for use in the courtroom.
   Provides that an employer may obtain, from the Bureau of Criminal Identification and Investigation, conviction records of an applicant for employment, or a volunteer
ticularly in the area of evidence and witnesses. The child-victim is often incompetent to testify in court,2 or if competent, is unable to articulate adequately in open court the occurrences leading to prosecution of the perpetrator.3 Judicial clarification is needed in the area of hearsay and its exceptions4 because of the increasing importance of the role of non-medical personnel in multidisciplinary hospital child protection teams,5 and in view of the growing number of incidents involving child abuse.

This article will examine recent case law dealing with the use of the medical diagnosis and treatment exception to hearsay6 in the abuse context, and with the use of child protection teams in the assessment, diagnosis and treatment of sexual abuse. It will

for a position, that involves supervisory or disciplinary power over a minor.

Further, there is proposed legislation before the Ohio Legislature to allow the statements of child sexual abuse victims identifying the perpetrator to be admissible under certain circumstances where the time, content and circumstances of the statements provide particularized guarantees. (The Hamilton County Prosecutor's proposal is on file at the N. Northern Kentucky Law Review).

2. See 3 J. Weinstein & M. Berger, Weinstein's Evidence § 601(06) (1975) (hereinafter cited as Evidence), at 601-45 et seq, discussing the Ohio Rules of Evidence as compared with the federal rule on competency. Specifically, the Ohio rule adopts the first sentence of Fed. R. Evid 601 relating to competency, but the Ohio rule creates four additional exceptions, including one relating to children. Id.

Ohio Rule of Evidence 601(A) states:

"Every person is competent to be a witness except: Those of unsound mind, and children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly. . . ."

Professor Weissenberger notes that Ohio Rule 601(A) essentially raises a rebuttable presumption of competency regarding children ten years of age. The party challenging the competency of the child bears the burden of proving that the child cannot relate facts truthfully or comprehend the obligation of an oath. 1 G. Weissenberger, Ohio Evidence § 601.3 (1985) at 3A (hereinafter cited as Ohio Evidence). The trial court has discretion to determine the competency of children. Id. at 4. Such determination is subject to reversal only for manifest abuse. Id. at 5.

3. See, e.g., Jennings v. Ebie, 105 Ohio App. 51, 143 N.E.2d 744 (1957) (a six-year-old who appeared incapable of receiving just impressions of the facts and transactions about which he is to be examined or of truthfully relating them was incompetent to testify as a witness); State v. Lee, 9 Ohio App. 3d 282 (1983) (five-year-old found competent to testify but needed to use anatomically correct dolls to illustrate her testimony).


5. A child protection team is a group of physicians, nurses, social workers and police officials brought together for the purpose of identifying and treating victims of child abuse. See State v. Barnes, slip op. CI of App. 12 App. Dist. Ohio, Clermont County, Ohio Case No. CA84-05-041 (1985) at 33.

propose for the judiciary a mode of analysis for the proper examination of these hearsay situations.\textsuperscript{7}

I. THE MEDICAL EXCEPTION

Under Section 803(4) of the Ohio Rules of Evidence, an exception to the prohibition against hearsay exists for a statement made to a physician or other person by one seeking and contemplating medical diagnosis or treatment. The declarant's subjective motive to obtain proper treatment or diagnosis acts as a circumstantial guarantee of its trustworthiness.\textsuperscript{8} Admissibility of statements made for the purpose of obtaining medical treatment or diagnosis is conditioned upon the objective standard that the declaration must be "reasonably pertinent" to the treatment or diagnosis sought.\textsuperscript{9} This requirement should be construed generously and applied so that the physician's belief as to pertinency of the declaration controls, i.e., the physician guiding the examination and soliciting information should determine what is pertinent to treatment or diagnosis.\textsuperscript{10}

Facts recited by the declarant in a good-faith effort to provide information—the nature of the injury, the object causing injury, and the time of occurrence—are contemplated by the pertinency requirement. Statements regarding fault or guilt, however, generally are not considered reasonably pertinent to diagnosis or treatment of a condition or injury.\textsuperscript{11}

In the area of the medical diagnosis and treatment of child abuse and child sexual abuse, the utilization of hospital child protection teams is becoming more widespread.\textsuperscript{12} Child protection teams often

\textsuperscript{7} Id.
\textsuperscript{8} Weissenberger, supra note 2, § 803.45, at 49-50; Staff Notes to Fed. R. Evid. 803(4).
\textsuperscript{9} Ohio Evidence, supra note 2, § 803.46, at 51-52.
\textsuperscript{10} Id. at 52 (citing supra note 2, at § 803(4)(D)).
\textsuperscript{11} Id. at 54. See infra text accompanying notes 24-30, 45-50.
\textsuperscript{12} For example the Cincinnati Children's Hospital Child Abuse Team reports indicate that in the tri-state area (Southeast Ohio, Northern Kentucky, and Southwest Indiana) reported incidents of child abuse (physical and sexual) in the period beginning in 1975 to 1984 has increased over 600%. In 1975 there were 8 reported incidents of sexual abuse; in 1983 there were 297 reported incidents, representing an increase of approximately 370%. The team report indicates that the dramatic increase is due to many factors, most notably the cooperative efforts of the team in developing better methods of identification and reporting. The team report indicates these figures represent only children seen at the Children's Hospital Medical Center and do not include reports of other agencies. Ms. Patricia Myers, Director of Social Services of the Medical Center, further indicates that the Child Abuse Center and team personnel have received 404 subpoenas between January 1, 1984
become involved in the diagnosis or treatment of sexual abuse of a young victim upon referral by a family member, family physician, police agency, teacher, or social service agency.\(^{13}\) When there is a diagnosis of child abuse or sexual abuse, members of the protection team normally will aid in the prosecution of the perpetrator. Such participation raises questions as to the permissible bounds of testimony to be elicited in court against the offender, especially as to statements both verbal and non-verbal, made by the victim to various members of the protection team—statements which may fall under the medical diagnosis exception or under another \textit{res gestae} hearsay exception, such as the excited utterance exception.\(^{14}\)

Successful child abuse and child sexual abuse prosecutions often depend upon the admission of out-of-court hearsay statements made by the child to a child protection team member or to a physician. The admission turns upon the purpose for which diagnosis or treatment was sought. For example, in \textit{W.C.L. v. People},\(^{15}\) statements made by a child sexual abuse victim to a physician to whom the child was referred, not for treatment, but for an abuse diagnosis as a step in law enforcement proceedings, were not admissible even though circumstantial guarantees of trustworthiness were present. The physician was a pediatrician on the child protection team at the University of Colorado hospital.\(^{16}\) The child had told the physician that W.C.L. had touched her with his "cock."\(^{17}\) The Supreme Court of Colorado held that the child's declaration to the physician was inadmissible, failing to fall within the medical diagnosis

\begin{table}
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Physical Abuse & 88 & 103 & 213 & 171 & 190 & 277 & 283 & 250 & 305 \\
Sexual Abuse & 8 & 12 & 79 & 81 & 111 & 131 & 203 & 190 & 297 \\
Total Child Abuse & 96 & 115 & 292 & 252 & 301 & 358 & 486 & 440 & 602 \\
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Information provided by Patricia Myers, Director, Social Services Children's Hospital Medical Center, Cincinnati, Ohio, "Overview of Child Abuse Team Services," (Rev. 1984).

\(^{13}\) Information provided by Patricia Myers, Director, Social Services, Children's Hospital Medical Center, Cincinnati, Ohio, \textit{Overview of Child Abuse Team Services}, (Rev. 1984).

\(^{14}\) \textit{FED. R. EVID.} 803(4); 803(2).

\(^{15}\) 685 P.2d 176 (Colo. 1984).

\(^{16}\) \textit{Id.} at 177. The pediatrician was qualified at trial as an expert in the diagnosis and treatment of child abuse, including sexual abuse of children. \textit{Id.}

\(^{17}\) \textit{Id.}
hearsay exception. The court reasoned that the hearsay statement did not fall within the medical exception because the Department of Social Services had referred the victim to the protection team as a step in the prosecution against the offender rather than for purposes of medical diagnosis or treatment.

In contrast with the Supreme Court of Colorado's reasoning in W.C.L., is that of the Michigan Court of Appeals in People v. Wilkins. In Wilkins, the Ingham County Department of Protective Services for Children referred a young sexual abuse victim to the family assessment clinic at Michigan State University. The child related to the physician the history of sexual acts performed upon her and identified the perpetrator as her step-father. The prosecution sought to have these statements admitted through the physician's testimony at trial. The court, in ruling that the statements were admissible, found that the child had no motivation to make the statements to the physician other than as a patient seeking treatment. Therefore, the statements pertaining to the sexual acts were admissible through the testimony of the doctor. As to the statements identifying the perpetrator, the court reasoned that the identity of the offender was reasonably pertinent to the diagnosis and treatment of the sexual abuse victim because the purpose of the assessment clinic was to identify difficult child/parent problems and to clinically diagnosis and treat all the medical, physical, developmental and psychological components of a sexual abuse case. The court reasoned further that there was no way to diagnose and treat the abuse unless it was known if the source of abuse was a family member so that the child would be removed from the home as part of the treatment plan.

Thus, the determination whether a child is referred to a protection team for purposes of a family assessment, treatment and a

18. Id. at 181.
19. Id. The W.C.L. court found that had the Supreme Court of Colorado adopted a residual hearsay exception similar to Federal Rule 803(24), then the child's statements to the physician might have been admissible under that exception. The W.C.L. court declined to adopt such an exception in the context of this case, however, and reversed the conviction. Id. at 183.
21. Id. at 816.
22. Id. Defendant objected to the admission of these statements as inadmissible hearsay under the medical diagnosis and treatment exception because the statements were not reasonably necessary to diagnosis and treatment. Id.
23. Id. at 817.
24. Id. at 817-18.
potential recommendation of removal from the family environment, or whether for purposes of law enforcement and prosecution, may be pivotal in deciding the medical diagnosis and treatment hearsay issue. If the referral is for family assessment and treatment purposes, the statements are likely to be admitted, but if referral is a step in law enforcement proceedings the statements are likely to be excluded. The foundation testimony by witnesses regarding the referral is, therefore, quite important.

A Wyoming decision, Goldade v. State, which dealt with physical abuse, employed reasoning similar to that of Wilkins. In Goldade, a young victim of abuse told an attending nurse and doctor she had been beaten and identified the perpetrator. Under Wyoming state law a physician who is called in on an apparent child abuse case is charged with the responsibility of determining whether the child is in such imminent danger to warrant immediate placement of the child in protective custody. The Goldade court recognized that the identity of a child abuser is not generally admissible under the medical diagnosis and treatment exception to hearsay. However, the court reasoned that because the physician was involved in the treatment of all components of child abuse and not simply physical manifestations of abuse, the statements regarding the offender’s identity were admissible under the medical exception. In the absence of the identity of the perpetrator, the decision concerning protective custody cannot be made; thus, the identity is considered to be reasonably pertinent to medical diagnosis and treatment of the victim. Relying on United States v. Rhodes, the Goldade court found that affording the medical hearsay exception a liberal interpretation in allowing statements of fault as evidence in child abuse cases is a logical extension of state public policy.

Although the duties of a physician under Wyoming state law constituted the fundamental basis for the Goldade court’s reason-

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27. Goldade, supra note 24, at 726-27.
28. Id. at 726, 728.
29. Id. at 726.
30. Id. at 727 (citing United States v. Rhodes, 11 Fed. R. Serv. (Callaghan) 1528 (9th Cir. 1982) (statements attributing fault made to emergency room nurse for purpose of diagnosis admissible).)
31. Id. at 727.
ing, this reasoning is applicable even in states lacking such a statute where an underlying purpose of a child protection team or assessment team is to treat all components of abuse, rather than simply the physical aspects of abuse. Thus, where a child protection team's primary function is the assessment and treatment of an abuse situation, the identity of the perpetrator is crucial to the assessment of the situation and the formulation of a recommendation or treatment plan. And, as such, information identifying the perpetrator relayed by the child victim to a member of a protection team to aid in the assessment of the abuse situation would fall within the medical diagnosis hearsay exception.

II. THE EXCITED UTTERANCE EXCEPTION

A Washington Court of Appeals decision, *State v. Bouchard*\(^32\) illustrates how another res gestae hearsay exception, that of excited utterances,\(^33\) may be utilized to permit admission of a child sexual abuse victim's statements. In *Bouchard*, a three-year-old girl suffered a perforated hymen.\(^34\) Upon returning home from her grandparents' house the child complained to her mother she had water in her pants.\(^35\) While changing the child's clothing, the mother found blood around the child's pelvic area.\(^36\) In answer to her mother's inquiry as to the reason's for the blood, the child responded, "Grandpa did it."\(^37\) The mother testified to this, over objection, and attending physicians indicated the child made a similar statement to them.\(^38\)

The *Bouchard* court found the girl's statements constituted excited utterances and hence were admissible as exceptions to hearsay.\(^39\) The danger of fabrication appeared remote given the short lapse of time between the occurrence and the first recital of the statement to the mother, especially considering the girls' tender age and fact that there were no intervening actions militating against the statement's reliability.\(^40\)

\(^{33}\) See supra note 13 and accompanying text.
\(^{34}\) Bouchard, supra note 31, at 762.
\(^{35}\) Id. at 763.
\(^{36}\) Id.
\(^{37}\) Id.
\(^{38}\) Id.
\(^{39}\) Id.
\(^{40}\) Id.
While the court found that the statements were admissible under the excited utterance exception, any statements made to the physician by the mother concerning what the child had said to her might have fallen into the medical exception as well. Because the medical diagnosis exception does not stipulate that the statements made to the physician must be made by the patient himself, the rule encompasses statements made by the person who brings the patient to the physician. This is true so long as the third person's statements are made while he subjectively contemplates treatment or diagnosis for the patient. For example, if under the Bouchard facts the mother had related the child's excited utterance to the doctor in subjective contemplation of aiding the physician in his diagnosis and treatment of the child, the medical exception would operate to admit the mother's statement as to what the child said under a multiple hearsay analysis. In order for the identity of the perpetrator to be admissible in such a double hearsay analysis, the identity of the actor must be "reasonably pertinent" to the diagnosis or treatment, as discussed above, so that the purpose of eliciting the statements identifying the actor is to treat the abuse situation rather than identify the actor for law enforcement purposes. Nonetheless, if the child, while still in a state of excitement after an abuse occurrence, tells a physician what happened, including who perpetrated the incident, the statements may qualify for admission under the excited utterance exception without regard to the medical exception and the underlying purpose for the medical examination.

III. THE USE OF ANATOMICALLY CORRECT DOLLS BY CHILD PROTECTION TEAMS

The Court of Appeals of Iowa in 1983 dealt with an issue in the diagnosis of child sexual abuse that is becoming more and more prevalent—that is, the use of dolls and puppets by child protection teams to enable an inarticulate victim to demonstrate nonverbally an abuse occurrence. In State v. Mueller the court held

41. Id.
42. FED. R. EVID. 803(4).
43. OHIO EVIDENCE, supra note 2, § 803.47 at 54.
44. FED. R. EVID. 805 (hearsay within hearsay admissible if each part of the combined statement conforms with some hearsay exception).
45. See text accompanying notes 27-30.
46. 344 N.W.2d 262 (Iowa Ct. App. 1983).
that the testimony of a child psychologist regarding a three-year-old boy’s verbal and non-verbal assertions, which the psychologist interpreted as meaning that the child had been sexually abused by his father, were not admissible as “statements made for purposes of medical diagnosis and treatment” because the boy did not consult the psychologist for medical aid and benefit. Rather, he was taken by his mother, at the suggestion of their family doctor, for the purpose of making a child abuse diagnosis. Additionally, the court found no evidence that the psychologist took any steps to assure a reliable response from the boy. The psychologist, over objection, testified that during her interviews with the child, when she asked how his “deedlebomb got red,” the child responded, “Daddy.” The psychologist further testified that after the child was told he could play with a toy if he would tell how his “deedlebomb” got red, the boy touched the mouth of a male puppet to the genitals of a male doll and said “ow, ow, ow.”

The Mueller court found the admission of the hearsay constituted reversible error because the psychologist had to bribe the boy to obtain any response from him since he was reluctant to speak with her. Therefore, the court found the responses were not reliable. The court further reasoned that the responses lacked trustworthiness because the boy had not sought the diagnosis. Hence, as a declarant, he did not necessarily have a motive to tell the truth because his treatment would depend upon information conveyed. Thus, the boy lacked the subjective motivation which would have constituted a circumstantial guarantee of trustworthiness.

Admittedly, the Mueller court’s reasoning is analytically correct. However, one cannot help but believe that, although the boy might not have anticipated receiving some medical benefit—because his mother, rather than he, had been the person to seek a professional diagnosis—he may have had some subjective motivation to tell the truth when he nonverbally demonstrated oral sex between the two dolls. Such an act is not likely to be within the realm of knowledge of a three-year-old boy unless such act had been performed upon him. Nonetheless, the court applied the customary analysis regarding subjective contemplation of medical benefit in reaching its con-

47. Id. at 266.
48. Id. at 264.
49. Id.
50. Id. at 266.
51. Id. at 265-66.
clusion that the out-of-court assertions were inadmissible under the medical exception to hearsay.

The result in *Mueller* may have been different if the child psychologist had been part of a child protection team, looking to medical diagnosis and treatment of the child in an abuse situation. Also, the psychologist could have taken steps to assure a reliable response from the child which would have enhanced the circumstantial guarantee of trustworthiness. For example, the psychologist might have indicated to the child that she was going to try to help him and therefore it was important that he tell the truth. Such statements would help a psychologist lay the foundation for admission under the medical diagnosis exception by ensuring that the child, by answering questions and making assertions, believes and expects the professional will diagnose, help, and treat him.\(^{52}\) Such foundation would undercut the fact that the child's parent was the person seeking a diagnosis on behalf of the child and would augment chances for admissibility of the out-of-court statement as evidence. As part of a protection team, the psychologist might have passed information to a medical doctor who, in turn, would utilize the information to formulate a diagnosis and treatment. Such procedure would satisfy a double hearsay analysis under the medical diagnosis exception.\(^{53}\)

As to the *Mueller* child's non-verbal actions utilizing anatomically correct dolls to illustrate occurrences, there can be no doubt the child was trying to communicate what had happened by his non-verbal conduct. As the equivalent of a verbal explanation of occurrences the actions constituted "statements" under section 801(A) of the Federal Rules of Evidence. The *Mueller* court correctly identified that the child's non-verbal assertions were being offered at trial to prove the truth of the matter asserted.\(^{54}\)

In a case where the necessary guarantees of trustworthiness are present, such non-verbal assertions made to a psychologist or other professional looking toward diagnosis and treatment of a medical problem will be allowed under the medical exception to hearsay. The use of dolls and puppets by a child abuse victim in


\(^{53}\) See *Ohio Evidence*, *supra* note 2, § 803.47 at 55.

\(^{54}\) *Mueller*, 344 N.W.2d at 264.
a clinical diagnostic setting has become an important aid in the assessment and treatment of child sexual abuse cases. Under appropriate circumstances, evidence concerning the child's actions should be admissible under the medical exception.\footnote{55 See supra, notes 7-10 and accompanying text for a discussion of medical exception.}

A recent case occurring in Clermont County, Ohio, in 1983 may be cited as an example where non-verbal assertions by a young sexual abuse victim utilizing anatomically correct dolls to illustrate occurrences were found to be admissible under the medical exception to hearsay.\footnote{56 State v. Jack Edward Barnes, Clermont No. CA84-04-033 (November 13, 1984, unreported) (father of child declarant); State v. Earl Barnes, Clermont No. CA84-05-037 (March 25, 1985, unreported) (grandfather of child declarant); State v. Linda Barnes, Clermont No. CA84-05-041 (April 8, 1985, unreported) (mother of child declarant). (Copies of these three cases are on file at Northern Kentucky Law Review.)}

Trial testimony of a social worker indicated that a five-year-old girl was taken to the child protection team at Cincinnati Childrens' Hospital Medical Center for diagnosis and treatment of general neglect and possible sexual abuse. The child was interviewed by the social worker, whose methods of gaining information from the young, potentially-abused patient included the use of anatomically correct dolls to help the child illustrate what had taken place. During one session the child was told the male doll represented her father, and the girl doll represented her, and was asked to show how her father touched her. The child put the dolls together depicting an act of intercourse. The child had been told by the social worker that she was there to help the child, and that the child should tell the truth so she could receive proper help. There was no indication the child had hesitated in using the dolls to demonstrate the sexual contact, or that the child failed to comprehend what telling the truth implied, or that she understood the social worker and her associates at the hospital wanted to help her. The social worker testified further that the information obtained from the child was communicated to protection team physicians to aid in the treatment of abuse and that the team worked together with the county child protection agency to assess a proper treatment plan for abused children generally, and this child in particular.

Over objection by the defense counsel, the court permitted the social worker's testimony to be admitted at trial. In reaching its
decision, the trial court reasoned that circumstantial guarantees of trustworthiness were present inasmuch as the child had a subjective motive to tell the truth, having been informed by the social worker that she was going to try to help the child for a medical benefit. The trial court determined that the non-verbal assertions of the child constituted an exception under section 603(4) of the Federal Rules of Evidence as made for purposes of medical diagnosis and treatment. 57

One other Ohio decision, although not specifically dealing with the use of anatomically correct dolls in the clinical diagnostic context, did, however, note the propriety of using such dolls to facilitate in-court testimony of a young abuse victim. In State v. Lee 58 a five-year-old female victim used two dolls with anatomical details to describe the actions of the perpetrator. 59 The trial court ruled that the dolls were adequately representative for purposes of the demonstration after objection by the defendant that the dolls lacked anatomical accuracy. 60 The Lee court found that the dolls helped to clarify the witness's explanation since she was unable to tell the jury about the events using appropriate physiological terminology. 61 The court held the trial court did not abuse its discretion in permitting the witness to use the dolls to illustrate her testimony. 62

The holding of State v. Lee was adopted and followed by the Twelfth District Court of Appeals of Ohio in State v. Madden. 63 In Madden, the trial court permitted the eight-year-old female victim to utilize anatomically correct dolls to illustrate her testimony while on the witness stand. 64 The defendant was convicted of having

57. In State v. Linda Barnes, supra note 55, the Court of Appeals for Clermont County held that non-verbal statements by the female child, where the child used anatomically correct dolls to depict sexual acts performed on her, made to a child protection team social worker were admissible under the medical diagnosis exception. In State v. Jack Barnes, supra note 55, the court in reviewing the record to determine whether the proceedings in the trial court were free of error, affirmed the convictions, finding that no prejudicial error had occurred. The Jack Barnes appeals court thus impliedly acknowledged the proper application of the medical diagnosis and treatment exception by the Clermont County Court of Common Pleas at trial.
59. Id. at 283.
60. Id.
61. Id.
62. Id.
63. 15 Ohio App. 3d 130 (1984).
64. Id. at 133.
vaginal intercourse with the girl, his granddaughter. On appeal, the Madden court found the trial court had not erred in allowing the child to use dolls to describe the defendant's actions given the girl's obvious lack of knowledge of anatomical terms; the child had testified that her grandfather had put his "thing" between her legs. The Madden court, citing Lee, found the use of the dolls proper to clarify the child's explanation of what had happened to her and to insure a common understanding between the witness and the jury concerning the events which had taken place.

To date, Lee and Madden are the only reported Ohio cases dealing with the use of anatomically detailed dolls. No doubt other cases will occur in Ohio and in other states which will define and outline the hearsay parameters relating to the usage of dolls in the child protection and medical contexts. Further, although there is presently limited case law regarding the use of testimony by members of child abuse protection teams, considering the recent influx of child sexual abuse matters into the criminal justice system, the hearsay parameters relating to child protection team members' testimony generally will be set by the courts.

IV. THE PROPER MODE OF ANALYSIS

In analyzing the admissibility or non-admissibility of hearsay statements made by an abuse victim to a member of a multidisciplinary child protection team, a judge should utilize a multi-step process. First, as a threshold, it must be ascertained whether the statement sought to be admitted is to be offered for its truth, so that the hearsay system of prohibitions and exceptions is implicated. Indeed, in child sexual abuse prosecutions, the truth of a victim's statement is unquestionably sought to be proved, thus implicating the hearsay system. It is doubtful that proof of the mere fact the statement was made or of the effect of the statement upon the listener is sought. Next, as another preliminary, it must be ascertained whether an exception to the basic definition will apply to admit the statement under section 801(D) of the Federal Rules of Evidence. In the context of multidisciplinary child protection teams, the section 801(D) excep-

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65. Id. at 133-34.
66. Id. at 133.
67. See Ohio Evidence, supra note 2, § 801.1 at 2 and § 801.4 at 8.
68. Id. at § 801.5; See also P. Giannelli, Ohio Evidence Manual § 801.06 at 7-8.
tions usually will not apply. Therefore, the next step in the analysis must be taken—that is, whether the statement is admissible under one of the codified exceptions in section 803 or 804 of the Federal Rules of Evidence.

Where it appears that a statement may be admissible under the medical diagnosis and treatment exception, it must first be ascertained whether the statement sought to be admitted, when made, was reasonably pertinent to obtaining medical treatment or diagnosis. The standard should be generously construed. The fact a professional solicited or took the information should be *prima facie* evidence that the statement was reasonably pertinent to diagnosis or treatment. Statements regarding past conditions or medical history should be scrutinized to guard against the admission of clearly self-serving narrations. In consideration of statements made by a young potentially abused victim to a multidisciplinary team member, one may reasonably conclude such statements were not self-serving, but rather were given accurately, the declarant recognizing the importance of telling the truth to facilitate his overall treatment and diagnosis. As Professor Weissenberger has noted, the pertinency standard embraces facts recited in a good-faith effort to provide necessary information and little is gained by construing the standard so strictly so as to exclude details naturally given in a statement made for medical treatment or diagnosis.

Further, one must evaluate the underlying purpose behind the child's being brought to the child protection team. If the purpose was *purely* for the gathering of evidence for the initiation of law enforcement proceedings, and the collection of information for medical diagnosis or treatment of the child was not contemplated, then any statements made will not be admissible under the medical exception. Where, however, the collection of information is in contemplation of medical diagnosis or treatment, and the declarant/victim is aware of this, then section 803(4) of the Federal Rules of Evidence will permit the admission of the statements made. Additionally, one should note how the child came to the attention of a physician or child protection team, although the manner should not necessarily be dispositive of the medical diagnosis question.

69. *Ohio Evidence* *supra* note 2, § 803.46 at 52.
70. See id. at 52, n.62.
71. Id. § 803.46 at 53.
Where a governmental authority or parent has caused the child to be brought to the physician or team, the court should scrutinize any testimony carefully to ascertain whether the child had motivation to tell the truth through a subjective contemplation of receiving treatment or diagnosis. If an intervening agency or parent caused the child to be brought for diagnosis, and if the child totally lacked a subjective contemplation of treatment or diagnosis, or otherwise lacked a motive to tell the truth, then the statements would be inadmissible.

In the child protection team context, a multiple hearsay analysis may be implicated as non-medical professionals such as social workers are involved in eliciting information from an abuse victim. Under Section 803(4) of the Federal Rules Evidence, when the declarant makes statements to a person other than a physician in subjective contemplation that the statements ultimately will be relayed to a physician for medical treatment or diagnosis, the statements will be admissible. Thus, when a child abuse victim makes statements to a social worker, and the child has been informed that information will be relayed to a doctor who will help the child and the child should therefore tell the truth, the social worker should be permitted to testify as to hearsay statements made by the child during an interview. Of course, any statements made directly to the physician in contemplation of medical treatment or diagnosis will be admissible under the exception.

The court, in evaluating whether statements should be admitted should ascertain whether all foundational requirements have been met. Requirements to be examined include the presence of a medical purpose, the awareness of the child of a medical purpose, the pertinence of the information to the medical purpose, whether the interviewer took steps to assure reliable responses (e.g. by emphasizing to the child the importance of telling the truth), if a social worker or other non-medical professional is involved, and the awareness of the child that information would be relayed to a physician for a medical purpose. Where a statement identifies the perpetrator, the court should examine the general purposes behind involvement of the team or physician, that is, whether the team or physician is involved in the treatment or diagnosis of the

72. See id. § 803.47 at 55.
73. See supra notes 7-10 and accompanying text.
74. 633 F.2d 77 (8th Cir. 1980), reh'g denied, (1980).
entire abuse situation and the overall family picture as it relates to the victim, or whether medical/physiological treatment alone is the end purpose. If the purpose is the former, identification of the perpetrator would be reasonably pertinent, and thus admissible.

The basic analysis suggested herein, apart from the issue of identification, comports with two recent federal circuit decisions, *United States v. Iron Shell* and *United States v. Nick*. In *Iron Shell* a physician's testimony as to statements by a nine-year-old female victim of sexual assault were held admissible at trial. During the physical examination the victim described the assault and the manner in which she was attacked. The defendant argued that such statements were not reasonably pertinent to diagnosis or treatment and that the examination would have been the same whether or not this extra information had been received. The *Iron Shell* court, finding that the victim had no other motive in making the statements than as a patient seeking treatment, found the statements within the medical exception because they were related to her physical condition and were consistent with a motive to promote treatment. The *Iron Shell* court noted that the result was consistent with *United States v. Nick*, wherein the examining physician was allowed under the medical exception to repeat the child's description of the assault, including statements about the general cause of the injury.

In both *Iron Shell* and *Nick*, the courts found it noteworthy that the victims had not identified the perpetrator of the assaults; the statements concerned what happened during the attacks rather than who made the attacks. Thus, neither *Iron Shell* nor *Nick* can be said to support allowing the identity of a perpetrator of a sexual incident to be admitted through section 803(3) of the Federal Rules of Evidence. However, under the rationale of the *Wilkins* decision and *Goldade*, a strong argument can be made

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75. 604 F.2d 1199 (9th Cir. 1979), reh'g denied, (1979).
76. 633 F.2d at 85.
77. *Id.* at 81-82.
78. *Id.* at 83.
79. *Id.* at 84.
80. 604 F.2d 1199 (9th Cir. 1979).
81. 633 F.2d at 85 (citing United States v. Nick, 604 F.2d at 1201-02).
82. *Id.* at 84; 604 F.2d at 1202.
83. *Supra* note 19.
84. *Supra* note 24.
for the admission of a victim’s statement identifying a perpetrator where the child protection team or physician is involved with treating and diagnosing all components or facets of abuse, including the abusive setting or environment, and not merely the physical trauma associated with sexual abuse. 85

The Common Pleas Court of Madison County Ohio in State v. Robert Reeder, 86 a 1985 child sexual abuse case involving a day care center worker, allowed a physician, the director of the Columbus Children’s Hospital Sexual Abuse Clinic, to testify as to statements made to him by children, including statements identifying the perpetrator of the alleged sexual molestation. The foundation required by the court prior to the physician’s testimony was that child sexual abuse was a medical diagnosis similar to the battered child syndrome and that it was necessary to know the identity of the perpetrator to diagnose and treat. 87 The brief submitted by the state noted the decisions in Goldade 88 and Iron Shell 89 in support of the proposition that the identity of the perpetrator is necessary for diagnosis and treatment of sexual abuse. The state argued that, although Iron Shell disallowed identification statements by a physician, the fact that in Iron Shell the perpetrator was a total stranger to the victim made the case distinguishable. 90 On the other hand, the state argued Goldade is clear support for permitting identification testimony by a physician, where the victim is a relative of the perpetrator, or as in Reeder, where the victim was in close proximity with the perpetrator on a day-to-day basis in a day care center. 91 The state argued that the Iron Shell conclusion was also distinguishable because the event was an isolated occurrence and not part of a pattern of ongoing abuse. 92 Counsel for the state in Reeder further emphasized that in Goldade the physician was not trying to diagnose and treat an isolated physical in-

85. See text accompanying notes 19-30.
86. Madison County Ohio Common Pleas No. 84 CR-10-083 (1985). (Information about this case is on file at NORTHERN KENTUCKY LAW REVIEW or is available from the Madison County Prosecuting Attorney, London, Ohio).
87. Letter from R. David Picken, Madison County Ohio Prosecutor, to George E. Pat tison, Clermont County (Ohio) Prosecutor, July 31, 1985. (This letter is on file with the NORTHERN KENTUCKY LAW REVIEW, with other material about State v. Reeder).
88. Supra note 24.
89. Supra note 73.
90. Supra note 85.
91. Id.
92. Id.
jury, but was trying to diagnose and treat an ongoing trauma. The state argued that a child in a sexual abuse case cannot be treated unless the perpetrator is identified and eliminated from the child's environment. By permitting the physician to testify regarding the child's identification of the perpetrator, the trial court in *Reeder* impliedly adopted the reasoning and analysis employed by the state. This mode of analysis, employed in *Reeder* and in the other cases discussed above, where the court permitted identification of the perpetrator, no doubt will be utilized with increasing frequency as the bounds of the medical exception are redrawn in view of the increased flood of child sexual abuse cases.

CONCLUSION

The medical diagnosis and treatment exception to hearsay is one of the several ways through which statements by a sexual abuse victim to a child protection team member may be admissible in a criminal prosecution. Its importance in this field should not be underestimated, given the increased participation of nonmedical professionals in the diagnosis, treatment, assessment and evaluation of child sexual abuse victims, and given the possible absence of other hearsay exceptions through which statements of a young victim may be admitted in evidence. Although legislative reform in the area of the presentation of victim testimony is forthcoming and may alleviate many problems in this area, the judiciary has an important duty to clarify and evaluate the application of hearsay exception rules to facilitate the presentation of testimony in the courtroom and to define the appropriate participation of child protection teams in abuse prosecutions. The importance of the role of the legislative branch, however, cannot be discounted. Ideas and suggestions for change, as well as actual reform, may emanate from the legislature. A proper analysis of the medical exception to hearsay with respect to child protection teams will enhance the likelihood that reliable, trustworthy and probative evidence will be available for consideration by the triers of fact.
COMMENTS

DEFENSIVE STRATEGIES TO HOSTILE TAKEOVER ATTEMPTS: THE IMPACT OF NORLIN CORP. V. ROONEY PACE, INC.

INTRODUCTION

Struggles for corporate control have traditionally been fought behind closed doors, usually within the confines of the corporate boardroom. Recently, however, with the highly publicized takeover struggles of such companies as Gulf Oil Company, Bendex, and Marathon Oil Company, takeover attempts have become media events sparking the interest of the public as a whole, as well as the attention of the legal community. No longer is any corporation safe from the unwanted overtures of another company or group of investors. The recent struggle of Phillips Petroleum with raider, T. Boone Pickens typifies this new trend in the takeover arena. Such struggles for control have spawned a whole new vocabulary for the public and for corporate practitioners. Terms such as Golden Parachutes, Pacman Defenses, and White Knights are now familiar to most people, although their meaning may not be understood.

In general, when a takeover attempt is successful, the incumbent management of the target company lose their jobs. Thus, dur-

1. E.g., recently both TIME MAGAZINE, Greenwald, High Times For T. Boone Pickens, TIME, March 4, 1985 at 52, and BUSINESS WEEK, Toy, The Raiders, BUS. WK. March 4, 1985, at 80 featured T. Boone Pickens and his recent activities as a Raider as their cover story.
2. See, e.g., Vol. 11 N. KY. L. REV., Issue 3, Symposium on Tender Offers; Lipton, Takeover Bids in the Target’s Boardroom, 35 BUS. LAW. 101 (Nov. 1979); Lipton, Takeover Bids in the Target’s Boardroom; An update after one year, 36 BUS. LAW. 1017 (Apr. 1981); Easterbrook & Fisdel, The Proper Role of a Target’s Management in Responding to a Tender Offer, 94 HARV. L. REV. 1161; Gelfund & Sebastian, Reevaluating the Duties of Target Management in a Hostile Tender Offer, 60 B.U.L. REV. 403 (May 1980); Brecher, Lazarus & Gray, The Function of Employee Retirement Plans as an Impediment to Takeovers, 38 BUS. LAW 503 (Aug. 1983) [Hereinafter cited as Impediment].
4. Golden Parachutes are management contracts which insure top management continued pay if there is a change in ownership or control.
5. A Pac-Man Defense is one in which the target company turns the tables on the tender offeror, and makes a bid to take control of tender offeror itself.
6. White Knights are companies which a target company will look to to merge with in order to defeat a takeover attempt.
ing the battle for control, directors and officers of the target may take actions to fight off the takeover attempt. The result has been numerous law suits to determine whether the directors' actions were justifiable as a business purpose or were carried out merely for the purpose of perpetuating director control of the company.

The purpose of this comment is to acquaint directors and practitioners with an outline of some defensive actions which may be allowed by the courts, as well as to provide examples of court cases which have examined these various defensive techniques. Included in the discussion will be the use of an employee stock option plan as a defense when set up in a pretender situation, and the use of a raider buyout and a defensive merger technique once the tender offer has been made. Finally, the comment will examine what impact the recent case of Norlin Corporation v. Rooney Pace, Inc. may have on directors' decisions in the future.

I. EMPLOYEE STOCK OPTION PLAN

Corporate management has traditionally used employee pension plans to promote and bolster employee morale by insuring some form of financial security to the employee in his later life. However, with the recent increase in hostile takeover actions, employee pension plans are taking on a whole new importance. Now, in addition to the aforementioned reasons for setting up a pension fund, management may be able to use the pension fund as an effective defensive measure to an unsolicited or hostile takeover attempt.

In order to understand how an employee pension plan can be used by management as a defensive action, an abbreviated background and operational summary of employee pension plans and how they are created, organized, and administered is necessary. Simply described, an employee pension plan is a collection of assets jointly contributed by the corporation and the employees and independently administered by trustees. Originally, the trustees were held accountable according to different standards of responsibility determined by the individual state laws. But, in 1974, Congress enacted the Employee Retirement Income Security Act of 1974. 10

7. 744 F.2d 255 (2d Cir. 1984).
8. See generally Impediment, supra note 2.
9. Id.
better known as ERISA, and established a statutory fiduciary standard. With the enactment of ERISA, all trustees of qualifying employee pension plans are held responsible for their actions according to the same fiduciary standard.

The ERISA legislation which is particularly important in the hostile takeover area is that which provides that the plan-trustees may purchase qualifying employers' stock for the plan worth up to 10% of the plan's total assets. The trustees of the plan


(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).


(a) Except as otherwise provided in this section and section 1114 of this title:

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.


(5) The term "qualifying employer security" means an employer security which is stock or a marketable obligation (as defined in subsection (e) of this section).

and a marketable obligation is defined as

(e) For purposes of subsection (d)(5) of this section, the term "marketable obligation" means a bond, debenture, note, or certificate, or other evidence of indebtedness (hereinafter in this subsec-
accomplish this through the use of an employee stock ownership plan,\textsuperscript{14} referred to as ESOP.

The importance of the ESOP as established under ERISA, as a defense to a hostile takeover attempt, is clearly understood when read together with other provisions of ERISA which allow directors, officers or employees of the sponsoring company to serve as trustees for the plan.\textsuperscript{15} A director or officer who also is a trustee for the plan could find himself in the following position during a hostile tender offer: 1) The trustee, along with other directors or officers of the target company, will have advised the shareholders not to tender their shares to the tender offeror, thus committing the corporation to fighting off the takeover attempt; 2) The trustee will have at his disposal the use of the ESOP to purchase stock,

\begin{itemize}
\item[(1)] such obligation is acquired—
\begin{itemize}
\item[(A)] on the market, either (i) at the price of the obligation prevailing on a national securities exchange which is registered with the Securities and Exchange Commission, or (ii) if the obligation is not traded on such a national securities exchange, at a price not less favorable to the plan than the offering price for the obligation as established by current bid and asked prices quoted by persons independent of the issuer;
\item[(B)] from an underwriter, at a price (i) not in excess of the public offering price for the obligation as set forth in a prospectus or offering circular filed with the Securities and Exchange Commission, and (ii) at which a substantial portion of the same issue is acquired by persons independent of the issuer; or
\item[(C)] directly from the issuer, at a price not less favorable to the plan than the price paid currently for a substantial portion of the same issue by persons independent of the issuer;
\end{itemize}
\item[(2)] immediately following acquisition of such obligation—
\begin{itemize}
\item[(A)] not more than 25 percent of the aggregate amount of obligations issued in such issue and outstanding at the time of acquisition is held by the plan, and
\item[(B)] at least 50 percent of the aggregate amount referred to in sub-paragraph (A) is held by persons independent of the issuer; and
\end{itemize}
\item[(3)] immediately following acquisition of the obligation, not more than 25 percent of the assets of the plan is invested in obligations of the employer or an affiliate of the employer.
\end{itemize}

\textsuperscript{14} ERISA § 407(e), 29 U.S.C. § 1107(e) (1982).
be it authorized but unissued stock, or treasury stock held by the
target company, or shares tendered by dissatisfied shareholders
upon the open market. By doing so the trustee will be able to dilute
the holdings of the tender offeror as well as solidify the position
of current management by putting more stock under the direct
control of the board of directors.\footnote{16}

Of course a director/trustee in this situation is not given un-
fettered control over the assets in the plan. All trustees of an
employee pension plan under ERISA must comply with the codified
fiduciary standard incorporated in the ERISA legislation.\footnote{17} During
a hostile takeover scenario, however, the directors and officers
will probably be committed to fight the takeover bid. It is
unrealistic to assume that a director/trustee in this situation would
not consider using this resourceful tool under his control to pur-
chase more of the target company's stock to the detriment of the
tender offeror. This is true even if a later judicial inquiry into the
propriety of the trustee's action reveals the trustee did not live
up to the fiduciary standard established under ERISA. The bot-
tom line remains the same: the target company will have fended
off the unsolicited takeover attempt by the tender offeror. The
above scenario was demonstrated recently in the takeover attempt
of Grumman Corporation by LTV Corporation.\footnote{18}

On September 23, 1981 LTV announced to the public that it in-
tended to make a cash tender offer for Grumman's common stock
for up to 70\% of the stock at a price of forty-five dollars per share.\footnote{19}
LTV stated that this was the first step towards acquiring whole
ownership of Grumman.\footnote{20} At the time of the LTV announcement
Grumman's stock was selling on the New York Stock Exchange
at a price ranging from 23 7/8 to 27 1/4.\footnote{21} The actual tender offer
by LTV was made on September 24, 1984, and was conditioned
upon the acquisition of a minimum of 50.01\% of Grumman's stock.\footnote{22}
The termination date for the offer was to be October 23.\footnote{23}

\footnote{16. As Directors or Trustees they would vote the stock owned by the ESOP.}
\footnote{17. \textit{See supra} note 11.}
\footnote{19. \textit{Bierworth}, 680 F.2d at 265-66.}
\footnote{20. \textit{Id.} at 266.}
\footnote{21. \textit{Id.}}
\footnote{22. \textit{Id.}}
\footnote{23. \textit{Id.}}
On September 25, the board of directors of Grumman met to consider the tender offer and communicate its position on the takeover to its shareholders. The Grumman board had employed as its investment banker, Dillon, Read & Company, to study the tender offer and give to the board its recommendation as to the offer by LTV. The conclusion of Dillon, Read & Company was that the offer was inadequate. Thus, at this meeting, the Grumman board decided to oppose the tender offer and issued a press release to the public announcing its intention to oppose the tender offer. Throughout the next few days members of the board of directors actively tried to persuade shareholders not to tender their shares to LTV.

On October 7, the trustees of the Grumman pension plan met to discuss what action, if any, they should take concerning any Grumman stock currently held by the trustees for the plan in a previously established ESOP. The trustees concluded that because of LTV's shaky debt situation it was not in the plan's best interest to tender the shares held in the ESOP to LTV.

Once the trustees concluded not to tender the shares in the ESOP, they next considered whether or not they should use the ESOP to actually purchase more of Grumman's stock. The trustees discussed whether the acquisition of more of Grumman's shares

24. See Regulation 14e-2, 17 C.F.R. § 240.14e-2 provides that
   § 240.14e-2 Position of subject company with respect to a tender offer.
   (a) Position of subject company. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, the subject company, no later than 10 business days from the date the tender offer is first published or sent or given, shall publish, send or give to security holders a statement disclosing that the subject company:
      (1) Recommends acceptance or rejection of the bidder's tender offer;
      (2) Expresses no opinion and is remaining neutral toward the bidder's tender offer; or
      (3) Is unable to take a position with respect to the bidder's tender offer. Such statement shall also include the reason(s) for the position (including the inability to take a position) disclosed therein.
   (b) Material change. If any material change occurs in the disclosure required by paragraph (a) of this section, the subject company shall promptly publish or send or give a statement disclosing such material change to security holders.
25. Bierworth, 580 F.2d at 266.
26. Id.
27. Id. at 266-67.
28. The trustees for the ESOP at this time all were either directors, officers, or legal counsel to Grumman.
29. Bierworth, 680 F.2d at 268.
at this time would be in the best interest of the plan, and noted that the outlook for Grumman had recently been enhanced because of "a number of fortuitous events [that] had occurred during the summer and early in September...." Of course the trustees were fearful that if they began to obtain substantial blocks of Grumman stock the price of the stock would be affected. However, because of the increased activity in the trading of Grumman's securities resulting from the tender offer, they concluded that they could purchase the stock in the open market without materially affecting the price of the shares.

On the basis of the October 7 meeting, the trustees of the plan approved the purchase of additional shares of Grumman's stock up to the 10% limit allowable under ERISA. By October the plan had acquired through the ESOP an additional 1,158,000 shares at a cost of $44,312,380. The purchase increased the plan's holdings from under 4% to approximately 8% of the total assets.

The next day, October 14, the district court temporarily enjoined the LTV tender offer because of inadequate disclosure and possible violations of the Clayton Act. Consequently, the price of Grumman's stock fell and the resulting loss to the plan from the additional purchases of stock was approximately $11,812,380.

It is important to note that at the October 7 meeting of the trustees of the plan, they executed an amendment to the trust agreement which provided that the company would "indemnify and hold harmless each trustee from any liability or expense arising out of any act or failure to act pursuant to the trust unless the liability or expense resulted from willful misconduct or lack of good faith." This was clearly an attempt to insulate the trustees from any loss the plan might suffer as a result of their actions for which they may be held personally liable under ERISA.

30. Id.
31. Id.
32. Id.
33. Id. at 269. At the time the plan only had about 3.8% of the plan's assets tied up in Grumman's stock.
34. Id.
35. Id.
37. Bierworth, 680 F.2d at 269.
38. Id.
(a) Any person who is a fiduciary with respect to a plan who breaches any of
On October 19, the Secretary of Labor brought the action which resulted in this suit. The Secretary sought, and was granted by the district court, a preliminary injunction against the trustees of the plan prohibiting them from "buying, selling or exercising any rights with respect to Grumman securities..." On December 3, the district court reaffirmed its preliminary injunction and directed that a receiver be appointed as an investment manager to act in the stead of the trustees in managing the stock in the plan.

On appeal the Second Circuit Court of Appeals held that the trustees had not committed per se violations of section 406(b) of ERISA as the Secretary had asserted. However, the court found the trustees had not made an impartial decision when they had decided to purchase more stock through the ESOP for the plan, and thus had not acted "with an eye single to the interests of the participants and beneficiaries." The court agreed with the trustees' argument that a trustee does not breach a fiduciary duty because a course of action followed by trustees benefits the corporation as well as the beneficiaries of the plan. The court, however, was clear in emphasizing that any benefit the corporation receives from a course of action decided upon by the trustees of the plan must be secondary to the benefit of the beneficiaries. Thus, the court held the trustees of the plan must exercise their judgment for the exclusive benefit of the beneficiaries.

The responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

40. Bierworth, 680 F.2d at 264.
41. Id. at 264-65.
42. Id. at 265.
43. Id. at 270. The secretary's view was previously rejected by the district court. 538 F. Supp. 463, 469.
44. Bierworth, 680 F.2d at 271.
45. Id.
46. Id.
47. Id. see also supra note 11.
Although the trustees of Grumman attempted to justify their actions to the court, Justice Friendly's stand against them was clear. The trustees had found themselves in a position to materially affect LTV's attempted takeover of Grumman. They had actually campaigned to defeat the takeover attempt and the court found that it was obvious the trustees could not make an unbiased decision as to what actions to take concerning the stock in the ESOP.\(^48\) It was the court's opinion that once this conflict occurred, the trustees should have appointed independent trustees to administer the stock held in the ESOP.\(^49\)

In the end, however, the result was that the incumbent management had defeated the hostile takeover attempt. Even if the district court had not enjoined LTV's tender offer, the takeover attempt probably would not have succeeded because even before LTV made its bid for control the plan controlled about 1/3 of the outstanding stock of Grumman. Clearly the acquisition of an additional 1,158,000 shares, that more than doubled the plan's holdings,\(^50\) would have given the plan more than 50% interest in the ownership of Grumman. Thus, the LTV offer would have failed as long as the trustees did not tender the stock.

It is obvious the use of the ESOP can be an important tool of management in fending off an unsolicited takeover attempt. In fact, the management of Grumman used this defensive technique very well. The Grumman management, however, may have made one error which possibly could have caused the trustees to have been held personally liable for the losses incurred by the plan through the additional purchases of the stock. Section 409(A) of ERISA provides in part that "any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses resulting from each such breach. . . ."\(^51\) Obviously a trustee of an ESOP will be very reluctant to act in the way the trustees of Grumman did unless there is some way they can possibly avoid personal liability.

As noted earlier, the trustees of Grumman did execute an amendment to the trust agreement at the October 7 meeting in an at-

\(^48\). Id. at 272.
\(^49\). Id. at 271-72.
\(^50\). Id. at 269.
tempt to indemnify themselves from liability. Such indemnity or insurance provisions are, to an extent, allowed under section 410(b) of ERISA. It is, however, questionable whether the amendment executed by the Grumman trustees would have been permissible under section 410(b); if not, the trustees would have been exposed to personal liability.

The Department of Labor has interpreted section 410(b) of ERISA to allow an employer to insure or indemnify a trustee of an ESOP provided the trustee is held responsible and liable in the first place and the employer is merely satisfying any liability the trustee may actually incur. The Labor Department further interpreted sec-

52. See supra note 38.
(b) Nothing in this subpart shall preclude—
   (1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary;
   (2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or
   (3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.
54. See supra note 39.
55. See regulation § 2509.75-4, 29 C.F.R. § 2509.75-4.

Examples of such indemnification provisions are:
(1) Indemnification of a plan fiduciary by (a) an employer, any of whose employees are covered by the plan, or an affiliate (as defined in section 407(d)(7) of the Act) of such employer, or (b) an employee organization, any of those members are covered by the plan; and
(2) Indemnification by a plan fiduciary of the fiduciary’s employees who actually perform the fiduciary services.

The Department of Labor interprets section 410(a) as rendering void any
tion 410(a) to prohibit any agreement by which the plan itself would indemnify the trustee. One court has gone so far as to hold that an indemnification agreement by an employer may be void because it has an indirect impact on the plan, because the plan through an ESOP, was a major stockholder in the company. The agreement adopting the amendment to the trust agreement by the trustees of Grumman probably would not have satisfied the interpretation of section 410 as promulgated by the Labor Department. The defect in the agreement to indemnify was the terms "indemnify and hold harmless each trustee from any liability. . . ." Obviously this does not meet the interpretation of section 410 by the Labor Department. Grumman was not merely going to satisfy the liability of the trustees if incurred, but was in fact, attempting to relieve the trustees of any liability when it was incurred. The agreement was not merely to satisfy any personal liability if it attached, but was in essence an attempt to relieve the trustees of any responsibility. It was, therefore, not in conformity with the views of the Labor Department.

Although the indemnity agreement set up by Grumman does not meet the Labor Department's standards, no personal liability was attached to the trustees. In fact, personal liability was not mentioned in either the district court's opinion or in the opinion of the Second Circuit Court of Appeals. Though the reason for this is not stated in either opinion, one explanation may be that the Department of Labor felt the constraints of the Code of Federal Regulations section 2509.75-4 may not withstand judicial scrutiny, arrangement for indemnification of a fiduciary of an employee benefit plan by the plan. Such an arrangement would have the same result as an exculpatory clause, in that it would, in effect, relieve the fiduciary of responsibility and liability to the plan by abrogating the plan's right to recovery from the fiduciary for breaches of fiduciary obligations.

While indemnification arrangements do not contravene the provisions of section 410(a), parties entering into an indemnification agreement should consider whether the agreement complies with the other provisions of Part 4 of Title I of the Act and with other applicable laws.

56. Id.
58. Bierworth, 680 F.2d at 269.
59. See supra note 55.
60. Bierworth, 538 F. Supp. at 463.
61. Bierworth, 680 F.2d at 263.
especially as applied to the agreement executed by Grumman.\textsuperscript{62} If this is so, such an agreement could serve as a good model to be followed by other companies. However, it is this author's opinion that an indemnification agreement could be constructed which would better fit the views of the Labor Department.

The ESOP could be used in the following framework as a defensive technique to a hostile takeover attempt:

1) The directors of the corporation should create a qualified employee pension plan as defined under ERISA.

2) The directors should place either themselves or high ranking management as trustees of the plan.

3) The trustees should create an ESOP and purchase a small amount of qualifying employer stock (avoiding the 10% limit, otherwise the defensive purpose no longer exists).

4) The corporation should either contract to obtain insurance for the trustees or insure the trustees itself (as long as this agreement does not seek to relieve the trustees of responsibility but is created merely to satisfy any liability that the trustees may incur).\textsuperscript{63}

5) Once a hostile tender offer is made, the trustees of the plan should increase the employer stock holdings in the ESOP, securing more stock under management's control and diminishing stock available to the tender offeror.

There are, however, two criticisms of the above defensive technique. First, as previously described, an ESOP, when used as a defensive move, has a much better chance of being upheld by the courts if steps 1-4 are implemented by management in a pretender context before the outsider makes his bid for control. This is because some courts may view the creation of the ESOP during a struggle for control solely as an effort by management to entrench and perpetuate its control and thereby hold the ESOP to be impermissible.\textsuperscript{64}

The second criticism of this defensive strategy is that it is a one-time shot. The best example of this is the \textit{Bierworth} decision.\textsuperscript{65}

\textsuperscript{62} Another reason may have been that neither court found the directors had made a \textit{per se} violation of ERISA.

\textsuperscript{63} See supra note 55.

\textsuperscript{64} Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975); Norlin Corp. v. Rooney Pace, Inc., 744 F.2d 255 (2d Cir. 1984).

\textsuperscript{65} \textit{Bierworth}, 680 F.2d 263.
Grumman did manage to fight off the takeover attempt by LTV, but the result of the trustees' actions concerning the ESOP was that the court appointed an independent trustee to deal with the ESOP in the future. Therefore, after utilizing the ESOP once as a defensive technique, the directors may lose control of the stock and so be precluded from using the ESOP again as a defense.

The ESOP is therefore a very important management tool during a hostile takeover attempt. Care, however, should be exercised in the use of the ESOP after the tender offer has been made since there are many other defensive moves open to management once the struggle for control has started.

II. DEFENSES ONCE THE TENDER OFFER BEGINS

Once a hostile group has begun its bid for control, the options open to incumbent management become limited. There are, however, defensive techniques which, when used prudently, are excellent defensive maneuvers to be brought into play once the takeover attempt has begun. Two of these weapons in the target company's arsenal are: 1) repurchase of the stock from the outsider (Raider Buyout) or 2) a defensive merger.

A. Raider Buyout

It is not unusual today for a public company to find itself in the position of having to use the "Raider Buyout" defense in order to protect the company from an outsider obtaining control. The typical development where this defense is useful begins when an outsider of the company begins to buy up large blocks of the company's stock. At first the buyer may insist the purchases are meant strictly as an investment. However, as the ownership of the target stock increases the position of the Raider, so does the Raider's demands for changes in the target company's policies. Soon the corporation is faced with the option of fighting the Raider for control or buying the stock back from the Raider at his profit. The obvious question becomes whether it is permissible to allow corporate management to purchase its own stock from an insurgent

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66. Id. at 276.
67. For a more in depth analysis of how an ESOP may be used in a takeover situation, see Impediment, supra note 2.
68. See supra note 3.
at an obviously higher than market value price and, if so, what limitations will the courts place on such a purchase.

This pattern was followed in the Delaware case of Cheff v. Mathes. This case was a stockholders' derivative suit which attempted to hold the directors of a target company liable for the repurchase of stock.

Holland Furnace Company was a Delaware Corporation engaged in furnace, air conditioning, and other home ventilation equipment manufacturing. After a recent re-organization and general shake-up, the company had optimistic aspirations for increased sales and higher profits.

During the last part of June 1957, trading in Holland's stock increased markedly and the price of the stock also began to rise. Also during June, the Chief Executive Officer of Holland, Mr. Cheff, met with Mr. Maremont, Chairman of the Board of Motor Products Corporation. Maremont asked Cheff whether Holland would be interested in merging with Motor Products. Cheff responded that because of the difference in the sales practices of the two organizations, "a merger was not feasible." 

In July the directors of Holland were told the increase in trading in June was the result of purchases of stock by Maremont and Motor Products. By the end of August, Maremont had acquired enough stock that he demanded to be placed on Holland's board of directors.

It was Maremont's idea to change the sales technique of Holland's from a personal salesman approach to a wholesale method. The exposure of Maremont's plans resulted in unrest among the sales force of Holland, culminating in many sales people leaving their jobs in fear of a Maremont takeover.

The directors of Holland decided that because of Maremont's bad reputation, as well as the danger to its business policies, the

69. 41 Del. Ch. 494, 199 A.2d 548 (1964). Although this decision is over 20 years old, it is still regarded as a good example of a Raider Buyout scheme.
70. Id. at ___, 199 A.2d 551.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id. at ___, 199 A.2d 552.
best course of action would be to acquire the stock back from Maremont. On October 23, 1957 the board of directors of Holland approved a resolution to purchase 155,000 shares from Maremont and Motor Products at a cost of $14.40 per share. The price paid was in excess of the current market price and consequently the derivative action was brought in February of 1958.

The trial court held for the stockholder and stated that the actual purpose behind the stock purchase from Maremont "was the desire to perpetuate control. . . ." On appeal the directors argued the plaintiff had failed to uphold its burden of proof by failing to show that the directors had not acted in good faith.

The court, per Justice Carey, refused to follow the argument of the directors. The court instead indicated that the burden of proof was on the defendant directors to show that the stock purchase was "one primarily in the corporate interest." However, the court emphasized that the board would not be liable for such a decision to purchase the stock unless it was "solely or primarily because of the desire to perpetuate themselves in office." The court reversed the trial court holding the defendants had met their burden of proof because they showed they had reasonable grounds for believing that "a danger to corporate policy and effectiveness existed by the presence of the Maremont stock ownership." The court noted the defendants had made a reasonable investigation and, using professional advice, had made a justifiable decision that Maremont posed a "reasonable threat to the continued existence of Holland, or at least existence in its present form."

In so holding, the Delaware Supreme Court approved the "Raider Buyout" defensive technique, provided the directors act in good faith. Although not expressly stated in the court's opinion in Cheff, implicitly the court held that the actions of the directors in a

78. Id.
79. Id. at ___, 199 A.2d 553.
80. Id.
81. Id.
82. Id. at ___, 199 A.2d 554.
83. Id.
84. Id. The court here was attempting to reconcile to previous cases Kors v. Carey, Del Ch., 158 A.2d 136, and Bennett v. Propp, Del., 187 A.2d 405.
85. 41 Del. Ch. at ___, 199 A.2d at 555.
86. Id. at ___, 199 A.2d 556.
"Raider Buyout" situation will be scrutinized under the business judgment rule.\(^7\)

It is clear directors who wish to use a "Raider Buyout" defense must conform to the following guidelines: 1) they must act in good faith; 2) their decision to buy out the stock must not be based solely on, or primarily for the purpose of perpetuating their own control; and 3) they must make a reasonable effort to determine if and how the Raider's interests are adverse to the interests of the corporation. If a director follows these guidelines, then the decision to use the "Raider Buyout" defense should escape judicial scrutiny.

Of course, the intentions of the outsider seeking control will dictate which defensive technique to use. If the Raider is looking at the takeover attempt of the target company merely as a short-term plan to increase the activity of the target's stock and reap a profit, he will probably be accessible to the target company's buying back his shares at profit to him (of course, this probably would have been the Raider's idea from the start).

However, the Raider may have begun the takeover attempt for the purpose of securing control of the target company for long-term gain. If this is true, then the "Raider Buyout" defense probably would not work because the Raider would not be interested in receiving the short-term profit, but instead would continue in his efforts to obtain control of the target. When this happens, the target management must turn to other defensive techniques.

**B. The Defensive Merger**

Once the management of the target company realizes the tender offer of the outsider is meant as a full-fledged takeover attempt and not merely as a quick profit scheme, they are left with only three options if they still plan to fight the takeover attempt. They are: 1) the target can attempt to take over the tender offeror; 2) the target can attempt to acquire another company which engages in activity similar to the tender offeror, causing an anti-trust prob-

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\(^7\) The "Business Judgment" rule sustains corporate transactions and immunizes management from liability where the transaction is within the powers of the corporation (intra vires) and the authority of management, and involves the exercise of due care and compliance with applicable fiduciary duties.

lem for them, and making the takeover illegal; or 3) the target
can seek out a "White Knight," and consumate a defensive merger
with that company. 88

Although the first two options are workable, they may not be
viable alternatives for many companies in the middle of a takeover
attempt. 89 The defensive merger, however, may allow a target com-
pany to escape the grasp of the tender offeror and still retain some
control in the future of the target company.

A good example of how a target can use a defensive merger
to fight off an unsolicited tender offer is found in the case of Tread-
way Companies, Inc. v. Care Corporation. 90 This case was decided
by the Second Circuit Court of Appeals, applying New Jersey law.

In January of 1978, Care Corporation, a Delaware corporation
engaging in the operation of health care and recreation facilities,
found itself in the position of having large amounts of cash on hand
and desired to find a way to invest it. Care subsequently decided
to invest in Treadway Companies, a New Jersey corporation which
operated bowling alleys and motor inns. 91

The investment by Care came about partially because the in-
vestment banker employed by Care to find an investment knew
Daniel Cowin, a director of Treadway as well as its largest
shareholder. 92 By the summer of 1978, Care's holdings in Tread-
way had reached nearly 5% and Care was required to file a schedule
13D with the Securities Exchange Commission (SEC), stating its
purpose in acquiring the Treadway shares. 93 At this time Care em-

88. Of course there are other options open to the target, such as state law claims
and violations of securities laws; however, excluding those, the target is realistically
left with only three options.
89. Obviously, in order to exercise either of the first two options, the target would
need substantial capital or an extended credit line. If the target does not have these
then those options may be foreclosed.
90. 638 F.2d 357 (2d Cir. 1980).
91. Id. at 360.
92. Id. at 360-61.

(1) Any person who, after acquiring directly or indirectly the beneficial owner-
ship of any equity security of a class which is registered pursuant to section 781
of this title, or any equity security of an insurance company which would have been
required to be so registered except for the exemption contained in section 781(g)(2)(G)
of this title, or any equity security issued by a closed-end investment company
registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], is
directly or indirectly the beneficial owner of more than 5 per centum of such class
shall, within ten days after such acquisition, send to the issuer of the security at
phasized its only interest in Treadway was for investment purposes. 94

Throughout the summer and fall of 1978, Care repeatedly stated both to the management of Treadway and to the SEC that its only interest in Treadway was as an investment. However, that fall, Care and Cowin began negotiating the sale of Cowin’s substantial holdings in Treadway to Care. On November 9, the sale of Cowin’s stock to Care was completed, and by the end of November Care owned 26% of Treadway’s outstanding shares. 95 Care still claimed the stock purchases were merely an investment. 96

By the spring of 1979, Treadway began to distrust Care’s stated intentions for buying Treadway’s stock. In April, Treadway’s direc-

its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

- (A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;
- (B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;
- (C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;
- (D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and
- (E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

94. 638 F.2d at 365.
95. Id. at 363.
96. Id.
tors employed the firm of Swordco as its investment banker in order to look for a possible business combination with Treadway.97

By autumn of 1979, Treadway had found a “White Knight” to help stave off Care’s takeover attempt. That company, Fair Lanes, Incorporated, dealt substantially in the bowling industry and obviously would make an ideal merger partner with Treadway.98

The negotiations between Treadway and Fair Lanes proceeded through the fall and winter of 1979. The basic plan, although amended many times, was for Treadway and Fair Lanes to merge in a stock-for-stock transaction.99 However, Care’s holdings in Treadway were quickly becoming nearly a third of all the stock outstanding, which, under New Jersey law would be enough ownership needed to block the proposed merger between Fair Lanes and Treadway.100

The contest for control continued, with Fair Lanes and Treadway trying to arrange a legal merger that would satisfy both the courts and the American Stock Exchange (AMEX).101 Care continued to buy up Treadway stock and by December owned 34% of the outstanding shares,102 enough now to block any merger attempt with Fair Lanes.

On December 20, the board of Treadway met and approved the sale of 230,000 of the company’s shares to Fair Lanes.103 Sixty-seven thousand of the shares consisted of treasury stock and 163,000 shares were authorized but unissued shares. The importance of the sale was that it lowered Care’s percentage of control from 34% to 28%.104 It was Treadway and Fair Lane’s plan that they would now be able to defeat Care’s nominees to the Treadway board at the next shareholders meeting, and presumably Care would become frustrated and allow the merger of Treadway and Fair Lanes to be consumated rather than continuing to fight for control for another year.105

97. Id. at 364.
98. Id. at 365.
99. Since both Treadway and Fair Lanes were involved in the bowling industry a merger between them would be ideal.
100. N.J. STAT. ANN. § 14A:10-3(2) (West 1969).
101. 638 F.2d at 365. The merger plan was amended continuously in order to avoid any possible legal action.
102. Treadway, 638 F.2d at 368, 369.
103. Id. at 369.
104. Id. at 368, 370.
105. Id. at 368.
Both sides now brought their cases to court. Treadway asserted that the purchase of its shares by Care from Cowin was illegal, whereas Care asserted that the transfer of shares to Fair Lanes was improper.\(^{106}\)

The district court ruled against Treadway, holding that the purchase of the stock from Cowin had not been illegal but that the transfer of the shares to Fair Lanes was.\(^{107}\) The court held that the primary purpose of Treadway in consumating the stock sale with Fair Lanes was to "thwart a Care takeover"\(^{108}\) and that the directors' motivation was "for the purpose of perpetuating its own control, and not with the best interests of the corporation in mind."\(^{109}\)

The district court then permanently enjoined the voting of the 230,000 shares owned by Fair Lanes and declared that the slate of nominees put forth by Care at the March 20, 1980 shareholders' meeting serve as the new directors of Treadway.\(^{110}\) The court did, however, grant a stay of its order while Treadway's appeal was expedited.\(^{111}\)

On appeal the Second Circuit, per Judge Kearse, affirmed the ruling of the district judge concerning the stock purchases of Care.\(^{112}\) However, the court reversed the district court on the matter of the sale of Treadway's stock to Fair Lanes.\(^{113}\) The court based its ruling on its interpretation of the business judgment rule.\(^{114}\)

The court began with the supposition that once the directors of Treadway had concluded the Care takeover would be detrimental to the company, it was reasonable for the directors to move to oppose the takeover.\(^{115}\) The court noted that under this analysis, provided the directors acted legitimately, their actions would be protected from scrutiny of the courts by the business judgment rule.\(^{116}\)


\(^{107}\) Id.

\(^{108}\) Id. at 686.

\(^{109}\) Id.

\(^{110}\) Id. at 687.

\(^{111}\) Treadway, 638 F.2d 357, 373.

\(^{112}\) Id. at 374.

\(^{113}\) Id. at 384.

\(^{114}\) Id. at 381.

\(^{115}\) Id.

\(^{116}\) Id.
Next, the court clarified the burden of proof in a situation in which the business judgment rule is being used as the defense. The court stated that the original burden of proof is on the claimant (Care) to show that the directors (Treadway) had "an interest in the transaction, or acted in bad faith or for some other improper purpose." Once the claimant has demonstrated this fact, the burden shifts and it is up to the directors to show that "the transaction was fair, in the sense that it was entered into for a proper corporate purpose, and not merely for the directors' selfish purposes." The court noted that the burden will rarely shift unless it is shown that the directors "had a real and obvious interest in ... retaining or strengthening their control of the corporation."

By using this analysis the court reversed the district court. Judge Kearse noted that the district judge based his ruling on the premise that the directors were attempting to perpetuate their control of the board. However, the court of appeals took notice of the fact that, except for the president of Treadway, none of the other directors had reason to anticipate being left on the board after the merger. The court held that in reality the directors of Treadway were moving "toward a business combination with Fair Lanes" which "could not be expected to perpetuate control by these directors."

The court therefore ruled that Care had failed to meet the burden of proof necessary under the business judgment rule, in order to shift the burden to the directors to justify their actions. The court then reversed the enjoinment of the shares held by Fair Lanes and ordered that there be a new election to determine the directors.

The Second Circuit had a unique opportunity to re-evaluate and interpret its holding in Treadway barely two months after its decision. The case of Crouse-Hinds Company v. Internorth,
Incorporated was similar to the Treadway case with some notable exceptions.

In Crouse-Hinds the target company, Crouse-Hinds, and the company with whom the merger was to take place, Belden, had agreed to a merger before a tender offer by Internorth was received. Internorth expressly conditioned its offer on the rejection of the proposed merger between Crouse-Hinds and Belden, by the shareholders of Crouse-Hinds.

The second major distinction between the two cases was that in Crouse-Hinds the directors of Crouse-Hinds would have retained their positions on the board after the consumation of the merger with Belden. Using this distinction, the district court interpreted the Treadway decision in a way that, whenever it was shown that the directors of the target company would stay in office after a merger, the burden of proof shifts to the directors to prove they have acted in the corporation's best interest. On appeal, the court, again per Judge Kearse, reversed the district court and clarified its holding in Treadway.

The court once again stated that the burden of proof under the business judgment rule shifts to the directors once the plaintiffs have shown that the directors had an interest in the transaction. However, the court went further and stated that, just because the directors are to be kept in office after the merger, no presumption arises that they have an interest in the transaction.

The court thus cleared up the issue of whether a director who is to keep his position after the merger is to be considered interested per se. The court, in reversing the district court, held that the judge must have inferred "that if the directors are to remain on the board after the merger, perpetuation of control must be presumed to be their motivation." The court concluded that "this inference has no basis in either law or logic."

The holdings of the court in these two cases, when combined

126. 634 F.2d 690 (2d Cir. 1980).
127. Id. at 692.
128. Id. at 693.
129. Id. at 702.
130. Id.
131. Id.
132. Id.
133. Id. (Emphasis by the court).
134. Id.
and summarized, would be that, in order to shift the burden of proof from the plaintiff to the directors under the business judgment rule, the plaintiff must show that the directors of the target had an identifiable interest in the transaction. The mere fact that the directors are keeping their jobs, in and of itself, without a further showing of interest, will not shift the burden of proof to the directors. As the court had previously noted, it was rare that such an obvious interest could be shown.

The defensive merger is thus a very important tool to be considered by management of a target company. In fact, the merger, if consumated correctly, could further complicate the hostile takeover bid of an outsider by creating an anti-trust issue. However, the legal use of the defensive merger, as well as other defensive techniques described earlier, may have been changed by the recent case of Norlin Corporation v. Rooney Pace, Inc.\textsuperscript{135} This case totally redefined and restructured the business judgment rule in the face of clear precedent otherwise.

C. The Norlin Decision

During the early weeks of January 1984, Piezo Electric Products purchased about 32\% of the outstanding stock of Norlin Corporation.\textsuperscript{136} Piezo is a corporation engaged in the selling and developing of certain electronic equipment.\textsuperscript{137} Norlin is a corporation which primarily manufactures musical instruments and deals in financial printing.\textsuperscript{138}

The board of Norlin, anticipating that the purchase of the stock by Piezo was the beginning of a takeover attempt, tried to get the district court to enjoin the purchase of more stock by Piezo, alleging violations of securities laws.\textsuperscript{139} However, the district court found no merit in Norlin's allegations and refused to grant the injunction.\textsuperscript{140} After the district court's refusal, Norlin resorted to various defensive techniques which resulted in this litigation.

During a five-day period between January 20 and 25, 1984, Norlin's directors approved the transfer of large amounts of stock

\textsuperscript{135} 744 F.2d 255 (2d Cir. 1984).
\textsuperscript{136} Id. at 259.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
to a wholly-owned subsidiary and to a newly created ESOP.\textsuperscript{141} The shares transferred to the subsidiary were in consideration of the cancellation of a promissory note and the issuance of another twenty million dollar interest-bearing note.\textsuperscript{142} The shares transferred to the ESOP were in exchange for a promissory note worth almost seven million dollars.\textsuperscript{143} The result of these transactions was to give the Norlin board control of 49\% of its outstanding stock.\textsuperscript{144}

The transactions in its own stock were without shareholder approval, and the directors were warned by financial advisors that their actions could result in de-listing of Norlin's stock from the New York Stock Exchange (NYSE).\textsuperscript{145} On March 15, 1984, the NYSE did in fact freeze trading of Norlin's stock with the intention of de-listing the stock.\textsuperscript{146}

On February 9, Piezo filed a counterclaim against Norlin in order to enjoin the voting of both the subsidiary's stock and the stock in the ESOP.\textsuperscript{147} The district court granted Piezo's request, noting that Panamanian law prohibited the voting of the subsidiary's stock, and that the creation of the ESOP and the issuance of the stock to it was a "management scheme to entrench itself in power."\textsuperscript{148} From this judgment Norlin appealed.

On appeal the Second Circuit held that the voting of the subsidiary's stock would be in violation of either New York or Panamanian law.\textsuperscript{149} Second, and more importantly, the court, per Justice Kaufman, held that the creation of the ESOP and the issuance of the stock to it violated the business judgment rule.\textsuperscript{150}

The court held that, during a contest for corporate control, the burden of proving the ESOP was set up for a proper purpose is upon the directors.\textsuperscript{151} In support of its position the court referred to a Pepperdine Law Review article,\textsuperscript{152} which in turn relied upon

\begin{itemize}
\item\textsuperscript{141} Id.
\item\textsuperscript{142} Id.
\item\textsuperscript{143} Id.
\item\textsuperscript{144} Id.
\item\textsuperscript{145} Id. at 259-60.
\item\textsuperscript{146} Id. at 260.
\item\textsuperscript{147} Id.
\item\textsuperscript{148} Id. The Court originally applied Panamanian law since Norlin was originally incorporated in Panama.
\item\textsuperscript{149} Id. at 264.
\item\textsuperscript{150} Id. at 266-67.
\item\textsuperscript{151} Id. at 266.
\item\textsuperscript{152} Id. citing Note, \textit{Employee Stock Ownership Plans and Corporate Takeovers: Restraints}
two Ninth Circuit cases to support this viewpoint. However, the Ninth Circuit has in the past interpreted the business judgment rule differently from the other circuits. The Ninth Circuit has put forth the view that, where directors attempt to use the business judgment rule as a defense, they must first demonstrate that their actions were based upon a compelling business purpose.

As previously noted, the Second Circuit followed the rule that the initial burden of proving the directors' actions were in bad faith is on the plaintiffs. The court in Norlin ignored this rule, and, instead, merely used inferences from actions which normally would occur during a takeover attempt to show that the directors were trying to perpetuate their control.

For example, the court noted that the ESOP was created merely five days after the district court refused to enjoin Piezo's actions, at a time when Norlin's management was "casting about for strategies to deter a challenge to their control." One might ask when the court would have suggested that a target company implement defensive techniques, once the tender offer has been made, and not create an inference of self interest. By holding as it did on this issue, the court demonstrated a glaring misunderstanding of the realities of the corporate takeover field.

Once a tender offer begins, time becomes of the essense for a target company which has determined the takeover is not in its best interest. The target usually must implement any defensive measures quickly or it may lose the chance to fight the takeover at all. The court's inference that the timing of the defensive technique conclusively establishes bad faith lacks any real basis in logic.

From a close reading of the case it becomes clear that the court incorrectly applied the burden of proof. The court placed the burden upon Norlin to justify its actions, before Piezo had prop-

155. Id. at 233-34.
156. Treadway, 638 F.2d 357; This same burden has been accepted by other circuits as well: Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), cert. denied, 454 U.S. 1092; Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980), cert. denied, 450 U.S. 999.
157. Norlin, 744 F.2d 266.
158. The case reads extremely well and only after repeated readings and enlightenment from Professor Robert Seaver did the author understand the realities of the court's opinion.
erly met its burden of showing self interest on the part of Norlin.

The Norlin court emphasized that its viewpoints were in line with its previous decisions in Treadway and Crouse-Hinds.\textsuperscript{159} However, on at least two important points the court ruled directly opposite from the previous decisions.

First, the Norlin court stated that the actions of Norlin's board suggested that it was impossible that retention of control was not a part of its consideration in creating the ESOP,\textsuperscript{160} and therefore self interest had been shown. However, previous case law took notice of the view that self perpetuation must be the sole or primary purpose of the transaction, and not merely a consideration of the directors in making their decision.\textsuperscript{161} There is no question that a director's (especially an inside one) decision during a takeover attempt may be based in part upon his desire to retain his job. However, if the action taken is also for a valid business purpose, the desire of the director to retain his job becomes merely incidental to the business purpose.\textsuperscript{162} Therefore the Norlin court improperly found self interest and did not follow precedent from earlier cases.

Second, the court rejected Norlin's contention that, once a target company determines that a takeover is not in its best interest, then the directors may take any action to oppose it.\textsuperscript{163} This same contention was adopted by the Second Circuit in the Treadway decision. Justice Kearse stated that "Once they [the directors] determined that a Care takeover would be detrimental to Treadway, it was similarly reasonable that the directors should move to oppose it."\textsuperscript{164} Again, the Norlin court broke with earlier precedent and ruled oppositely. Thus, the court on two important issues in the Norlin case ignored precedent and changed the law.

Finally, the court demonstrated a characteristically limited understanding of the business judgment rule when it stated: "The business judgment rule does indeed require the board to analyze carefully any perceived threat to the corporation, and to act appropriately."\textsuperscript{165} The business judgment rule requires nothing. It is a defensive rule implemented by the courts of this country to in-

\textsuperscript{159} Norlin, 744 F.2d 265, n.7.
\textsuperscript{160} Id.
\textsuperscript{161} Treadway, 638 F.2d 357.
\textsuperscript{162} Crouse-Hinds, 634 F.2d 690.
\textsuperscript{163} Norlin, 744 F.2d at 266.
\textsuperscript{164} Treadway, 638 F.2d at 381.
\textsuperscript{165} Norlin, 744 F.2d at 266.
sulate directors from judicial scrutiny when they have acted in good faith.\textsuperscript{166} Its use comes into play after the directors have acted. It does not require them to act. It acts as a shield not a sword.

In deciding the case as it did, the Second Circuit totally restructured the business judgment rule. If the decision is followed by other courts, directors of target companies will find themselves with their backs to the wall. What the court has effectively done is to cast a presumption of self interest over all defensive actions that directors may take if as a result they will keep their positions. This is a radical deviation from earlier decisions and a dangerous mis-application of corporate law with ramifications which may be felt throughout the country.

CONCLUSION

Hostile corporate takeovers have now become an everyday media-covered happening.\textsuperscript{167} Directors of target companies may find themselves walking a fine line that has on one side the loss of their jobs and on the other side the ever-increasing sanctions of the court. However, provided these directors act in good faith, and use techniques such as those described above, and provided that the \textit{Norlin} decision is not widely followed, directors in a besieged company should be able to walk the fine line that the courts have constructed and defeat the takeover attempt without incurring liability.

\textbf{Christopher Barclay}

\textsuperscript{166} See supra note 88.
\textsuperscript{167} See supra note 1.
THE FUTURE OF COPYRIGHT PROTECTION AND
COMPUTER PROGRAMS—BEYOND
APPLE V. FRANKLIN*

In the significant¹ and closely watched² computer software case, Apple Computer, Inc. v. Franklin Computer Corp.,³ the United States Court of Appeals for the Third Circuit handed down a decision on August 30, 1983, that clarified⁴ and solidified⁵ the view recognizing the copyrightability of computer programs, and probably⁶ ended the first round of copyright litigation involving

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* In August, 1984, this paper was entered in the Nathan Burkan Memorial Copyright Law Competition of 1984, sponsored by the American Society of Composers, Authors and Publishers (ASCAP). It received the second place award in the competition's local level at Salmon P. Chase College of Law of Northern Kentucky University. Subsequently, it was honored by being selected for entry in the competition's national level. The involvement of this paper in the Burkan competition delayed its publication in the NORTHERN KENTUCKY LAW REVIEW until Winter, 1986, two years after the Apple v. Franklin decision and one year after the writing of the paper.

Despite the publication delay, within the past year computer litigation cases have no longer questioned the basic copyrightability of computer software. Rather, cases have raised issues relevant to computer software in more traditional copyright areas such as notice of copyright, substantial similarity, derivative works, and copyright ownership in "joint works" and "works for hire."


2. See Sanger, supra note 1, at D1; Gillin, supra note 1, at 5 ("drawn considerable attention from the computer community").

3. 714 F.2d 1240 (3d Cir. 1983).

4. Sanger, supra note 1, at D1; Gillin, supra note 1, at 5 ("one of the most definitive statements of the law").


6. Gillin, supra note 1, at 5 (quoting Robert Bigelow, Editor of COMPUTER LAW AND TAX REPORTER: "The third circuit is a very respected group and its decisions often carry a good deal of weight in other circuits").
computer software. The Third Circuit reversed the decision of the United States District Court for the Eastern District of Pennsylvania by holding computer operating systems programs copyrightable, as well as computer programs expressed in object code, and those embedded on a ROM (Read-Only-Memory) chip. In addition, the Third Circuit held that by making out a prima facie case of copyright infringement, the plaintiff is entitled to a preliminary injunction without a detailed showing of irreparable harm. This decision therefore apparently has settled the status of the general copyrightability of various forms of computer programs and thus relieved many of the prevailing concerns in the computer software industry.

This article will examine the significance of Apple v. Franklin as the culmination of the first wave of computer software litigation—the push to recognize and establish the protection and copyrightability of computer programs in various forms and media. This article will then examine emerging as well as future problems in the computer programming industry and its legal protection, especially that found under copyright law.

INTRODUCTION

Devices have steadily evolved to aid man in his computing tasks, from the ancient abacus before Christ, Pascal's mechanical geared desk calculator in the 1600's, Babbage's mechanical printing "Difference Engine" in the 1800's, to ENIAC and the electro-mechanical, programmed, first general purpose computers of the

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10. Id. at 1254.
11. But see Myers, Franklin Settles Copyright Dispute with Apple, COMPUTERWORLD, Jan. 9, 1984, at 6, col. 1.
13. J. BOYCE, MICROPROCESSOR AND MICROCOMPUTER BASICS, at 1 (1979) [hereinafter cited as BOYCE].
14. Id. at 2.
15. Id.
1940's. After the use of vacuum tubes in the primitive early computers, came the use of smaller, more efficient transistors and then the use of a collection of all necessary components on one semiconductor solid in the integrated circuits (IC) and IC assemblies of the 1960's. Through the advances of the semi-conductor industry, the room-sized computers of the 1940's were reduced in size and increased in capability heralding the advent of the microprocessor and microcomputer.

Along with the development of the programmed and programmable computers, also called "hardware," came the need for computer programs, known as "software." The hardware is of little value and can do no useful work until it is provided with programs of two types: applications software and system software. Application programs are written to solve a particular user's problems, e.g., payroll accounting, games, or statistical analysis of data. System programs include operating system programs, utility programs, interpreter programs, and compiler programs. They are written to facilitate the execution of the varied applications programs.

16. Id. at 2, 6; see also I. Flores & C. Terry. Microcomputer Systems, at 3 (1982) [hereinafter cited as Flores & Terry].
18. Flores & Terry, supra note 16, at 256. A computer is a problem-solving device instructed in how to solve the problem by a program which is contained in memory.
19. Boyce, supra note 13, at 82. A microprocessor is a large-scale integrated circuit assembly containing much of the computing capability of a very small computer.
20. Id. A microcomputer is a microprocessor based computer.
21. Id. at 128 (a computer program is a "list of instructions"); see also 17 U.S.C. § 101 (1976) (amended 1980) ("a set of statements of instructions to be used directly or indirectly in a computer in order to bring about a certain result").
22. Flores & Terry, supra note 16, at 34, 265.
23. Id. at 34.
24. Id. at 35. Operating system programs handle all input, output and file management operations.
25. Id. Utility programs include text editor programs, print programs, copy programs, debug and trace programs (error finding), etc.
26. Id. Interpreter programs execute programs in a procedure-oriented language, e.g., BASIC.
27. Id. Compiler programs convert source language programs (e.g., PASCAL) into executable machine code.
28. Id.
Programming a computer has gone through various evolutions, or generations, since the 1940’s process of manually wiring and rewiring the circuitry and setting switches to perform the task at hand. The first evolutionary step was the change from the engineering task of manually setting plugs and wires, to the use of an internally stored instruction program. This internal instruction program used a machine level language, or binary code of symbols (0’s and 1’s), to determine memory addresses and operation codes. The next evolution was the advent of the assembler, and assembly language, which allowed the use of mnemonic aids in writing the program instructions. The third evolutional change was the development of language processors and machine language conversion, which enabled the use of procedure-oriented languages akin to English, such as FORTRAN (FORmula TRANslation), and BASIC (Beginner’s All-purpose Symbolic Instruction Code). Presently, fourth and fifth generation changes (discussed later) are being developed.

The foregoing advances eased the writing of programs by introducing a greater variety of “English-looking” computer languages enabling more users to write more individualized programs to solve their particular tasks. However, a language gap between the end user and the computing machine began to develop because each


30. Gemignani, The View, at 271; Romberg & Thomas, Reusable Code, Reliable Software, COMPUTERWORLD, Mar. 26, 1984, at ID/17, col. 2. (hereinafter cited as Romberg & Thomas). See also SIPPL, supra note 17, at 11, 180, 189, 216 (Machine language is used to write instructions in a form directly useful by the computer; the operation codes are those symbols that designate the computer operation to be performed; and the memory addresses are the numbers that identify the storage locations in memory).

31. BOYCE, supra note 13, at 116-17. A mnemonic aid is a group of letters or numbers that is mindful of actual English language words, used for help in remembering the instruction being performed. E.g., “SUB M” is a mnemonic that represents “subtract memory from A,” and compares with the binary code “10010110”. See also SIPPL, supra note 17, at 20 (An assembler is a computer program that translates input symbolic codes—the assembly language—into machine instructions).

32. Romberg & Thomas, supra note 30, at ID/18.

33. Procedure-oriented languages, oriented to the description of procedural steps, are similar to the language used in the job and are relatively independent of the data processing system. Language processors—the translating programs—are needed to convert from one language form of representation to that of the language of the machine. See SIPPL, supra note 17, at 80, 241.

34. Id. For example, the BASIC language equivalent of the note 31 instruction might be “LET A = A-M.”
computer still only “understood” a native instruction set of its binary object machine language. In order to bridge that ever-widening gap, more complex operating system and applications programs had to be written to incorporate instructions translating the writings of the user into writings the machine could “understand.” As the programming evolution continued, computer software became a more valuable and marketable consumer product and the software industry blossomed.

Along with the growth of the software industry came the increased concern for software protection, and concern over software piracy. Traditional trade secret law was used to protect a program’s underlying algorithms, but not the software, in company trade secrets. Patent protection was used to protect the inventions of novel hardware items, but proved inappropriate to cover software items except when they were dynamically used as part of the machinery. Trademark law had only limited and circumspect

35. Flores & Terry, supra note 16, at 46; see also Davidson, supra note 17, at 341 (distinguishing binary form and object code).
applications for the protection of software, but along with the ideas of unfair competition, misappropriation of ideas and unjust enrichment, afforded better protection in the videogame and home computer program areas (e.g., "PAC-MAN" and "VISICALC"). In general, the law of copyright seems to be the most suitable legal protection for software products to protect the program, i.e., the writing itself.

I. COPYRIGHT AND COMPUTER PROGRAMMING

In order to promote the progress of science and the useful arts, Congress has the constitutional power to grant authors exclusive rights in their writings for limited times. Congress first exercised its power in 1790 with the creation of a Copyright Act encompassing "any map, chart, book or books already printed. . . ." For almost two hundred years, the act has been periodically revised and its scope expanded. With the latest revision in 1976, copyright protection now extends to "[o]riginal works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."
In 1964, the Copyright Office began accepting computer programs for copyright registration as "books." However, computer programs were specifically excluded from the Copyright Act of 1976. Instead, the National Commission on New Technological Uses of Copyrighted Works (CONTU) was created to address the subject of computers and copyright. In its Final Report of 1978, the commission made specific recommendations to amend the new copyright law to encompass computer programs and computer uses of copyrighted programs. These recommendations were embodied in the Computer Software Copyright Act of December 12, 1980.

Under the current act, programs, data bases, and documentation are included in the definition of "literary works," whereas flowcharts can be copyrighted as pictorial works and the display modes of videogames as audiovisual works. However, the underlying idea or algorithm is not eligible for copyright protection.

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(5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings.


53. Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3028 (1980) amending 17 U.S.C. § 101 (1976) to add a definition of "computer program" (see supra note 21), and revising 17 U.S.C. § 117 (1976), to describe the limitations on exclusive rights in computer programs: ("it is not an infringement for the owner of a copy of a computer program to make... another copy or adaptation... provided: (1) that... [it] is created as an essential step in the utilization of the computer program in conjunction with a machine... or (2) that... [it] is for archival purposes only").

54. 17 U.S.C. §§ 101, 102(a)(1) (1976). "Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards in which they are embodied. See also N. Boorstin, *Copyright Law*, § 2-21 at 65 (1981) [hereinafter cited as Boorstin].

55. A "flowchart" is a visual or graphical representation of a program or procedure using block diagrams and flow symbols, and connecting lines to represent the sequence of operations. See SIPPL, supra note 17, at 130-31.

56. 17 U.S.C. § 101 (1976) (amended 1980) ("'Pictorial, graphic, and sculptural works' include two-dimensional... works of... charts, technical drawings, diagrams, and models").

57. 17 U.S.C. § 101 (1976) (amended 1980) ("'Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices... together with accompanying sounds").
regardless of the form in which it is described, nor is the mechanical or utilitarian aspect of any useful article (e.g., tangible medium of expression) eligible.

The varied nature of computer programs existing in a multitude of forms, along with the misunderstanding surrounding the nature of programming itself, has caused a great deal of confusion and doubt regarding copyright protection. Writing a computer program is a demanding project, involving five separate tasks for the programmer to perform.

First is the problem analysis stage where the step-by-step procedure or algorithm is developed. Next is the organization phase where the use of flowcharts, or block diagrams of the algorithm, helps organize and sequence the algorithm into the operations necessary for the problem solution. Using the flowchart and the appropriate instruction set of the computer, the computer program is then coded, converting the flowchart actions into instructions that will result in computer operations. Next the coded program is tested and "debugged" by comparing each coded step with the flowchart action, and running the program on the computer to eliminate errors. The last task is the documentation step, which gathers the corrected flowchart, final program copy, sample input and output data, and other information necessary to document and explain the program evolution. Once a computer program is written it can be stored on various types of media, including punched cards, paper tapes (mechanical),

58. 17 U.S.C. § 102(b) (1976) ("In no case does copyright protection ... extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, ... ").
59. 17 U.S.C. § 101 (1976) (amended 1980) ("A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.").
60. Compare Iskrant, supra note 44, at 92, with Davidson, supra note 17, at 339-48.
61. Boyce, supra note 13, at 126.
62. Id. (An algorithm is comparable to a step-by-step recipe in a cookbook).
63. Id. (Flowcharts to programmers are much like blueprints to engineers).
64. Id.
65. Id. at 127. The testing stage involves a give and take iteration between the programmer and computer, submitting the program as input, and receiving error messages or solutions as output until the program instructions are correct.
66. Id.
67. Flores & Terry, supra note 16, at 144. The medium is a physical material, the sur-
mark sensing cards (optical), magnetic tapes and disks (magnetic),\textsuperscript{68} and semiconductor memory chips.\textsuperscript{69} For copyright purposes one must always distinguish the medium (the tangible object, useful article) from the program (the writing, copy) fixed upon it;\textsuperscript{70} distinguish the algorithm (the idea, procedure) from the coding describing it (the expression);\textsuperscript{71} and distinguish the functioning of the program (applications, operations, utilities) from the writing of it (coding of the instructions in the various languages).\textsuperscript{72}

Under the last distinction the general nature and purpose of a computer program must be recalled; that is, a set of instructions is written in order to communicate to the computer a task to be performed. For ease of human understanding and program production, many "English-looking" languages or codes have been created for writing source programs (e.g., writing a program in something other than machine language). However, they still have to be copied or translated into the binary language the computer "understands," to produce the object program — the machine language translation of the source program. Therefore, little distinction should be made between the writing in the source program (the starting point of the set of instructions), and the writing in its object code version (the computer understandable translation of the same initial set of instructions).\textsuperscript{73}

\textsuperscript{68} Id. at 10-13. Read-Only Memory (ROM) has data permanently written on it by the manufacturer and can only be read. Random Access (Read/Write) Memory (RAM) can be read and written to, temporarily storing data while power is on. Programmable Read-Only Memory (PROM) is a read-only memory chip that can be permanently programmed by the user. Erasable Programmable Read-Only Memory (EPROM) can be erased and reprogrammed many times.

\textsuperscript{69} See 17 U.S.C. § 101 (1976) (amended 1980), defining a work to be "fixed" in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. See also 17 U.S.C. § 102(a) (1976) and note 67 supra.


\textsuperscript{71} 17 U.S.C. § 101 (1976) (amended 1980), defining a useful article as an article having an intrinsic utilitarian function. See also Davidson, supra note 17, at 372-73.

\textsuperscript{72} See e.g., Davidson, supra note 17, at 371; Boorstin, Copyrights, Computers, and Confusion, 63 J. PAT. OFF. SOC'Y. at 295 (1981). But see Stern, Another Look at Copyright Protection of Software: Did the 1980 Act Do Anything for Object Code?, 3 COMPUTER/L.J. 1 (1981). For definitions, see SIPPL, supra note 17, at 212, and 294.
II. Case Law

The case litigation from 1964 to 1984 involving computer programs reflects changes in the copyright law as well as the changes in the software industry. One of the first cases alleging copyright infringement was *Synercom Technology, Inc. v. University Computing Co.*, 74 (decided under the 1909 Copyright Act) which held that user manuals intended for use with computer programs were copyrightable and thus infrangible. 75 However, input formats were considered to be uncopyrightable ideas inseparable from their expressions, 76 or alternatively, formats were not proper subjects of copyright. 77 Distinguishing the idea of sequencing data from the expression of its sequencing in the formats was the difficulty; hence, the court alternatively invoked the doctrine of *Baker v. Selden* 78 and analogized input formats to blank forms. 79

*Data Cash Systems, Inc. v. JS&A Group, Inc.* 80 was decided under the 1976 Act. 81 This case involved a computer chess program converted into machine readable code and entered on a ROM chip. 82 There was no dispute that the defendants copied the ROM program; however, the court analogized the ROM chip and program to a piano roll and musical score, 83 and held that the ROM was a mechanical embodiment of the source program and not a copy of it. 84 The case was affirmed by the Seventh Circuit, however, only because infringement action was precluded due to the absence of any copyright notice 85 on the ROM chip or instruction sheets. 86

75. 462 F. Supp. at 1009-11.
76. Id. at 1014.
77. Id.
78. 101 U.S. 99 (1879) (blank forms that record and do not convey information are not copyrightable, thus if the idea is inseparable from the expression, copying that expression for use versus for explanation is not an infringement).
79. 462 F. Supp. at 1011.
81. 480 F. Supp. 1063 (N.D. Ill. 1979), aff’d on other grounds, 628 F.2d 1038 (7th Cir. 1980).
82. 480 F. Supp. at 1065-66.
84. 480 F. Supp. at 1068.
85. See 17 U.S.C. § 401(a) (1976) ("[A] notice of copyright . . . shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.")
86. 628 F.2d at 1042.
This time the difficulty was in distinguishing the writing from the medium and the various forms (levels) of code.

The next group of cases involved video games and audiovisual performances\(^\text{87}\) as well as the underlying computer programs.\(^\text{88}\) The courts usually looked for substantial similarities in the games and display.\(^\text{89}\) Although the courts in most of the videogames cases upheld their copyrightability because of the audiovisual aspect, the courts were also forced to look at the underlying programs and medium in which the programs were embedded. The Third Circuit in *Williams Electronics, Inc. v. Artic International, Inc.*\(^\text{90}\) rejected the contention that ROM devices were utilitarian objects, and held instead that the issue was whether the program embodied in the ROM satisfied the requirement of fixation in tangible form.\(^\text{91}\)

The court also rejected the contention that a copy must be intelligible to humans and intended as a medium of communication to humans, thus rejecting the theory that protection is only available for source codes and not object codes.\(^\text{92}\) The Seventh Circuit in *Midway Mfg. Co. v. Artic International, Inc.*\(^\text{93}\) also stated that a copy could be made in any medium, and that the original work of authorship should not be confused with the material objects in which the work must be fixed.\(^\text{94}\)

Software copyrightability also began to crystallize in nonvideogame programs. In *Tandy Corp. v. Personal Micro Computers, Inc.*,\(^\text{95}\) decided under the 1976 Act, the ROM chip was found to be

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88. Williams Electronics, Inc. v. Artic International, Inc., ___ F. Supp. ___ (D.N.J. 1981) aff’d, 685 F.2d 870 (3d Cir. 1982) (audiovisual modes as well as the underlying computer program were registered and infringement was held).


90. 685 F.2d 870 (3d Cir. 1982).

91. Id. at 874.

92. Id. at 876-77. See also the text corresponding to note 73 supra about source and object programs and the tasks to communicate to the computer.


94. Id. at 1007-08. See also Midway Mfg. Co. v. Strohon, 564 F. Supp. 741 (1983) (a ROM chip is like a tape or disc—to store information; object code programs on it are copyrightable).

the tangible medium of expression on which the program was imprinted; therefore copying the program in the ROM chip was an infringement.\(^8\) Stored on the ROM chips is usually the object code or machine language version of the computer programs, normally the operating system programs that are permanently stored in the computer. Cases arose in which the courts addressed the subject of protection for object code and operating system programs.

The court in *GCA Corp. v. Chance*,\(^7\) decided under the 1980 Amendments, ruled that "[B]ecause the object code is the encryption of the copyrighted source code, the two are to be treated as one work; therefore copyright of the source code protects the object code as well."\(^8\) The plaintiff was entitled to injunctive relief from the admitted copying of its operating systems programs.\(^9\) The court in *Hubco Data Products Corp. v. Management Assistance, Inc.*\(^\text{100}\) similarly said that the operating system "object code" was infringed.\(^10\) Likewise, the court in *Apple Computer, Inc. v. Formula International, Inc.*\(^\text{102}\) ruled that "all computer programs as embodied in ROMs" are protectible by copyright regardless of their function or purpose.\(^103\)

### III. Apple v. Franklin

In the midst of these rulings recognizing the copyrightability of computer programs, whether embodied in ROM chips, written in object or source code, or oriented as applications or operating systems programs, was the district court decision in *Apple Computer, Inc. v. Franklin Computer Corp.*\(^\text{104}\) (Three days later the Third Circuit decided *Williams Electronics, Inc. v. Artic International Inc.*,\(^\text{104(a)}\) but reconsideration of the *Apple* decision in light of *Williams* was denied).\(^105\)

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96. *Id.* at 173.
98. *Id.* at 720.
99. *Id.* at 723.
101. *Id.* at 452.
103. *Id.* at 780.
104(a). 685 F.2d 870 (3d Cir. 1982).
105. However, in denying a motion for reconsideration in light of *Williams*, the district court distinguished that case as not directly addressing the issues raised in *Apple* v. *Franklin*. 
Plaintiff-appellant, Apple Computer, Inc. ("Apple"), a California corporation and a leader in the computer industry, manufactures and markets personal computers, peripheral equipment and computer programs. Numerous computer programs developed by independent third parties are designed to run on the Apple II computer. Defendant-appellee, Franklin Computer Corporation ("Franklin"), a Pennsylvania corporation, manufactures and sells the ACE 100 computer, designed to be "Apple compatible" so that software and peripherals developed for the Apple II could be used with the ACE 100. To achieve such compatibility, Franklin admittedly copied fourteen of Apple's computer programs. This precipitated the suit.

Apple filed suit alleging that Franklin was liable for copyright infringement, patent infringement, unfair competition and misappropriation. Franklin asserted that the programs contained no copyrightable subject matter, that the copyright registrations were invalid and unenforceable, and that Apple misused and failed to comply with the procedural requirements for suit under 17 U.S.C. §§ 410, 411.

The district court analyzed what it considered to be a division and lack of consensus of opinion about ROMs and object codes,


106. 714 F.2d at 1242.
107. Id.
108. Id. at 1243.
109. Id. at 1245.
110. Id. at 1244. The fourteen programs are: "Autostart ROM," embedded on a ROM chip; "Applesoft," stored in ROM; "Floating-point BASIC" stored on disks; "Apple Integer BASIC," stored on the DOS 3.3 Master Disk; "DOS 3.3," the disk operating system program stored on the DOS 3.3 Master Disk; "Master Create," stored on a disk; "Copy," stored on a disk; "Copy A." stored on a disk; "Copy OBJO"; "Chain," stored on a disk; "Hello," stored on a disk; "Boot 13," stored on a disk; "Apple 13-Sector Boot ROM," stored in a ROM; "Apple 16-Sector Boot ROM," stored in a ROM. For a description of what each program does or has done, see id. at 1244 n.4.
111. Id. at 1244.
112. Id.
113. Id. See also 17 U.S.C. § 410 (registration of claim and issuance of certificate); and 17 U.S.C. § 411 (registration as prerequisite to infringement suit).
114. 545 F. Supp. 812. The court compared the viewpoints of the majority, dissent and concurrence in the CONTU Final Report, Id. at 817-18; weighed the decision in Data Cash, and Synercom Technology heavily, while treated lightly those in Tandy Corp. and GCA Corp., Id. at 817-19. The court also meshed the ideas of the ROM as a mechanical device and the program written on it, plus meshed the idea of the program, its function to produce a result, and the printed instructions themselves. Id. at 823-24. Confusing the semiconduc-
doubted Apple's likelihood of success on the merits or irreparable injury exceeding that of Franklin's, and denied the motion for a preliminary injunction.\footnote{Id. at 812, 825.} Apple appealed to the Third Circuit Court of Appeals, which concluded "that the district court proceeded under an erroneous view of the applicable law," reversed the denial of the preliminary injunction and remanded.\footnote{714 F.2d at 1242.}

In a five-part opinion the court of appeals thoroughly reviewed the facts and procedural history of the case as well as the district court opinion, and entered into an in-depth discussion of the law and issues presented on appeal.\footnote{Id. at 1242-55.} The appeals court had difficulty discerning why the district court questioned the copyrightability of the programs at issue,\footnote{Id. at 1246.} and addressed four main issues: whether copyright can exist in a computer program expressed in object code; whether copyright can exist in a computer program embedded on a ROM; whether copyright can exist in an operating system program; and whether independent irreparable harm must be shown for a preliminary injunction in copyright infringement actions.\footnote{Id. at 1247.}

In analyzing the first issue, the appeals court felt its decision in Williams was applicable in finding no basis to distinguish object code from source code.\footnote{Id. at 1247-48.} Under the 1976 Act, as amended in 1980, two requirements need to be satisfied to constitute copyrightable subject matter—an original "work of authorship" must be "fixed in a tangible medium of expression."\footnote{Id. at 1246.} The court cited the CONTU Final Report's recommendation that "computer programs, to the extent that they embody an author's original creation, are proper subject matter of copyright,"\footnote{Id. at 1247.} and dispelled the notion that copyrightability depends on a communicative function to individuals.\footnote{Id.} Computer programs can be perceived directly or with the
aid of a machine and are, by definition, instructions to be used directly or indirectly in a computer; only the machine language can be used directly. Thus the court looked to the words of the statute to find protection from unauthorized copying of both source and object code program versions.

The court of appeals quickly dispatched the second issue by reaffirming its Williams opinion that "[T]he statutory requirement of fixation is satisfied through the embodiment of the expression in the ROM devices." The court was able to separate the ROM as a utilitarian object or machine part from the copyrightable computer program that was written and stored on it.

The third issue concerning operating system programs was not raised in the Williams case and was considered the heart of the Apple appeal and a matter of first impression. Franklin argued that an operating system program is either a process, system, or method of operation and therefore uncopyrightable under 17 U.S.C. § 102(b) and under the precedent of Baker v. Selden. This contention focused on the function of a computer program to control the workings of the machine, analogizing the software as a machine part, rather than as the written set of instructions that is the program. The court rejected Franklin's utilitarian use argument by stating that Mazer v. Stein did not allow the intended use of an article eligible for copyrightability to bar or invalidate its registration. The court believed that the 17 U.S.C. § 101 definition of computer programs made no distinction between application and operating programs, and found Franklin's attack on operating systems programs "inconsistent with its concession that applica-

124. Id. (A program listing can be easily printed of the source or object codes.)
125. Id.
126. Id. at 1248.
127. Id. at 1249.
129. 714 F.2d at 1249-50.
130. Id. at 1250. (citing Baker v. Selden, 101 U.S. 99 (1899)).
131. Id. at 1251. See also Note, Copyright Protection for Video Games, Computer Programs and Other Cybernetic Works, 5 COMM/ENT L.J. 477 at 490-91 (1983).
133. 714 F.2d at 1252.
133(a). Id. at 1252.
tion programs are an appropriate subject of copyright." 134

Franklin attempted to raise a corollary argument involving the idea/expression dichotomy 135 but the appeals court would not make a decision on that point because the record concerning it was not clear. However, the court adopted the viewpoint that "[I]f the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result," as copyright protects originality rather than novelty or invention. 136 Franklin conceded that at least some of Apple's programs could have been rewritten 137, and Apple introduced evidence of existing Apple II-compatible operating programs written by other parties. 138 Yet because there were no district court findings on that issue the Third Circuit declined to decide it. 139

One point the court did make clear was that Franklin's desire to achieve total compatibility with programs written for the Apple II machine was a competitive and commercial objective, which "does not enter into the somewhat metaphysical issue of whether particular ideas and expressions have merged," and was not pertinent to the copyright issue. 140 The court did an extremely good job of picking through the arguments and identifying the relevant facts, and at all times remained cognizant of the true structure of the varied forms of computer programs, as writings or "literary works"—proper subject matter under the copyright law.

The last major issue on appeal was the necessity of a showing of irreparable harm. The prevailing view, ignored by the district court, is that the "showing of a prima facie case of copyright infringement or reasonable likelihood of success on the merits raises a presumption of irreparable harm." 141 Here Franklin was an admitted and knowing infringer; yet, because of the large size of Apple and small size of Franklin, the district court felt Apple was "better suited to withstand any injury it might sustain during litigation." 142

134. Id. at 1251.
135. Id. at 1252. "Protection is given only to the expression of the idea—not the idea itself." (quoting Mazer v. Stein, 347 U.S. 201, 217 (1954)).
136. Id. at 1253 (quoting Dymow v. Bolton, 11 F.2d 690 (2d Cir. 1926)).
137. Id. at 1253.
138. Id. at 1245.
139. Id. at 1253.
140. Id.
141. Id. at 1254.
142. Id.
The appeals court, on the other hand, held the infringer's size should not determine the ability of the copyright holder to get prompt judicial redress. The court would not condone allowing a knowing infringer to structure its business around its infringement. In fact, Apple pointed out that immediately after the district court's denial of a preliminary injunction, the exclusive Canadian distributor for the Franklin ACE 100 launched a "shock campaign" or a "most ambitious and intensive marketing program" of one-time limited offers and price reductions, aimed at creating an instant computer user base across Canada.

The appeals court distinguished its holding in Kontes Glass Co. v. Lab Glass, Inc., and held that as here, where there was adequate evidence of a great expenditure of time, effort, and money, public interest requires a presumption of irreparable harm. The CONTU Final Report recognized the "cost of developing computer programs is far greater than the cost of their duplication." Thus, the appeals court did not want to undermine the encouragement of creativity—the basic rationale for protecting copyright. Again the Third Circuit saw through to the real heart of the issue.

Other issues raised by Franklin such as Apple's compliance with registration, notice and deposit requirements, the Copyright Office's "rule of doubt" policy, and Apple's alleged misuse of its copyright were not considered by the district court and were not reached on appeal.

Franklin petitioned the United States Supreme Court for a writ
of certiorari on October 28, 1983, but the case was voluntarily dismissed on January 4, 1984, after a settlement agreement was reached between the parties. Franklin agreed to pay Apple $2.5 million, to drop all litigation, to accept the copyright claim on Apple’s operating system software, and to stop copying Apple’s programs. The settlement also established an arbitration procedure for any future copyright disputes between the two companies relating to any substitute Apple-compatible computer program. After the settlement, Franklin introduced a line of compatible microcomputers based on its own proprietary operating system. Nonetheless, they have also felt the effects of their legal battle with Apple.

Although the Supreme Court never heard the program copyright issues raised in this case and thus they are not definitively resolved, as a practical matter they seem fairly well settled. A second appellate jurisdiction, the Ninth Circuit Court of Appeals, later arrived at similar conclusions on program copyrightability as the Third Circuit. In jurisdictions with no appellate decisions (for example, the Sixth Circuit), district courts have affirmed the idea of computer program copyrightability and protection. As
a possible reflection of this trend in the courts, many copyright infringement cases are now being settled out of court. 165

So ends the first round of litigation concerning computer software—its copyrightability. Future software litigation will probably focus on traditional copyright issues, such as the idea/expression dichotomy, fair use, and substantial similarity to determine copyright infringement and the extent and scope of copyright protection.

Issues regarding computer program creativity and the origin of authorship could be spawned by the continual advances in software technology and artificial intelligence. Finally, innovations in areas such as state, federal, and international cooperation and legislation, non-software copyright litigation, and industrial safeguards and protections, among others, should continue to influence and enhance computer programming and copyright law. The remainder of this article will explore in greater detail some of these emerging issues.

IV. THE FUTURE AND BEYOND
A. Traditional Copyright Issues

Software copyright infringement litigation will now turn from focusing on whether programs are eligible for copyright protection to more sophisticated issues of substantial similarity, the idea/expression dichotomy and other traditional copyright issues. 166 The plaintiff in an infringement case will have to prove copyright ownership, copyright infringement (copying), and damages. 167 A registration certificate is prima facie proof of ownership to satisfy the first element; 168 however, proof for the second and third elements is more difficult.

Without admissions of direct copying by the defendant, 169 future plaintiffs, in order to raise a presumption of copying, must prove the defendant had access to plaintiffs program, and that the two programs are strikingly similar. 170 To have access, a defendant must

165. See, e.g., Corona, IBM Settle on Lawsuit, COMPUTERWORLD, Feb. 13, 1984, at 139, col. 1.
166. Boorstyn, After Franklin, supra note 7, at 1D/31.
169. Recall Franklin’s admission, text to note 109 supra.
170. BOORSTYN, supra note 54, at § 10:12, 289.
have had a reasonable opportunity to see plaintiff's work. In videogame litigation, access could be established through circumstantial evidence because of a reasonable possibility of an opportunity to see, for example, a widely published videogame; while copying could be inferred if the works were strikingly similar.

The presence of striking similarities might also be used to infer copying of applications and operating systems programs. But the same program can appear in different forms, on different media, and in different languages. Even expert witnesses may have trouble determining copying. Access, if the program is a very popular and widely published work, might be established by showing a reasonable opportunity to see or become familiar with the plaintiff's program; or there may be common errors, a common employee, or a trial use of the infringed program. However, theft of information stored inside the computer, via telephone connections or other electronic means, may go undetected, making proof of access difficult. If access is shown, substantial similarity in protected elements of the work must next be proved.

The traditional test of substantial similarity is whether an ordinary observer or audience, by comparing the overall appearance of the two works, would recognize the copy as being taken from the original. With the bewildering array of computer programs, as stated above, expert testimony may first be needed to help distinguish the protectible expression from the uncopyrightable idea, after which the ordinary observer would then be allowed to decide similarity of expressions. Substantial similarity in the expression has been found when a substantial portion of the defendant's information was identical to that of the plaintiff's. Another
suggestion is to determine if the second program is a translation into another language or if, in comparing the structure and ordering of the programs, there is consistent paraphrasing.182

Programmers have the right to use the same ideas and make the computer do the same thing, but it must be by independent creative effort and not by piracy.183 To assure such independent creation, one company isolated a programmer to write a program code based only on the ideas in another company’s program.184 But when there are a limited number of ways to express an idea,185 or if the idea and its expression are indistinguishable,186 copyright protection will be withheld.

With computer programs, the idea is the underlying function or task to be performed, the algorithm is the step-by-step procedure necessary to accomplish that task, and the expression is the coded instructions in the written program. For the idea and expression to be indistinguishable in a computer program, the description of the expression must differ little from a description of what the work is.187 For example, if the idea is to add two numbers to obtain a third, the expression may be limited to a combination of three terms.188 But as the programming ideas become more complex, the number of possible expressions also enlarges.189

Another defense of copyright infringement is “fair use,” which looks to the nature of the copyrighted work (some works are more susceptible to copying, e.g., data bases and compilations); to the purpose of the defendant’s use (commercial or non-profit); to the

...
defendant's particular use of the work (the quantity and quality of use); and to the effect of the use on the work's potential market (potential impact of harm). Many of the purposes evidenced in recent copyright infringements were goals to achieve "compatibility" with popular computer programs. However, achieving compatibility was a commercial purpose, where the programs were virtually identical, and produced a substantial impact on the market, reducing the demand for the popular program by substituting the infringer's program for that of the original. The fair use factors were not satisfied. The remaining issue of proving damages could thus be fulfilled similarly by showing such substantial impacts.

Federal law preempts any state law equivalent to a copyright law; however, state laws involving more than mere acts of copying and selling, such as unfair competition, and misappropriation are not preempted. But, in the extremely competitive software industry, claims of unfair competition and misappropriation have been met with claims of monopoly and anti-competitive conduct. Recently, a monopoly violation was found where the licensing of operating system software was illegally tied to the purchase of central processing units. However, as long as there is a lasting public benefit derived from the creative activity of the author, a limited copyright monopoly is justified as a necessary condition to the full realization of the author's creative activities. With computer software, it must be recalled that this copyright monopoly extends not to the machine or to the underlying algorithm, but only to the written program expression.

Certain exclusive rights are available with software copyright:

190. See Boorstyn, supra note 54, at §§ 5:2, 10:27.
191. See, e.g., Apple v. Franklin, 714 F.2d at 1253; Comment, Copyright Protection, supra note 188, at 119; and Gemignani, Apple v. Franklin: Of What Consequence?, 1 ABACUS 46 (Spring 1984).
192. Cf. Iskrant, supra note 44, at 127 (infringement exists with the diminution of even one customer in the market).
193. Boorstyn, supra note 54, at § 1:9, at 13; and Kintner & Lahr, supra note 180, at 475.
194. See Brief for Appellee, Apple v. Franklin, supra note 152, at 3; and Note, Copyright Protection of Computer Object Code, supra note 128, at 1732-35.
195. Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984). See also Olmos, Court Upholds Verdict Against DG in Antitrust Suit, COMPUTERWORLD, July 16, 1984, at 95, col. 2.
196. Boorstyn, supra note 54, at § 1:2, at 3; and Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
197. See, e.g., Note, Copyright Protection of Computer Object Code, supra note 128, at 1733.
to reproduce the work in copies, to prepare derivative works, and
to distribute copies of the work. 198 However, there would be no
infringement when an owner of a copy makes essential adapta-
tions for use with a computer or makes an archival copy. 199 Under
some licensing agreements, though, the buyer agrees not to copy
the software. 200 A distinction must be made between the owner of
the copyright and the owner of the material object in which
the copyrighted program is embodied. 201

Some remaining traditional copyright areas relevant to software,
include "joint works" and "works for hire." Although much pro-
gramming is done by individuals, working in teams is a well-
established practice, so a "joint work" will result if there was an
intent to collaborate and merge all contributions into one work. 202

In the "works for hire" situation, the employer, or other person
for whom a work was prepared, is considered the author for copy-
right purposes, unless otherwise agreed in writing. 203 But, if an
employee joins another company and is asked to write similar pro-
grams relying only on memory and skill, there might be an issue
of copyright infringement (access and substantial similarity versus
independent professional expertise). 204 Using other doctrines such
as breach of contract and misappropriation of trade secrets could
avoid the problem of proving copyright infringement. 205

In an employer/consultant situation, the consultant may contract
to retain copyright ownership; 206 however, recently one consulting
firm found itself battling over a jointly installed software package. 207
"Who is the author?" and "What is the writing?" are still ques-
tions to be asked throughout the next generations of software
development. 208

200. See, e.g., Betts, Experts Make It Clear: Software Legal Issues Unclear, COMPUTER-
ment, Documentation in Cooperative Programming, COMPUTERWORLD, May 28, 1984, at SR/34.
204. Gemignani, The View, supra note 29, at 29. See also Graham, The Legal Protection
205. Gemignani, The View, supra note 29, at n.118.
207. Beeler, Ownership of Software Package At Issue, COMPUTERWORLD, Apr. 23, 1984, at
1, col. 1.
208. See, e.g., Note, The Copyrightability of Object Code, 59 NOTRE DAME L. REV. 412 (1984);
B. New Technology

"Software is the magic carpet to the future." With the implementation of increasingly complex functions in emerging software technology, the future holds much in store. Even now, increased capabilities of software exist or are being developed with the advent of new generations in technology.

The software of the fourth generation has been described as a non-procedural or less procedural alternative to traditional programming, increasing efficiency and speed of processing. The programmer can concentrate on the significant procedural aspects of the problem (specification of the tasks), while the computer is responsible for the details of its processing (how to do the tasks).

Languages and tools such as Mantis and Ideal pre-define routine tasks to improve programmer productivity; Ramis II and Focus perform complex logic in a combination of non-procedural, English-like statements and regular procedural logic. Query languages, such as Mark V, allow diverse searching of data bases, and report writing tools, such as Imagine, offer general systems-building capability. Many more products exist that are suitable for solving most programming tasks while improving timeliness and coding efficiency.

The fourth generation will see the use of programmer productivity tool kits to ease the programmer’s tasks and to promote user involvement. These kits might include tools such as: language-directed editors that speed up program entry and debugging by generating program structures (outlines), checking syntax, and performing tedious programming chores; application generators, that

and Harris, Apple Computer, Inc. v. Franklin Computer Corp.—Does a ROM a Computer Program Make?, 24 JURIMETRICS J. 248 (Spring 1984).

209. The Wizard Inside the Machines, TIME, Apr. 16, 1984, at 56 [hereinafter cited as The Wizard].


211. See, e.g., The Wizard, supra note 209, at 62; Schussel & Davey, Legend Holds True for Fourth Generation Tools, COMPUTERWORLD, May 28, 1984, at SR/2, col. 1; and Philips, Can Fifth Generation Software Replace Fallible Programmers, COMPUTERWORLD, July 16, 1984, at ID/27, col. 2. See also supra text accompanying notes 29-34.

212. See Schussel & Davey, supra note 211, at SR/2, col. 1; and Romberg & Thomas, supra note 30, at ED/18, col. 4.

213. Romberg & Thomas, supra note 30, at ID/18, col. 4.

214. Schussel & Davey, supra note 211, at SR/2.


allow users to generate programs via question-answer, fill-in-the-blank computer interaction;²¹⁷ and program generators that rapidly generate data base programs, end-user documentation, and error-free code.²¹⁸ Other design, maintenance, and debugging tools could be included as well.

Programmers will still be needed to fill in the missing pieces and provide the program logic, the specification of the necessary sequence of steps, or the "how" to achieve a desired result.²¹⁹ Fourth generation software can provide many building blocks to eliminate starting from scratch, but the programmer still has to stack them up in the proper order. It will be in the fifth generation that the creation of software will become fully automatic.²²⁰

Copyright issues in the fourth generation, where many users/programmers will be selecting specifications and "filling in the blanks" from generated structures, may arise in the areas of joint, derivative, or collective works or compilations and may ask whether sufficient creativity or originality has been performed. Copyright of the fourth generation tools themselves (e.g., the editor programs, etc.) should lie with the author of those programs as in the present generation of software.²²¹ However, once a user creates a tool-aided program, one might ask, "Has sufficient original material been added to warrant copyright to the user?"

One author has developed a method to measure the complexity of every piece of software code, large or small. This enables determining equivalent (isomorphic) systems, irrespective of their application or programming language, and comparing potential sizes and costs of software projects. This method also provides information about the quality of software design.²²² It might help determine if the user is adding much originality or just picking and choosing among building blocks, possibly making a collection, compilation, or derivative work.

It could then be argued that the author(s) of the "tool" program(s) intended user collaboration and merging for such a compilation or joint work²²³ at the time of the later use, or granted permission

²¹⁷ Munson, supra note 210, at SR/24; and Schussel & Davey, supra note 211, at SR/2.
²¹⁸ Batt, supra note 215, at 27.
²¹⁹ Philips, supra note 211, at ID/27.
²²⁰ Id. at ID/28.
²²¹ Munson, supra note 210, at SR/26, col. 3.
for the creation of a derivative work. Here, the distinctions will lie between the writings of the fourth generation programs and the subsequent programs produced in using the fourth generation software.

Fifth generation and artificial intelligence software and technology is pushing toward replacing user programmers. Fifth generation software usually refers to system development approaches where the interfaces between the machine and the individual are at the specification level only, while "the organization of the specifications into the facts needed to create an information processing system is carried out by the software development system." Artificial intelligence is described as "any program that allows computers to handle functions considered to require intelligence when humans do them."

Subject areas include expert and knowledge-based systems, that codify expert know-how into analytical and problem-solving rules and strategies; natural language programs, that can "comprehend and obey orders in everyday English;" visual-based programming languages, that allow the creation of programs from pictorial designs; as well as vision systems, voice recognition systems, and intelligent robots. Languages such as Intellect, Prolog, and Lisp, based on symbolic and logic versus procedure programming, are more free-form and English-like, and will be used in this generation. The ability to automate fully the creation of software will

224. See Boorstin, supra note 54, at § 4:3, at 100.
227. Philips, supra note 211, at ID/27, col. 2.
228. Romberg & Thomas, supra note 30, at ID/18, col. 4. See also Philips, supra note 211, at ID/28, col. 4.
229. Hammonds, supra note 226, at 52, col. 2.
230. Beeler, supra note 226, at 17, col. 3.
231. Alexander, supra note 226, pt. 2, at 139.
233. Schussel & Davey, supra note 211, at SR/2.
be available using reusable codes, knowledge bases, and inference engines.\textsuperscript{234}

Copyright protection in these future generations should still be afforded to the creators of the increasingly complex internal programs stored within the machine. Expert systems must be programmed in the conventional way to contain the rules for reasoning about a subject area. But once written, they can be used by an expert in the subject area, rather than need an expert in software. New programs will not need to be written by a programmer in situations which once required them because an expert system, once developed, will be able to construct software, and write new programs it understands, with directions from its user.\textsuperscript{235}

Copyright issues might arise once the machines are programmed and put to use. Expert or knowledge-based programs (for example, Psi), can compose simple computer programs based on English descriptions of the tasks to be performed, whereas Mycin takes disease symptoms and advances a medical diagnosis supported by its reasoning, and Prospector predicts the location of underground mineral deposits.\textsuperscript{236}

Does copyright to the generated output (programs, diagnoses, predictions) lie with the original program creator, with the user providing the input information, or with the computer? Most expert programs follow a set pattern of rules so that, given the same information, the same answer should be generated. Thus the creator of the original program laid down the foundation for the generated output. However, some advanced programs are able to “learn” from the past and modify themselves to alter their behavior with experience. The same data therefore might not receive the same answers.\textsuperscript{237} For example, in Japan, the goal of its “Fifth Generation Project” is to develop super inference machines, programmed so they will be capable of reasoning their way through massive amounts of knowledge and data. They will have the ability to learn, associate, infer, decide and behave in ways usually considered “the exclusive province of human reason.”\textsuperscript{238}

\textsuperscript{234} Philips, supra note 211, at ID/28. See also Alexander, supra note 226, pt. 2, at 142. (an inference engine is “the main program that determines which rules to apply when”).\textsuperscript{235} Munson, supra note 210, at SR/24, col. 4.\textsuperscript{236} Alexander, supra note 226, pt. 2, at 142-44.\textsuperscript{237} Id. pt. 3, at 149.\textsuperscript{238} See McCorduck, supra note 225, at 629; and Uttal, supra note 225, at 82.
Will there have been an independent creation of an original work of authorship, beyond a mere trivial variation of the original program, created by the computer's own skill, labor and judgment? Is there a fictional human author or a human-machine hybrid as "author"? Who is an author? It has been defined as "he to whom anything owes its origin; originator, maker." But does "he" mean only humans can be authors and have works of authorship? These questions will not be easy to answer until the age of the fifth generation has fully dawned.

In the meantime, copyright protection will continually need to be extended to the present day innovators to protect their new technology and give them the incentive to continue. This new venture is such an intensive investment in time, talent, and money, that joint efforts are being put forth, not only in Japan, but in the United States as well. However, United States industries are willing to participate only with an assurance of investment protection.

The next software generation is being promoted as a new dimension called "knowledgeware." Computers have been programmed to help us do a thing right or do a thing well, but in the knowledgeware generation, the computer will help us do the right thing. Computers will not depend upon the user to exploit the machine to its best advantage; rather, the machine will be programmed to "exploit the potential of the mind." Copyright issue answers might not come easily in the next generation of intelligent machines, but perhaps the machines themselves will help us resolve the complex issues their presence will raise.

C. Other Relevant Topics

The growth in worldwide markets has prompted industry con-
cern about software protection on an international scale. Foreign copyright legislation has been watched, and foreign suits have been litigated.

In the United States, the software industry is trying various methods of combating software piracy and pilferage. Abandoning attempts at embedded protection, the industry is turning to site licensing, retail pricing, and legislation. Most of the battle lines will be drawn at the corporate level as the "once clubby cottage industry" changes to a high stakes, combative business.

Congress, state legislatures, and other groups are also looking at improved means of protection for the new technology. Proposals include making changes in the copyright act for computer software, creating more stringent criminal penalties for program piracy and counterfeiting, and making rule changes regarding deposit of computer programs with trade secrets. At least three

247. See, e.g., Wilkins, Chema Appeals to Asian States for Aid Against High-tech Pirates, COMPUTERWORLD, July 2, 1984, at 73, col. 3; and Kirchner, Panic Over Foreign Competition Discouraged, COMPUTERWORLD, Mar. 12, 1984, at 118, col. 1.

248. See, e.g., Kirchner, Japan Buries Copyright Bill, U.S. Fears It May Resurface, COMPUTERWORLD, Apr. 23, 1984, at 92, col. 1; Batt, U.S. Officials Decry Japanese Copyright Plan, COMPUTERWORLD, Mar. 19, 1984, at 100, col. 1; and The Wizard, supra note 209, at 61.

249. See, e.g., Bartolik, Apple Wins Two Court Battles in War Against Fakes, COMPUTERWORLD, June 11, 1984 at 141, col. 1.


254. The Wizard, supra note 209, at 60.

255. See, e.g., Kirchner, How Far Are We Willing to Go to Secure Our Systems?, COMPUTERWORLD, May 7, 1984, at 43, col. 1.


257. 1983 A.B.A. Committee Reports, Sec. of Pat., Trademark, and Copyright L., Committee No. 406, at 239 (about H.R. 6983, 97th Cong., 2d Sess. (1982)).


state legislatures have passed bills concerning computer crime and copyright enforcement.260

Because of the rapidly changing nature of software and its relatively quick obsolescence,261 suggestions for alternative forms of software protection have been advanced, such as "cybernetic" copyright,262 "idea" copyright,263 compulsory licenses,264 among others.265 Other new areas of protection include bills passed by the Senate and House granting copyright or sui generis protection to the imprinted designs on semiconductor computer chips ("mask works"),266 and proposed antitrust exemption bills for joint research which would aid United States industries to respond to the Japanese Fifth Generation Project.267 Yet with all the emerging proposals and legislation, uncertainty about the clarity of software legal issues continues.268

CONCLUSION

Many technological advances have been made in the computer industry over the past few decades. Quantum leaps have been made in all areas. Although Congress was given constitutional power to protect these advances, traditional areas of law have been slow to include computer technology. Even when expressly protected by statute, as in the 1980 Software Copyright Act, enforcement of those protections was slow, and at times, conflicting. However, as legal understanding of the nature of computer technology increased, a general consensus began to emerge.

The Apple v. Franklin case was significant in pitting an industry leader against an admitted infringer to test the basic heart of the

261. See, e.g., Sherman, Microsoft's Drive to Dominate Software, FORTUNE, Jan. 23, 1984, at 82.
262. Note, Copyright Protection for Video Games, supra note 131, at 504.
263. Note, Copyrighting Object Code, supra note 128, at 437.
265. See, e.g., Davidson, supra note 17, at 418.
copyrightability issues as applied to computer software. That decision apparently settled the issue of program protection, thus ending the first round of copyright litigation. A brief sigh of relief spread throughout the industry. However, new issues and new technological advances continue to emerge and the legal battles for protection will continue.

This article has explored several of the emerging issues in the next round of software copyright litigation. Speculation was also made as to issues of the future stemming from continued developments in the next generations of computer technology. To some, copyright law may seem inappropriate to protect computer programming. However, it is a truly workable doctrine set forth to protect original works of authorship. This protection nurtures creativity and advancement in technology in computer software—an area where innovative writings have long been a hallmark.

ELIZABETH A. McMILLAN-McCARTNEY
AFTER HILEN V. HAYS—KENTUCKY'S NEW COMPARATIVE NEGLIGENCE

INTRODUCTION

In the recent decision of Hilen v. Hays Kentucky's Supreme Court rejected its long-established rule pertaining to contributory negligence and took the bold step of adopting a new rule of comparative negligence. The court's decision was indeed significant, allowing the Commonwealth of Kentucky to join a growing majority of jurisdictions which now utilize one of several possible forms of comparative negligence. Implications beyond the confines of the holding in Hilen are as yet unclear, but one thing is certain: the contributory negligence defense will no longer serve its traditional role as a complete bar to recovery in an action founded upon negligence. A "pure" scheme of comparative negligence is the new way for the Commonwealth.

This comment shall 1) briefly discuss the case of Hilen v. Hayes; 2) review the recently rejected doctrine of contributory negligence; 3) give an overview of the development of the comparative negligence standard; and 4) peer around the corner, after the Hilen decision, to determine how Kentucky's judicially-mandated comparative negligence standard should apply to selected areas of the law.

I. THE CASE—HILEN V. HAYS

Hilen v. Hays grew out of what one might, at first glance, think to be a rather ordinary kind of negligence action. The appellant in the case, Margie Montgomery Hilen, was a passenger in an automobile driven by the appellee, Keith Hays. While in an intoxicated state, Hays overturned his vehicle by running into the back of another vehicle. Hilen, as a result, suffered injuries and sought redress for the negligent manner in which Hays had driven his

1. Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984) [hereinafter cited as Hilen].
4. Id. at 720.
5. Hilen, supra note 1.
The jury at trial level, however, found Hilen contributorily negligent and disallowed any recovery for her injuries. The trial court specifically found that Hilen failed to exercise reasonable care for her own safety by riding with someone she knew or should have known was too intoxicated to drive safely. The appellant objected to instructions on contributory negligence and asked for an instruction to the jury based on a comparative negligence standard, but the trial judge refused the request.

On appeal, the Kentucky Court of Appeals affirmed the trial court's decision. But the Kentucky Supreme Court reversed the trial court and in a well-written opinion gave the Commonwealth its first look at comparative negligence. Thus, a case containing a rather ordinary set of facts brought about an unquestionably extraordinary result.

The Kentucky Supreme Court, in its holding, stated:

Henceforth, where contributory negligence has previously been a complete defense, it is supplanted by the doctrine of comparative negligence. In such cases contributory negligence will not bar recovery but shall reduce the total negligence that caused the damages. The trier of fact must consider both negligence and causation in arriving at the proportion that negligence and causation attributable to the claimant bears to the total negligence that was a substantial factor in causing the damages.

The court by its decision accepted a “pure” form of comparative negligence for Kentucky based on the current trend in American law and, more importantly, “present day morality and concepts of fundamental fairness.” The court remanded Hilen, directing that the jury use instructions from the Uniform Comparative Fault Act to apportion fault among the parties.

6. Id. at 720.
7. Id. at 716-17.
8. Id. at 718-19.

In the event the jury finds both parties at fault:
(a) ... the court ... shall instruct the jury to answer special interrogatories ... indicating:
   (1) the [total] amount of damages [the] claimant would be entitled to recover if contributory fault is disregarded; and (2) the percentage of the total fault ... that is allocated to [the] claimant [and] defendant, [the total being 100%].
(b) In determining the percentages of fault, the [jury] shall consider both the nature and the extent of the causal relation between the conduct and the damages claimed.
The court’s decision was ordered to apply to: 1) Hilen; 2) any case tried or retried after the filing date of the Hilen opinion; and 3) any case pending at the time of Hilen, including all appeals in which the issue concerning contributory versus comparative negligence was properly preserved.10

II. WHERE KENTUCKY HAS BEEN—CONTRIBUTORY NEGLIGENCE

The Hilen opinion offers a worthwhile discussion of the evolution of the contributory negligence defense prior to its judicial rejection, as well as the reasons why the Commonwealth finally adopted comparative negligence as a complete defense in a negligence action.11

Historically, Butterfield v. Forrester12 was the first reported case using contributory negligence to completely bar recovery in a negligence action. In that case the plaintiff rode his horse into a pole which the defendant had negligently left obstructing the roadway. The plaintiff was thrown from his horse and, as a result, suffered injuries. The trial court found as a matter of fact that the pole could have been avoided by the plaintiff since it was recognizable at a distance of better than one hundred yards. The court, per Lord Chief Justice Ellenborough, went on to state:

A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. . . . One person being in fault will not dispense with another’s using ordinary care for himself. Two things must occur to support this action, an obstruction in the road by the fault of the defendant and no want of ordinary care to avoid it on the part of the plaintiff.13

Fifteen years later, in a case quite similar to Butterfield,14 Massachusetts became the first American state to adopt the concept of contributory negligence, and soon thereafter the rule spread throughout the United States.15

The first reported Kentucky case applying contributory negligence to a negligence action was decided in 1892 in Newport

11. See generally id.
13. Id. at 61.
News & M.V.R. Co. v. Dauser. After Newport News, the contributory negligence principle was upheld as a valid defense in every Kentucky decision until the Hilen case in 1984.

In general, four considerations previously have been proffered by the courts in support of the contributory negligence defense. First, the courts have looked at a plaintiff's negligence as proximately causing an accident, or at least as an intervening cause between a defendant's negligence and a plaintiff's injury. Second, the courts have argued that a contributory negligence rule provides the correct type of punishment for a plaintiff's improper actions and forces that plaintiff to come to court with "clean hands." Third, the rule has been treated as a measure designed to discourage accidents by denying recovery to those parties who fail to use reasonable care for their own safety. And finally, the concept of contributory negligence provided impetus to economic expansion during the critically important early years of this nation's Industrial Revolution. In other words, the rule was accepted by the courts to support American industries by offering a neat legal mechanism which provided protection to defendant companies confronted with injury actions based on their negligent conduct.

Prior to Hilen, Kentucky courts imposed a duty of care upon a suing plaintiff which he needed to meet to succeed in recovering for injuries in a negligence action. A plaintiff could not recover

17. See generally Sandy River Cannel Coal Co. v. Caudill, 22 Ky. L. Rep. 1175, 1176, 60 S.W. 180 (1901); Peerless Mfg. Corp. v. Davenport, 281 Ky. 654, 136 S.W.2d 779 (1940); Price v. T.P. Taylor & Co., Inc., 302 Ky. 736, 196 S.W.2d 312 (1946); Myers v. Ben Snyder, Inc., 313 Ky. 832, 233 S.W.2d 1016 (1950); Felix v. Stavis, 365 S.W.2d 72 (Ky. 1964); Williams v. Chilton, 427 S.W.2d 586 (Ky. 1968); Houchin v. Willow Ave. Realty Co., 453 S.W.2d 560 (Ky. 1970).
20. See Prosser, Comparative Negligence, 51 Mich. L. Rev. 465 (1953) [hereinafter cited as Comparative Negligence].
21. But see W. PROSSER, TORTS 428 (3d ed. 1964) where Prosser states: the assumption that the speeding motorist is, or should be, mediating on the possible failure of a lawsuit for his possible injuries, lacks all genuine reality or basis in human experience; and it would be quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant to hope that the person he injures will be negligent too.
22. See supra note 20.
23. Id.
24. See generally cases cited supra note 17.
if he fell beneath an objective standard of care. The courts particularly looked to conduct on the part of a plaintiff which created a risk of undue harm to himself. The court will now look to the plaintiff's conduct only to apportion damages. Kentucky has rejected contributory negligence on the basis of "fundamental fairness." The judiciary of the Commonwealth has determined it unduly harsh to retain a defense which completely bars a plaintiff's recovery when, in all fairness, a defendant ought to pay for at least a portion of the plaintiff's injuries.

III. THE COMPARATIVE NEGLIGENCE STANDARD KENTUCKY ACCEPTED

In deciding to adopt a comparative negligence standard, Kentucky became the forty-second state to abolish the contributory negligence defense. Thirty-two states have now legislatively enacted comparative negligence by statute, while Kentucky joins nine other states which have adopted comparative negligence by judicial decree. The Supreme Court of Kentucky simply refused to wait for a comparative negligence bill to be legislatively voted into law, especially in view of the recent history of the Kentucky General Assembly and its failure to act on numerous occasions when presented with such a measure.

After coming to understand the shortcomings of contributory negligence, states began to make moves to change the law. The last clear chance doctrine presented one way to ameliorate the harshness of contributory negligence. An exception which did not allow the defense of contributory negligence to bar recovery for willful or wanton misconduct on the part of a defendant also found

25. See id.
26. See id.
27. Hilen, supra note 1, at 718.
28. See id. at 718, where the court states:
"To those who speculate that comparative negligence will cost more money or cause more litigation, we say there are no good economies in an unjust law." (footnote omitted).
29. Id. at 718-19.
30. See Woods, supra note 2, at 17.
31. See generally Hilen, supra note 1, at 716, n.3.
32. See generally id. at 716 n.4.
33. Id. at 717.
acceptance. In fact, Illinois actually experimented with the comparative negligence concept in 1858 only to reject it in 1894. Illinois actually experimented with the comparative negligence concept in 1858 only to reject it in 1894. Kansas also enjoyed a brief exposure to comparative negligence in the 1880's, but it was in Georgia that the concept first took hold in such a manner that it would remain viable. The concept of comparative negligence slowly spread to other states until, by the late 1960's, it found tremendous popularity, and today comparative negligence has replaced the contributory negligence defense in all but a small minority of states.

In deciding to join the ranks of comparative negligence believers, the Kentucky Supreme Court was confronted with a variety of plans from which to choose. These plans included: 1) a “modified” comparative negligence system; 2) a “slight-gross” comparative negligence system; and 3) a “pure” form of comparative negligence.

The court rejected a “modified” system of comparative negligence. Under this system a plaintiff may only recover if his percentage of fault is determined not to exceed the percentage of fault of the party against whom he is seeking to recover. Two subcategories of a “modified” system prevail: 1) a “less than” plan, and 2) a “50-50” plan. In those jurisdictions where a “less than”

36. See Galena & C.U.R. Co. v. Jacobs, 20 Ill. 478 (1858); Illinois C.R. Co. v. Hammer, 72 Ill. 347 (1874); City of Lanark v. Dougherty, 153 Ill. 163, 38 N.E. 892 (1894).
39. See generally Woods, supra note 1, at 17.
40. Id.
41. Id.
42. See generally Comparative Negligence Replaces Contributory Negligence Defense, FC&S BULLETIN, METHODS PUBLIC LIABILITY C-1 (1985) [hereinafter cited as FC&S BULLETIN]. See also LAUPENBERG, supra note 2, at 9-10.
43. See generally HEFT & HEFT, supra note 2, at 8-13. See also FC&S BULLETIN, supra note 42.
44. See generally HEFT & HEFT, supra note 2, at 7-8. See also FC&S BULLETIN, supra note 42.
45. See generally HEFT & HEFT, supra note 2, at 13-16. See also FC&S BULLETIN, supra note 42.
46. Hilen, supra note 1, at 719.
47. See FC&S BULLETIN, supra note 42.
48. See id.
49. Id.
plan is followed, the plaintiff must be less than 50% at fault in order to recover for the defendant’s percentage of negligence.\(^5^0\)

In those jurisdictions, however, where a “50-50” plan is in force, the plaintiff’s negligence may be equal to, but not greater than, 50% in order to recover.\(^5^1\)

The Kentucky Supreme Court also rejected the “slight-gross” system of comparative negligence.\(^5^2\) This system only finds acceptance in Nebraska and South Dakota.\(^5^3\) Under the system, a plaintiff may recover if his negligence is “slight” and the defendant’s negligence is “gross.”\(^5^4\)

The court decided to adopt the “pure” form of comparative negligence, finding it to be the fairest of all the forms of comparative negligence and the easiest to administer.\(^5^5\) Under this system a plaintiff may recover for any negligence which may be attributable to the defendant in a negligence action.\(^5^6\) For example, the percentage of negligence accorded to the plaintiff can theoretically be 99% and he may still recover for the defendant’s 1% of negligence.\(^5^7\) The system allows a claimant to recover reduced damages up to the very point at which the court finds him to be solely at fault.\(^5^8\)

IV. How Comparative Negligence Should be Applied

Application of Kentucky’s new “pure” form of comparative negligence is yet to be determined in a wide variety of contexts. The courts must, sooner or later, confront the many problems which comparative negligence presents. The following discussion provides guidance on how the “pure” form of comparative negligence should be applied to some of the existing areas of Kentucky law which the system will affect.

50. Id.
51. Id.
52. Hilen, supra note 1, at 719.
53. A better label for South Dakota’s law would be “slight-ordinary” as South Dakota now allows a slightly negligent plaintiff to recover from a defendant who is guilty of only ordinary negligence. See S.D. Comp. Laws Ann. § 20-9-2 (1967); Nugent v. Quam, 82 S.D. 583, 152 N.W.2d 371 (1967).
54. See Heft & Heft, supra note 2, at 7-8. See also Laufenberg, supra note 2, at 10.
55. Hilen, supra note 1, at 719-20.
56. See Heft & Heft, supra note 2, at 13-15.
57. Id. at 15.
58. Laufenberg, supra note 2, at 9.
A. Last Clear Chance Doctrine

Under the last clear chance doctrine, a plaintiff will not be barred from recovery for his injuries, even though he is contributorily negligent, if the defendant could have avoided injuring him by merely exercising reasonable care. The doctrine was adopted in Kentucky as a means of avoiding the harshness resulting from the absolute bar of the contributory negligence defense.

The two theories propounded in support of the doctrine rest on the premises that: 1) if the defendant has the last clear opportunity to avoid a harm, then the plaintiff's negligence is not the proximate cause of that harm; and 2) the defendant is more culpable than the plaintiff who placed himself in peril but was unable to extricate himself.

Jurisdictions have differed in their treatment of the last clear chance doctrine under the newly accepted comparative negligence system. But, the preferred view is to abolish last clear chance in the face of the purpose of comparative negligence. Comparative negligence takes into account the undesired characteristics of contributory negligence by apportioning fault. The doctrine has no further function to perform where contributory negligence no longer completely bars the plaintiff's recovery. The retention of last clear chance as an "all or nothing rule" would only result in a windfall to the plaintiff by allowing him to completely escape the consequences of his own negligence. The doctrine would defeat the very purpose of comparative negligence. The courts of Kentucky should, therefore, view the last clear chance doctrine as a once useful measure which no longer needs to be adhered to in considering negligence actions.

B. Assumption of the Risk

Under the concept of assumption of the risk, a plaintiff who unreasonably exposes himself to the risk of a known danger is com-
pletely barred from recovering for the defendant's negligence. Assumption of the risk may arise in a number of situations, both express and implied, and could therefore present serious problems for a court to consider under a comparative negligence standard. Fortunately, for purposes of this discussion, Kentucky abolished the defense in 1967, treating it instead as a matter of contributory negligence. The assumption of the risk defense is one less problem which the Kentucky courts must worry about treating.

C. Proximate Cause

In negligence actions the courts are faced with the task of determining whether or not a plaintiff's negligence is a proximate cause of his injuries. In fact, a court under a contributory negligence standard might well find itself using proximate cause as a tool for overcoming the standard's harsh results. A court could, for example, allow recovery to an injured plaintiff by refusing to recognize that the claimant's failure to use reasonable care for his own safety is a "proximate cause" of such injuries. Kentucky's new comparative negligence standard should give courts less cause to make a negative finding of proximate cause for the sole purpose of allowing recovery where a positive finding would otherwise exist. The courts should, however, exercise extreme care not to use comparative negligence to create burdensome duties for plaintiffs for the simple purpose of limiting recovery. The use of summary judgment on behalf of the plaintiff should continue to find a proper use. Of course, the courts should also exercise care not to allow a plaintiff recovery when summary judgment for the defendant is appropriate. This point was made clear in the recent federal decision of Carlotta v. Wagner. The plaintiff in the action sought damages for injuries he suffered while using the defendant's swimming pool. He struck an innertube that was being held by a friend while he was attempting to dive through it. The plaintiff claimed negligence on the part of the defendant for failing to en-

68. See Laufenberg, supra note 2, at 14.
69. See generally Schwartz, Comparative Negligence § 9.2 at 159 (1974); Comment, Voluntary Assumption of Risk and the Texas Comparative Negligence Statute, 26 Baylor L. Rev. 543 (1974).
70. See Parker v. Redden, 421 S.W.2d 586 (Ky. 1967).
72. See Osborne v. Montgomery, 234 N.W. 372 (Wis. 1931); accord Note, Legal Cause, Proximate Cause, and Comparative Negligence in the FELA, 18 Stan. L. Rev. 929 (1966).
force a ban on floating objects in the pool and for failing to warn of the danger of diving through inner tubes. The district court denied the plaintiff reconsideration of the defendant's award of summary judgment even though the judgment was made prior to *Hilen v. Hays*. The court noted the importance of finding whether "[T]he negligence of the defendant is so insignificant as compared to that of the plaintiff that no recovery should be had despite the doctrine of comparative negligence, or, in other words, whether the plaintiff's negligence is the sole proximate cause of the injury."74

The court found *Carlotta v. Wagner* to be a case in which it was improper to submit instructions to the jury for apportioning fault.75

D. Gross Negligence and Willful or Wanton Misconduct

Ordinary negligence has been defined by the courts as a failure on the part of an individual to use reasonable care under the circumstances.76 Beyond ordinary negligence are the concepts of gross negligence and willful or wanton misconduct, which conceptualize a greater "degree" of negligence on the part of an individual.77

Under the recently rejected contributory negligence system, Kentucky courts recognized that a defendant found guilty of gross negligence or willful or wanton misconduct, rather than ordinary negligence, could not utilize the contributory negligence defense to bar the plaintiff's recovery.78 Much like the last clear chance doctrine, the court's use of gross negligence or willful or wanton misconduct can be viewed as an attempt to overcome the harshness that a contributory negligence defense deals a plaintiff by otherwise denying that plaintiff any chance to recover.79 To this extent, Kentucky's new comparative negligence standard gives good cause to do away with the gross negligence and willful or wanton misconduct concepts and to replace them, instead, with a single generalized concept of negligence. The Supreme Court of Wisconsin, per Chief Justice Hallows, elaborated on this reasoning in stating:

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74. Id.
75. Id.
76. See *Honaker v. Crutchfield*, 247 Ky. 495, 57 S.W.2d 502 (1933).
77. See *Bielski v. Schulze*, 16 Wis.2d 1, 114 N.W.2d 105 (1962).
78. C.f. *Louisville & N.R. Co. v. George*, 279 Ky. 24, 129 S.W.2d 986 (1939) (which points out treatment of gross or unwilling or wanton acts).
79. See *Schwartz, Comparative Negligence* § 5.3 at 105 (1974).
The doctrine of gross negligence as a vehicle of social policy no longer fulfills a purpose in comparative negligence. Much of what constituted gross negligence will be found to constitute a high percentage of ordinary negligence causing the harm. Obviously, we are stressing the basic law of negligence, the equitable distribution of the loss in relation to the respective contribution of the faults causing it.\(^{80}\)

It is clear that, in order to apply a comparative negligence standard to other than ordinary negligence actions, Kentucky courts must be willing to view gross negligence and willful or wanton misconduct as different only in "degree" and not in "kind."\(^{81}\) Persuasive argument has been advanced that negligence which is not ordinary is not of the same "kind" as negligence which is ordinary and, thus, should render a comparative negligence standard inapplicable.\(^{82}\) This reasoning, however, fails to accord proper weight to the realization that any deterrent effect reaped by categorizing conduct as gross or willful or wanton is reasonably retained in a comparative negligence standard. The defendant remains liable, and the plaintiff is awarded those damages to which he is rightfully entitled. Furthermore, ordinary negligence, gross negligence, and willful or wanton misconduct are all concepts grounded in "unintentional" negligent acts and therefore properly must be deemed different only in "degree" and not in "kind."\(^{83}\) The Commonwealth should not treat gross negligence or willful or wanton misconduct as different in "kind" from ordinary negligence and, as a result, similar to an intentional tort.\(^{84}\) The courts should instead recognize the wisdom of Justice Hallows\(^{85}\) and accept the existence of but a single negligence scheme to which the comparative negligence standard finds application.

E. Intentional Torts

Prior to the Hilen decision the courts of Kentucky were not disposed to apply the defense of contributory negligence so as to bar a plaintiff's recovery where the defendant's conduct constituted

\(^{80}\) Bielski v. Schulze, 16 Wis.2d 1, 17, 114 N.W.2d 105 (1962).

\(^{81}\) Id.


\(^{83}\) See Billingsley v. Westrac Co., 365 F.2d 619 (8th Cir. 1966).

\(^{84}\) See id.

\(^{85}\) Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962).
an intentional tort.\textsuperscript{86} Indeed, at common law it was recognized that a claimant's contributory negligence provided no defense to the intentionally tortious conduct of the defendant.\textsuperscript{87} As a result, it may be argued that the area of law which pertains to intentional torts should continue to enjoy a special consideration by the courts and should not be affected by Kentucky's comparative negligence standard.\textsuperscript{88} Even the Uniform Comparative Fault Act,\textsuperscript{89} referred to by Kentucky's Supreme Court Justice Liebson,\textsuperscript{90} would call for an exclusion of intentional torts from the application of comparative negligence. The Commissioner's Comment to section (b) states:

The Act does not include intentional torts. Statutes and decisions have not applied the comparative fault principle to them. But a court determining that the general principle should apply at common law to a case before it of an intentional tort is not precluded from that holding by the Act.\textsuperscript{91}

Negligence is an action founded on "unintentional" misconduct while "intentional" torts constitute a wholly different "kind" of action. While sound argument can be proffered which would warrant allowing gross negligence or willful or wanton misconduct to be classified as merely different in "degree" from ordinary negligence,\textsuperscript{92} intentional torts must be accepted as beyond the purview of negligence and also the comparative negligence standard.\textsuperscript{93} An action based upon an intentional tort is by definition "intentional" in nature, just as an action based upon negligence is by definition "unintentional" in nature. The distinction between an "intentional" act and an "unintentional" act provides sufficient consideration to prove different "kinds" of actions. The difference to be made is clearly not semantic but is substantive. The courts have followed a policy of punishing "intentional" acts more severely than "unintentional" acts.\textsuperscript{94} In keeping with the important distinctions

\textsuperscript{86} There are no Kentucky cases which have held contributory negligence to bar recovery for an intentional tort.
\textsuperscript{87} See W. Prosser, Torts § 66 (4th ed. 1971).
\textsuperscript{88} See generally Laufenberg, supra note 2, at 16.
\textsuperscript{90} Hilen, supra note 1, at 721 (Liebson, J., concurring).
\textsuperscript{92} Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962).
\textsuperscript{93} See generally Laufenberg, supra note 2, at 16.
\textsuperscript{94} See W. Prosser, Torts § 66 (4th ed. 1971).
to be made between negligence and intentional torts, the Kentucky courts should not apply a comparative negligence standard to intentional torts.

F. Punitive Damages

Punitive damages have generally been defined as those damages ordered by a court to enhance compensatory damages due to the oppressive character of the acts complained of. It must be emphasized that recovery of punitive damages rests within the discretion of the court and is not considered a matter of right.

Because of the nature of punitive damages—the fact they are allowable only as a special form of punishment to the defendant—they must be considered separate and apart from the purely compensatory aspect of a negligence action. To apply a comparative negligence standard to punitive damages would be to defeat a purposeful policy decision of the courts and the state legislature which has enjoyed longstanding favor in Kentucky. The concept of punitive damages has not been fashioned for reason of compensating a claimant. It consequently has no bearing whatsoever on the allocation of fault of the parties to a negligence action. Punitive damages must be recognized for their value as a punishment device which only affects wrongdoers in exceptional instances of misconduct, without regard to the wrongdoer's percentage of fault. By awarding punitive damages based on comparative negligence, the courts of Kentucky would be misapplying a system that looks to compensate based solely on fault to a remedy which provides punishment regardless of fault.

G. Wrongful Death and Survivors Actions

Kentucky Revised Statute 411.130 covers actions for wrongful death brought by a personal representative of the deceased. Section (1) states:

Whenever the death of a person results from an injury inflicted by

98. Id.
99. Id.
the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.\footnote{101}

Kentucky courts have, in the past, applied the contributory negligence defense to actions brought for death by negligence or by a wrongful act.\footnote{102} The defense was also made to apply to situations where a parent sought recovery for a child's death under Kentucky Revised Statute 411.130(1).\footnote{103} The parent, if found guilty of contributory negligence or imputed contributory negligence, was specifically barred from recovery\footnote{104} under Kentucky Revised Statute 411.130(2)(d), which reads:

If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased, one (1) moiety each, if both are living; if the mother is dead and the father is living, the whole thereof shall pass to the father; and if the father is dead and the mother living, the whole thereof shall go to the mother.\footnote{105}

Comparative negligence should change the previous case law application of the contributory negligence defense of Kentucky Revised Statute 411.130.\footnote{106} Wrongful death and survivors actions compose but one of a number of categories of negligence actions that warrant no privileged consideration for retention of a contributory negligence defense. Whether the parent or the deceased is contributorily negligent in causing death need be considered by the court only insofar as apportionment of percentage of fault is concerned. The concept that a parent guilty of contributory negligence or imputed negligence should not enjoy one hundred percent recovery should continue to be followed, but only within the confines of the comparative negligence standard.

Furthermore, the portion of the wrongful death statute which allows recovery of punitive damages when an act causing death is willful or when the negligence is gross should not be affected by the comparative negligence standard.\footnote{107} The legislature desired

\footnotetext{101}{KY. REV. STAT. ANN. § 411.130(1) (Bobbs-Merrill 1970).}  
\footnotetext{102}{E.g., Passamanek v. Louisville Ry. Co., 98 KY. 195, 32 S.W. 620 (1895).}  
\footnotetext{103}{See Toffen v. Parker, 428 S.W.2d 231 (Ky. 1968).}  
\footnotetext{104}{See Service Lines, Inc. v. Mitchell, 419 S.W.2d 525 (Ky. 1967).}  
\footnotetext{105}{KY. REV. STAT. ANN. § 411.130(2)(d) (Bobbs-Merrill 1970).}  
\footnotetext{106}{KY. REV. STAT. ANN. § 411.130 (Bobbs-Merrill 1970).}  
\footnotetext{107}{KY. REV. STAT. ANN. § 411.130(1) (Bobbs-Merrill 1970).}
special punishment measures in these instances and this special remedy should not be modified by apportioning fault.

H. Nuisance Actions

Nuisance actions may be based upon either negligent\textsuperscript{108} or intentional\textsuperscript{109} conduct of the defendant. Depending on the underlying basis of the conduct, comparative negligence should apply if such conduct is negligent, but should not apply if the conduct is intentional.\textsuperscript{110} The reason for this conclusion hinges on the important observation that nuisance actions brought on negligence grounds have previously been subject to a contributory negligence defense\textsuperscript{111} while nuisance actions brought for intentional misconduct have not been subject to the defense.\textsuperscript{112} Where the plaintiff's negligence has contributed along with the defendant's negligence to cause a nuisance, the comparative negligence standard directs an allocation of damages according to a determination of the percentage of fault of the parties concerned. The Wisconsin Supreme Court provides a wise analysis which may be relied on in its discussion of one particular area of nuisance law—the attractive nuisance.\textsuperscript{113} The court states: "The law of attractive nuisance is but a phase of the law of negligence. It necessarily follows that if the plaintiff child is found guilty of contributory negligence our comparative negligence statute applies."\textsuperscript{114} (emphasis added).

I. AGE AND INCAPACITY

Age should be a factor for deciding whether Kentucky's comparative negligence standard should or should not apply. Specifically, the courts should not apply comparative negligence to an action involving a child under the age of seven. The fact that the old contributory negligence defense was not recognized in such a situation in the past would mandate this conclusion.\textsuperscript{115} Previous Kentucky court decisions have followed the rule that a

109. See id.
110. See Laufenberg, supra note 2, at 19.
111. E.g., Schiro v. Oriental Realty Co., 76 N.W.2d 355 (Wis. 1956).
112. Id.
113. See Nechodomu v. Lindstrom, 273 Wis. 313, 327, 77 N.W.2d 707.
114. See Nechodomu v. Lindstrom, 273 Wis. 313, 78 N.W.2d 417 (1956).
115. E.g., Goff v. Horsley, 439 S.W.2d 937 (Ky. 1969).
child under age seven must be presumed unable to commit contributory negligent acts. If no negligent act can be lawfully committed, then logically no comparative negligence standard can apply.

In regard to a child who is seven to fourteen years of age, the courts should adhere to a special analysis under the comparative negligence standard. This analysis would compare the particular child to other children of like age, intellect, and experience before deciding whether the child is himself partially at fault in bringing about the injury which he suffered. If the court finds the child at fault, then his damages must be reduced by the proper proportion of the plaintiff's fault. Otherwise, the child receives full recovery.

A child over the age of fourteen is presumed capable of negligence under Kentucky law. Therefore, unless this presumption is overcome by proof of special circumstances, he should not enjoy a "softer" standard of care with respect to his own safety.

The courts should, additionally, consider if an individual has diminished mental capacity, whether the individual be a plaintiff or defendant, in apportioning fault among parties. The incapacity of a party can then be treated as a mitigating factor when determining whether conduct is negligent.

J. Safety Statutes

Kentucky has recognized an exception to the contributory negligence doctrine where a particular safety statute has been enacted with the purpose of protecting people or a class of people from their inability to protect themselves. In the past, this exception allowed a plaintiff to recover for injuries even though he was, in fact, contributorily negligent. In this way the purpose of the safety statute—protection of plaintiffs from potential violators of the statute—was not defeated.

The comparative negligence system does not nullify the intended effects of a safety statute in the same way as the contributory negligence doctrine.

116. Id.
119. See Laufenberg, supra note 2, at 13.
121. See generally Schwartz, Comparative Negligence § 14.3 (1974).
122. See Lomayestewa v. Our Lady of Mercy Hospital, 589 S.W.2d 885 (Ky. 1979).
123. See id.
negligence defense. Under the system, a plaintiff may recover for injuries from one who has violated a safety statute, but only to the extent that he is free from fault.124 A plaintiff, for example, may recover for that percentage of fault attributable to the defendant, but no more. A defendant would remain liable under a safety statute for his own percentage of fault. Thus, the comparative negligence standard would treat a safety statute fairly and would not overwhelm the statute's intended effects. Once again, Wisconsin used this rationale in applying comparative negligence to a case which involved a dog-bite statute violation.125 The case concerned a boy who approached an unfamiliar dog from behind, wrapped his arms around it, and ended up being bitten by it. The state dog-bite statute stated that, "the owner . . . shall be liable to the person so injured. . . ."126 The court reversed the trial court for its failure to determine the amount of the boy's contributory negligence.127 Kentucky courts should, in this same way, see no problem in applying a comparative negligence standard to safety statutes.

K. Product Liability Act

Under the Kentucky Product Liability Act of 1978 contributory negligence is recognized as a complete defense in product liability actions.128 Kentucky Revised Statute 411.320(3) states:

In any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.129

Therefore, a problem arises as to whether the precise wording of the statute prevents the courts from applying comparative negligence to actions occurring after the passage of the Act.

Authorities are not in agreement concerning application of comparative negligence to strict product liability actions.130 Argument
has been advanced that liability in these actions should not be considered absolute, but rather should be fault-oriented. This line of thought would clearly require that comparative negligence apply to product liability actions. On the other hand, argument has been made just as strongly that comparative negligence would be an inappropriate standard because of the no-fault aspect of product liability. In the recent case of Lewis v. Inland Steel Co., the Kentucky Court of Appeals applied comparative negligence to a product liability case concerning design defects. The court noted the need to instruct the jury at trial court level to consider the plaintiff's negligence in a product liability case, which occurred prior to the Product Liability Act, in view of the recent Hilen v. Hays decision. Lewis must be seen as proper because it allows comparative negligence to serve as a predicate for fairness to a product liability action in which the plaintiff may have contributed to his injury. The defendant remains strictly liable to the injured plaintiff, but is required to pay only those damages which are his fault. To allow a comparative negligence standard to apply if a plaintiff sues in negligence but not if the plaintiff sues in strict liability would indeed be anomalous.

The courts must be careful, however, in comparing the negligence of the plaintiff with that of the defendant, so as not to characterize foreseeable misuse on the part of the plaintiff as contributory negligence. Only misuse by the plaintiff which is unforeseeable to the defendant should reduce the plaintiff's award of damages. Comparative negligence should also apply where the plaintiff fails to discover dangers in his use of a product that a reasonable man would foresee.


135. Id.
136. Id.
137. See generally Schwartz, Strict Liability and Comparative Negligence, 42 TENN. L. REV. 171 (1974-75).
138. Id.
In considering the implications of a comparative negligence standard for actions occurring after the passage of Kentucky's Product Liability Act, the recent decision of *Anderson v. Black & Decker, Inc.* held that no such application should arise. Justice Bertelsman recognized the important distinction to be made between the Lewis situation, where an accident occurred prior to the 1978 Kentucky Product Liability Act, and actions occurring after the passage of the Act, which were therefore covered by it. The court failed to speak to the former kind of action but held that:

Kentucky Revised Statute 411.320(3), being clear and unambiguous and its application according to its terms not yielding an absurd result, must be applied according to its plain meaning. The defendant's motion for an instruction that contributory negligence is a complete bar in this case, if supported by the evidence, will be granted.

The court rejected the dicta of *Hilen v. Hays* in making its determination. The *Hilen* opinion concerning the same statute stated:

It may be arguable that the statute is capable of being construed as providing for contributory negligence as a complete defense to a products liability action (a question which remains open for a case in point), but from its background it is clear that the legislative purpose was to deal with the availability of contributory negligence as a defense in products cases and not with whether contributory negligence should result in a complete bar or proportionate recovery.

In view of the new comparative negligence standard, *Anderson* places too much emphasis on the strict meaning of each particular word used in the Products Liability Act. When the Kentucky General Assembly passed this legislation, it did so within the confines of the then-existing contributory negligence defense. The General Assembly saw the need to limit the liability of defendants in products actions, thus providing some protection to defendants

143. Id.
144. Id.
146. *Hilen*, supra note 1, at 715.
from unqualified liability. With the advent of comparative negligence in Kentucky the contributory negligence defense is no longer useful except in recognizing a plaintiff's fault. By applying the comparative negligence standard to the Product Liability Act, the Act's intent is retained while the standard's effects are allowed their truest form of realization. For similar reasons advanced in support of its application to injuries occurring prior to passage of the Act, and because the legislative intent of the Act would not be disregarded, Kentucky's comparative negligence standard should be applied to actions arising under the state's Product Liability Act.

L. Counterclaims and Setoffs

A setoff is a net judgment which may result from a case involving counterclaims. This situation would never arise under Kentucky's old contributory negligence system because one or both parties would be barred from recovery. The "pure" system of comparative negligence, however, gives rise to the greatest possibility of a setoff situation. For illustration purposes, suppose that a plaintiff sues a defendant for $10,000 and the defendant counterclaims for $1,000 damages. If the jury then finds the plaintiff 80% at fault and the defendant 20% at fault, then plaintiff should recovery $2,000 and the defendant should recover $800. If neither party has insurance coverage, it is clear that the defendant's award of $800 should be set off against the plaintiff's award of $2,000, leaving the defendant liable for the remaining amount of $1,200. A setoff here reduces the amount of the claimant's award based on the total award and the percentage of fault attributable to each of the parties. In essence, there exists two verdicts and one judgment, and setoff averts the useless formality of each party exchanging money only to finish with the same result of a single payment of money.

A difficult problem occurs when insurance coverage is provided to one or both of the parties and a "net judgment" approach is used. Under the above-described system of setoff, insurance com-

148. See generally Hilen, supra note 1.
150. See Laufenberg, supra note 2, at 30.
151. Id.
152. Id.
153. Id.
154. Id. at 31.
panies could reap quite a windfall of savings on cancelled damages. To rectify this possibility, Kentucky should follow Florida’s lead. In *Bournazian v. Stuyvesant Ins. Co.*, a Florida appellate court refused to allow setoffs when insurance coverage was involved. The court supported its decision by placing emphasis on the fact that, had reciprocal claims been tried in separate actions, an insurance company would have no choice but to recompense for those damages awarded. As a result, in the above example the plaintiff should recover $2,000 from the defendant’s insurance company and the defendant should recover $800 from the plaintiff’s insurance company.

As the number of parties to a litigated action increases, it is easy to see that the concept of setoff can become more complicated. But the comparative negligence concepts should always be made to apply.

**M. Multiple Party Situations—Joint and Several Liability, Apportionment, Contribution, and Indemnity**

At common law, when two or more defendants negligently combined to produce an injury to the plaintiff each of these defendants was jointly and severally liable for the entire award of damages. Joint and several liability favored the plaintiff since the aggregate wealth of the joint tortfeasors stood behind a judgment for damages.

The common law in Kentucky has been modified by statute. While no contribution right existed at common law, Kentucky Revised Statute 412.030 reads: “Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude.”

The state legislature has also enacted Kentucky Revised Statute 454.040 which reads:

In actions of trespass the jury may assess joint or several damages.

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155. *Id.*
157. *Id.*
158. *Id.*
against the defendants. When the jury finds several damages, the 
judgment shall be in favor of the plaintiff against each defendant 
for the several damages, without regard to the amount of damages 
claimed in the petition, and shall include a joint judgment for costs.\footnote{162}

This statute has, for many years, been held to apply to personal 
injury actions.\footnote{163} Thus, it permits, but does not require, the jury 
to apportion damages.\footnote{164}

Applying a "pure" form of comparative negligence to multi-party 
situations promises to be an extremely complicated venture which 
this comment cannot address in detail. Nevertheless, the standard 
should be utilized by the courts when faced with multiple-party 
litigation.\footnote{165}

Under the comparative negligence theory, the courts should con-
sider the proportion of fault of each particular tortfeasor before 
arriving at a verdict.\footnote{166} Ideally, all tortfeasors should be brought 
before the court at one time.\footnote{167} But if all defendant tortfeasors have 
not been properly joined in a single action, the court should con-
sider the fault of absent parties for the purpose of assessing the 
total fault of the tortfeasors as compared with the claimant's fault.\footnote{168}
Such a consideration, of course, would not bind absent parties.\footnote{169}
Using the court's findings pertaining to fault allocation, the plain-
tiff may, nevertheless, seek to collect that percentage of damages 
not attributable to him from the parties defending in the original 
suit. In a future action the defendants may, in turn, seek an 
allocation-oriented form of contribution\footnote{170} from those who were not 
parties to the original suit for their portion of liability. In other 
words, the contribution sought would only be for that portion of 
fault attributable to the unjoined party and not any preset percen-
tage of fault. In this way, there would result an understandable 
multiple-party system which looks to an allocation of fault under

\footnotesize{
163. See Orr v. Coleman, 455 S.W.2d 59 (Ky. 1970).
165. See generally Comment, The Allocation of Loss Among Joint Tortfeasors, 41 So. Cal. 
    L. Rev. 728 (Spring 1968).
166. See Laufenberg, supra note 2, at 21.
167. Id.
168. See, e.g., Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934); 
    Ross v. Koberstein, 220 Wis. 73, 264 N.W. 642 (1936).
169. See Laufenberg, supra note 2, at 21.
}
Kentucky's contribution statute\textsuperscript{171} and also requires allocation of fault under Kentucky Revised Statute 454.040.\textsuperscript{172}

Where all proper parties have been joined to a single action, there will be no need for contribution as the court's findings which pertain to each respective tortfeasor's percentage of fault will bind such tortfeasor.

A further problem arises when damages against a party defendant are found to be uncollectible.\textsuperscript{173} In this circumstance the court should reallocate damages to those against whom they who are collectible in a fashion similar to that prescribed by the Uniform Comparative Fault Act.\textsuperscript{174} A party plaintiff would, accordingly, always be given the fullest opportunity to collect his award for damages.

Indemnity, in its present form, should no longer remain a viable doctrine under Kentucky's new comparative negligence system. Indemnity calls for shifting the entire loss from one tortfeasor to another.\textsuperscript{175} But a comparative negligence standard requires allocating fault among tortfeasors, even though some proportion of fault may certainly shift from one tortfeasor to another.\textsuperscript{176} Interestingly, when a party pursued by a liable defendant is found 100% at fault, this would closely equate with the indemnity concept, since the entire loss has then shifted to that party. Only under these rare circumstances would the old indemnity concept continue to find a responsible use.\textsuperscript{177}

\textbf{CONCLUSION}

It is readily apparent that \textit{Hilen v. Hays}\textsuperscript{178} is a landmark case in Kentucky law. \textit{Hilen} does away with the old contributory negligence defense and in its stead, brings to the Commonwealth a "pure" form of comparative negligence.\textsuperscript{179}

\begin{flushleft}
\textsuperscript{171}. Id.
\textsuperscript{173}. In a case where damages against a defendant tortfeasor are found to be uncollectible, since liability has been allocated among all tortfeasor defendants, the claimant would be unable to collect his full award for damages unless special procedures account for these circumstances.
\textsuperscript{175}. See, e.g., Ohio River Pipeline Corp. v. Landrum, 580 S.W.2d 713 (Ky. Ct. App. 1979).
\textsuperscript{176}. Id.
\textsuperscript{177}. Id.
\textsuperscript{178}. Hilen, supra note 1.
\textsuperscript{179}. Id. at 720.
\end{flushleft}
The comparative negligence standard will require some important decisions to be made by the courts. There are many areas of the law which have been affected by the standard.

This comment suggests an approach to comparative negligence which places heavy emphasis on fairness and practicability. An analysis applying comparative negligence to every pertinent area of the law would not be possible in a paper of this scope. But, a general guide has been provided which has attempted to treat several of the most predominant concerns which have already emerged.

It will take years for many of the problems created by comparative negligence to be encountered by the courts. The time to start thinking about them, however, should be now.

HEMAN "MAC" RILEY*

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FIREMEN AND THE FOURTH AMENDMENT: WHAT ARE THE REQUIREMENTS OF A POST-FIRE SEARCH?

I. INTRODUCTION

On October 18, 1980, a fire broke out in the home of Raymond and Emma Jean Clifford. Detroit firefighters arrived at about 5:42 a.m., and extinguished the fire. By 7:04 a.m., both police and firefighters had left the premises. At 8:00 a.m. that same morning, Lieutenant Beyer of the arson section of the Detroit Fire Department was instructed to investigate the Clifford fire and was informed the Fire Department suspected arson. Lieutenant Beyer did not arrive at the Clifford home, however, until about 1:00 p.m., after having processed a prisoner, investigated another fire, and stopped for a brief lunch.

When Lieutenant Beyer and his partner arrived at the Clifford home, a neighbor told them that the Cliffords were out of town on a camping trip and would not return that day, and that he had been instructed to request the Cliffords' insurance agent send a crew out to secure the home. While waiting for water to be pumped from the basement by a work crew, the investigators seized a Coleman fuel can which was in the driveway, apparently set aside by the firefighters while fighting the fire, and marked it as evidence. The work crew was finished by 1:30 p.m., and at that time, without procuring either consent or warrant, Lieutenant Beyer and his partner entered the residence and began a search for the cause of the fire. In the basement, they seized as potential evidence two more Coleman fuel cans and a crock pot which had been set to turn on at 3:45 a.m. The investigators also noted in particular that the drawers and closets were full of old clothes, that the walls had nails but no pictures and that there was wiring

2. Id.
3. Id.
7. Id.
8. Id.
9. Id. at 290-91.
and cassettes for a video recorder but no recorder. A photographer was summoned to take pictures throughout the house.\textsuperscript{10}

Raymond and Emma Jean Clifford were arrested and charged with arson. They moved to suppress the evidence obtained through the search of their home, claiming it was undertaken without a warrant, consent or exigent circumstances and, therefore, was \textit{per se} unreasonable under the fourth and fourteenth amendments.\textsuperscript{11} The trial court denied the motion, holding that the search was justified by the exigent circumstances exception to the warrant requirement.\textsuperscript{12} The Michigan Court of Appeals reversed, stating that no exigent circumstances justified the search.\textsuperscript{13} The Michigan Court of Appeals found that the Fire Department's policy prescribing warrantless searches when the premises were open to trespass, the owner was not present and the search occurred within a reasonable time of the fire, was inconsistent with the United States Supreme Court's decision of \textit{Michigan v. Tyler},\textsuperscript{14} and violated the Cliffords' fourth amendment rights.\textsuperscript{15}

The case of \textit{Michigan v. Clifford} posed an intriguing question for the United States Supreme Court: How does the fourth amendment limit the investigation of a recent fire? Certiorari was granted "to clarify doubt that appears to exist as to the application of our decision in \textit{Tyler}."\textsuperscript{16} The opinion by Justice Powell joined by Justices Brennan, White, and Marshall, concluded that the search of the Cliffords' home violated their "reasonable expectation of privacy"\textsuperscript{17} and that post-fire investigations were subject to the warrant requirement.\textsuperscript{18} Justice Stevens concurred in the judgment of the Court that the search was in violation of the fourth amendment, but based his conclusion on his customary\textsuperscript{19} interpretation of the fourth amend-

\begin{itemize}
\item \textsuperscript{10} \textit{Id.} at 291.
\item \textsuperscript{11} \textit{Id.}
\item \textsuperscript{12} \textit{Id.} at 289.
\item \textsuperscript{13} \textit{Id.}
\item \textsuperscript{14} 436 U.S. 499 (1978). This case was previously the most definitive as to the permissible scope of searches and seizures under post-fire circumstances.
\item \textsuperscript{15} \textit{Clifford}, at 290.
\item \textsuperscript{16} \textit{Id. See also supra note 14.}
\item \textsuperscript{17} The area in which one has a "reasonable expectation of privacy" is the test derived from \textit{Katz v. U.S.}, 389 U.S. 347 (1967) for defining the area within the sphere of fourth amendment protection. See 1 W. LaFave, \textit{Search and Seizure: A Treatise on the Fourth Amendment} §§ 2.1, 2.3 (1978) [hereinafter cited as LaFave]. See also Ashdown, \textit{The Fourth Amendment and the "Legitimate Expectation of Privacy"}, 34 \textit{Vand. L. Rev.} 1289 (1981).
\item \textsuperscript{18} \textit{Clifford}, 464 U.S. at 295.
\end{itemize}
ment: the fourth amendment forbids *unreasonable* searches without a warrant and the search here was "unreasonable in contravention of the Fourth Amendment because the investigators made no effort to provide fair notice of the inspection to the owners of the premises."²⁰ Justice Rehnquist, joined by Chief Justice Burger, Justice Blackmun, and Justice O'Connor, dissented from the plurality judgment and found the original entry and search of the basement indistinguishable from *Michigan v. Tyler.*²¹

While Justice Powell announced that the decision in *Clifford* would clarify the doubts as to the application of *Tyler,*²² the four-one-four alignment of the Court leaves doubt as to whether it has cleared or muddied the water downstream of *Michigan v. Tyler.*²³ This paper will attempt to glean the clarifying aspects of the *Clifford* decision from the various opinions by analyzing the development of the law regarding post-fire searches prior to *Tyler,* the impact of the *Tyler* decision itself, and focusing on the Court's reasoning in *Clifford,* while concentrating on the fourth amendment arguments by each faction of the Court. Finally, it will scrutinize the relevancy of this case as applied to future post-fire searches to see what impact, if any,²⁴ this case will have on existing law.

II. CONSTRAINTS ON FIRE SCENE SEARCHES PRIOR TO *MICHIGAN V. TYLER*

The most significant constraint on investigatory conduct by public officials—whether policemen, firemen, or postmen—is the fourth amendment.²⁵ Action outside the confines of the fourth amendment

²⁰ *Clifford,* at 305. Cf. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325-26 (1978) (Stevens, J., dissenting) (Justice Stevens argued that the fourth amendment requires warrants only for unreasonable searches and that the regulatory inspection program in Barlow's was reasonable and therefore not within fourth amendment warrant requirements). See also *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976); *United States v. Biswell,* 406 U.S. 311 (1972); *Terry v. Ohio,* 392 U.S. 1 (1968) (all of these cases are exceptions to the warrant requirement).

²¹ *Clifford,* at 305-06.

²² *Id.* at 289.

²³ The dissent recognizes the incongruity of the clarification statement in Powell's opinion. "But that same opinion demonstrates beyond peradventure that if that was our purpose, we have totally failed to accomplish it; today's opinion, far from clarifying the doubtful aspects of *Tyler,* sows confusion broadside." *Clifford,* at 306.

²⁴ The impact of the decision is limited to its clarifying aspects since the plurality judgment carries no precedential effect.

²⁵ The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly
results in exclusion of all evidence gained through unconstitutional search or seizure, and inspectors therefore are faced with the perplexing problem of determining the boundaries of fourth amendment protection. The Supreme Court has found this problem to be no less perplexing, redefining the area protected and the need for a warrant in administrative searches in at least two important cases. A further complication is that the requirement of a warrant has been excepted in a number of circumstances. Police conduct will necessarily vary with the current interpretation of the fourth amendment requirements. Two distinct stages of the development of the requirements for fire searches can be perceived: the periods prior to and after Camara v. Municipal Court.

A. Warrant Requirements for Fire Inspections

Prior to Camara (1967)

It is a fact of American life that the government will need to inspect both private and commercial buildings. Municipalities have long appointed individuals to inspect residences to protect the...
general populace from the spread of disease or fires. Prior to 1967, both the Supreme Court and lower courts were of the opinion that warrantless regulatory inspections were constitutional.

In *Frank v. Maryland*, the Supreme Court affirmed the conviction of Aaron Frank for not allowing his home to be inspected according to a Maryland health ordinance. The *Frank* Court balanced the privacy interest of Frank against the tremendous need for public health inspections, and held that the inspection touched only on the "periphery" of Frank's fourth amendment rights since the fourth amendment primarily applies to searches for evidence in criminal prosecutions. The Court also found that the regulated nature of the inspections exerted "only the slightest restriction on his claims of privacy." The public need for health protection therefore easily outweighed Frank's interest.

Fire inspections, conducted according to state statute or local ordinance, were judged under the same administrative standard as *Frank*. A representative example is the Iowa Supreme Court. In *Rees*, the defendant occupied an apartment and had an interest in the business maintained within a building that caught fire. Several investigators made a prolonged investigation of the fire, reentering the building on numerous occasions. The trial court agreed with the defendant that the evidence obtained by this warrantless extended investigation...
should be excluded," but the decision was reversed in an opinion citing the Iowa statutes directing investigation of every fire and authorizing entry by officials. The Iowa court found authority in Frank for the proposition that an inspector could go on property without the aid of a warrant to ascertain whether conditions might be hazardous to the general welfare. "Statutes and ordinances authorizing civil inspections have long been acknowledged and sanctioned as incident to the police power of a state or municipality but they must be within constitutional limits." The Rees majority also stated: "A reasonable search mandatory under a legislative enactment is clothed with as much dignity and is entitled to as much consideration as a search under a warrant issued by a Justice of the Peace."

Four Iowa Justices vigorously dissented in Rees and noted that "[S]ome check must be put on administrative bodies." The dissenters turned out to be most prophetic; a little over one year later the Supreme Court reversed its position on administrative warrants and pronounced a new standard.

B. Camara and See: Development of The Administrative Warrant

In Camara v. Municipal Court, a lessee refused to allow an inspector from the Division of Housing Inspection of the San Francisco Department of Public Health to make a routine annual inspection without a warrant. The housing code authorized the inspector to enter any building at a reasonable time to perform any duty imposed by the code. The district court of appeals relied on Frank v. Maryland and held that the authorization of warrantless entry did not violate the fourth amendment, but the Supreme Court revoked the rationale of Frank in no uncertain terms: "[W]e cannot agree that the Fourth Amendment interests at stake in these in-

41. Id. at 815, 139 N.W.2d at 407.
42. Id. at 817, 139 N.W.2d at 408.
43. Id. at 818, 139 N.W.2d at 409.
44. Id. at 825, 139 N.W.2d at 413.
45. Id. at 827-28, 139 N.W.2d at 414.
47. Camara at 526.
48. Id. at 527-28.
spection cases are merely 'peripheral.'" The Court went on to hold that administrative searches were "significant intrusions" upon fourth amendment rights and that lack of a warrant process deprived the individual of the "traditional safeguards which the Fourth Amendment guarantees." But even while upholding the "traditional safeguards" of the warrant requirement, the Court made a monumental and seemingly contradictory decision that the standard for the code enforcement inspection programs would be something less than traditional probable cause! The Court stated that the standard for administrative searches should be based upon "reasonableness" and what is reasonable should be determined "by balancing the need to search against the invasion which the search entails." The Court concluded "that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." In a companion case to Camara, See v. City of Seattle, the Court extended its holding to commercial premises, stating a "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries."

A venomous dissent to the Court's holding in Camara and See was authored by Justice Clark and joined by Justices Harlan and Stewart. The dissenters accused the Court of jeopardizing the health and welfare of millions of people and declared that the holding

prostitutes the command of the Fourth Amendment that 'no Warrants shall issue, but upon probable cause' and sets up in the health and safety codes area inspection a newfangled 'warrant' system that

49. Id. at 530.
50. Id. at 534.
51. Id.
52. Id. at 537. The Court suggests three persuasive factors which should be considered in "reasonableness." Id. For a discussion of these three factors and their application see LaFave, Administrative Searches, supra note 28, at 14-20.
53. Camara at 538.
54. 387 U.S. 541 (1967).
55. Id. at 543. The Court did leave open the possibility of some distinction between residential and commercial premises: "We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." Id. at 545-46.
56. Id. at 546.
is entirely foreign to Fourth Amendment standards. It is regrettable that the Court wipes out such a long and widely accepted practice and creates in its place such enormous confusion in all of our towns and metropolitan cities in one fell swoop.\(^7\)

The dissenters agreed that the standard should be "reasonableness" and argued that the warrantless inspections allowed under *Frank* were reasonable.\(^8\)

There is no doubt that the verdicts in *Camara* and *See* have had a great impact on administrative searches and seizures.\(^9\) Any search under a municipal or state ordinance requires at a minimum an administrative warrant unless there is consent,\(^6\) exigent circumstances,\(^1\) or other clearly defined exceptions\(^2\) to the warrant requirement. In applying this standard to fire inspections, it is clear that regular inspections for fire code violations (as a fire preventive measure rather than at the scene of a fire) are governed strictly by the administrative warrant requirement.\(^8\) It is less clear, however, how the administrative warrant governs the post-fire search.

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57. Id. at 547.
58. Id. at 549.
60. See LaFave, Administrative Searches, supra note 28, at 22-23. LaFave argues that consent justified the majority of searches under the *Frank* rationale and will continue to be the primary justification for a warrantless search under the *Camara* approach. "[R]efusal will not prevent the inspection but will only prompt the inspector to return with a warrant. . . ." Id. at 23.
61. *Camara* at 539, cites the following cases as examples of warrantless administrative inspections or seizures justified without a warrant: North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (seizure of unwholesome food); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory smallpox vaccinations); Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U.S. 380 (1902) (health quarantine); Kroplin v. Truax, 119 Ohio St. 610, 165 N.E. 498 (1929) (summary destruction of tubercular cattle).
62. See Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Biswell, 406 U.S. 311 (1972) (exception to warrant requirement where industry has long been subject to close regulation and inspection).
63. Recall that *See* involved refusal to submit to fire inspections. See 387 U.S. at 541. *Camara* would apply this same rationale to residential premises.
It is obvious fire trucks do not have to stop by the courthouse and obtain a warrant on their way to a fire. Prior to the Court's decision in Michigan v. Tyler, however, there was little or no guidance as to what the fourth amendment and Camara required once the fire was extinguished. In United States v. Gargotto, the appellant contended gambling records introduced into evidence had been illegally seized by an arson investigator and a police investigator shortly after the fire had been put out. Acting without a warrant or consent, the officers had seized records scattered about the floor and others still within cabinets and drawers. The court held the seizure of the documents on the floor and otherwise in plain view was not unreasonable by fourth amendment standards. The court noted that the officers had a duty under relevant statutes to investigate the cause of a fire, and justified the search by the exigent circumstances and a "probable cause" exception to the warrant requirement. The court rejected the argument that a warrant was required under the rationale of Camara and stating that "[T]hose cases did not deal with administrative inspection at the time of an unusual occurrence or emergency situation such as the fire which caused the officers to conduct the search and seizure in this case." In United States v. Green, the defendant was convicted of possession of copper plates used for counterfeiting. The plates were found during an investigation of the cause of a fire which had been extinguished just a short time before. The inspection, pursuant to statutory autonomy, took place without a warrant or consent. Green argued that the Deputy Fire Marshall needed a warrant to inspect and the exigent circumstances justified only the entry of the firefighters to suppress the flames. The court distinguished

65. 476 F.2d 1009 (6th Cir. 1973).
66. Id. at 1010-12.
67. Id. at 1013. The court cites Coolidge v. New Hampshire, 403 U.S. 443 (1971), as authority for the "plain view doctrine." The court remanded the case to determine whether the seizure of papers within the drawers could be justified by exigent circumstances.
68. Id. at 1012. See supra note 32.
69. Gargotto, 476 F.2d at 1012-13.
70. Id. at 1013.
71. 474 F.2d 1385 (5th Cir. 1973).
72. Id. at 1386-87.
this situation from the situation requiring a warrant in *Camara*, analogizing the fire scene to the traditional warrantless administrative inspections approved by the *Camara* Court. The court reasoned that the investigation of a fire is inseparable from the suppression of the fire and the ordinary fireman “cannot determine, after he douses the blaze, whether the danger is past or merely hidden, awaiting only a fresh supply of oxygen to set it off again with perhaps disastrous results.” The court decided this was not the type of search contemplated by the decision of *Camara* and *See* and therefore not subject to the rule of those cases. After thereby establishing the inspector’s presence was lawful, the court found the seizure of the evidence justified by the “plain view” doctrine.

Cases such as *Gargotto* and *Green*, established the position that a post-fire investigation is inseparable from the initial exigency, but did not indicate the length of time the exigency could last. That question faced the Michigan Supreme Court in *People v. Tyler*. In *Tyler*, evidence was admitted which was seized by inspectors at various times, from four hours to three weeks, after the fire had been extinguished. In excluding all evidence seized after the blaze was fully extinguished, the Michigan Supreme Court noted that entry onto fire-damaged property is subject to the fourth amendment warrant requirement and once the “firefighters have left the premises, a warrant is required to reenter and search. . . .” The United States Supreme Court granted certiorari “to consider the applicability of the Fourth and the Fourteenth Amendments to official entries onto fire-damaged premises.”

III. *MICHIGAN V. TYLER: TIMETABLE FOR WARRANTLESS SEARCHES AT FIRE SCENES*

On January 21, 1970, shortly before midnight, a fire broke out in a furniture store leased by Loren Tyler. At approximately 2:00

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73. Id. at 1388. See *supra* note 61.
74. Id.
75. Id. at 1389.
76. *Accord* *Steigler* v. *Anderson*, 496 F.2d 793 (3d Cir. 1974). In *Steigler*, the court held the exigent circumstances justified the fire inspector’s search and that *Camara* had explicitly exempted this type of emergency function from its warrant requirement. *Steigler*, 496 F.2d at 797.
78. Id. at 583, 250 N.W.2d at 477.
Fire Chief See arrived to find the fire extinguished and the firefighters watering down the smoldering embers. He was informed that firefighters fighting the blaze had found two plastic containers of flammable liquid. Chief See called Police Detective Webb, who arrived on the scene about 3:30 a.m., and the two of them entered the store to search for the cause of the fire. The firefighters left and Chief See and Detective Webb abandoned their inspection about 4:00 a.m. because of the smoke and steam. The containers were seized although no warrant or consent had been obtained for these investigations or the seizure of the containers.

Chief See returned to the store at approximately 8:00 a.m. with an assistant fire chief and briefly surveyed the building. At around 9:00 a.m., the assistant fire chief returned with Detective Webb. The assistant fire chief and Webb found and removed evidence. No consent or warrant was obtained for this search.

Three weeks after the fire, Sergeant Hoffman of the Michigan State Police Arson Section reentered the store and took photographs. Apparently, Sergeant Hoffman made several visits to the scene, and his testimony, as well as evidence he seized, was admitted at respondent's trial. All of Sergeant Hoffman's searches and seizures were made without consent or warrants.

The Michigan Supreme Court concluded that evidence seized subsequent to the 4:00 a.m. departure was inadmissible and ordered a new trial. The United States Supreme Court affirmed, but held that the evidence seized by Detective Webb and the assistant fire chief was admissible.

The Court analyzed various fourth amendment requirements relating to entries on fire-damaged premises. The Court first established that inspections by fire inspectors are clearly within protection of the fourth amendment, citing Camara and See. Justice Stewart, author of the Court's opinion, then dismissed petitioner's argument that fire victims have no protectable expectations of privacy. "People may go on living in their homes or work-

80. Id. at 501.
81. Id. at 502.
82. Id. This evidence consisted of carpeting with suspicious burn marks and pieces of tape with burn marks. These items were suggestive of a fuse trail.
83. Id. at 503.
84. Id. at 511.
85. Id. at 505.
The petitioner next argued that the fact the fire occurred is alone the justification needed for an administrative warrant to investigate, and the magistrate will therefore have little function other than to “rubber stamp” a warrant. The Court pointed out, however, that the magistrate will balance the need for the intrusion against the threat of disruption to the occupant. Since the broad regulatory guidelines of the usual administrative search are missing, “a more particularized inquiry may be necessary.” Factors the Court found relevant to the occupant’s interest include “number of prior entries, the scope of the search, the time of the day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner’s efforts to secure it against intruders....” The magistrate will thereby perform the valuable function of preventing harassment to the individual. Justice Stewart summed up this section of the Court’s opinion:

As a general matter, then, official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment. Since all the entries in this case were ‘without proper consent’ and were not ‘authorized by a valid search warrant,’ each one is illegal unless it falls within one of the ‘certain carefully defined classes of cases’ for which warrants are not mandatory.

The Supreme Court next analyzed each search of the store to determine whether it fell within the carefully defined class of cases and was therefore valid without a warrant. The Court observed that emergency situations have validated warrantless searches in the regulatory field in the same manner as a compelling need and lack of time to obtain a warrant have justified searches in criminal law enforcement. Entry to fight a fire, then, is no problem since this is a tremendous exigency making the warrantless entry

86. Id. Petitioner also argued that evidence of arson would justify a search under a notion of abandonment; however, the Court points out that the arson cannot be proved until the defendant is convicted and the search cannot be validated ex post facto. Id. at 505-06.

87. Id. at 507.

88. Id.

89. Id. at 508, 509 (quoting Camara, 387 U.S. 528-29). See also 3 LAFAYE supra note 17, § 10.4, at 269.

90. 436 U.S. at 509. The Court’s reasoning parallels the reasoning of United States v. Green, see supra notes 71-75 and accompanying text.
reasonable. The doctrine of "plain view" then absolves seizure of obvious criminal or statutory violations from fourth amendment sanctions. This reasoning made the firemen's seizure of the two plastic containers proper without a warrant. The United States Supreme Court found the Michigan court's view of the duration of the exigency—that it ends when the fire is extinguished—unrealistically narrow. The Court indicated that prevention of the fire's reoccurrence, preservation of evidence, and decreased intrusion on privacy by investigations concurrent (rather than subsequent) with the disaster, were all reasons to allow officials to remain in the building to investigate the cause of the fire. This reasoning would have justified any new evidence discovered by Chief See or Detective Webb on their first inspection; however, nothing was found on that search.

Justice Stewart's majority opinion next reversed the Michigan Supreme Court's exclusion of evidence seized during the subsequent 9:00 a.m. search by Detective Webb and the assistant fire chief. "Under these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of warrant thus did not invalidate the resulting seizure of evidence." This part of the opinion was not joined by Justice White or Justice Marshall. Their view was that the Michigan Supreme Court correctly held exigent circumstances justifying warrantless entry were no longer present and that this was not a continuation of the earlier entry. "The fact that the firemen were willing to leave demonstrates that the exigent circumstances justifying their original warrantless entry were no longer present." Justice White predicted the Court's holding that subsequent re-entries were "continuations" would confuse firemen and make it difficult to determine how a re-entry would be viewed by the courts. Justice White's dissent also argued that a warrant was

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91. Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971). Notice that this is also the rationale used by the Sixth Circuit and Fifth Circuit in the cases previously discussed. See supra notes 65-75 and accompanying text.

92. Tyler, 436 U.S. at 510.

93. Id. at 511.

94. Id. at 514-15.

95. Id. at 515. The Court holds that the delayed search in Tyler was analogous to the situation in G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977), where a two day delay precipitated a finding of no exigent circumstances.

96. Tyler, 436 U.S. at 515-16. These words turn out to be very prophetic in light of Clifford's attempt to clarify this very uncertainty. See supra note 16 and accompanying text.
required for the subsequent searches because their purpose was gathering evidence of arson, and searches for evidence of a crime, under non-exigent circumstances, are subject to the fourth amendment warrant requirement. 7

The Supreme Court agreed with the Michigan Supreme Court that evidence obtained after January 22 should be excluded." Those entries were felt to be clearly outside any exigent circumstances and without consent, and therefore subject to the warrant requirement.99

Justice Rehnquist dissented from the Court's opinion, finding that all of the searches were "reasonable" and therefore allowed under the fourth amendment.100 Justice Stevens concurred in the judgment, but under a different interpretation of the fourth amendment.101 Under Stevens' analysis of the fourth amendment, the searches in Tyler were not reasonable because fair notice was not given to the defendant, and no warrant was obtained.102

IV. AFTER MICHIGAN V. TYLER: HOW WERE RE-ENTRIES VIEWED BY THE COURTS?103

The Tyler decision would seem to establish a point in time where a warrantless post-fire inspection would no longer be justified by the primary exigency (the fire).104 The Tyler majority also validated the first re-entry based on a notion that it was somehow a continuation of the initial entry four hours earlier. Lower courts

97. Tyler, 436 U.S. at 516.
98. Id. at 511.
99. Id. The Court does not state what level of probable cause (criminal or administrative) would have been necessary to obtain this warrant. In Section V of the opinion it does state that traditional showings of probable cause are necessary for gathering evidence of arson on a subsequent investigation. Id. at 512.
100. Id. at 516-17.
101. Id. at 512-13. See supra notes 19, 20 and accompanying text.
103. Recall that Justice White had said "[T]o hold that some subsequent re-entries are 'continuations' of earlier ones will not aid firemen, but confuse them, for it will be difficult to predict in advance how a court might view a re-entry." Tyler, 436 U.S. at 515-16 (emphasis added).
104. Although the Court in Tyler did not establish this exact point in time, it indicated that warrantless searches immediately after the fire were justified, as were those four or five hours later; however, searches after that day required a warrant. Tyler, 436 U.S. 509-12.
responded to the decision in *Michigan v. Tyler* in a variety of ways.\textsuperscript{105} A discussion of some of these decisions might demonstrate what the Court was trying to "clarify" in *Michigan v. Clifford*.\textsuperscript{106}

In *United States v. Callabrass*,\textsuperscript{107} the Second Circuit Court of Appeals interpreted *Tyler* to allow a warrantless entry of a narcotics officer three hours after the fire had been extinguished because drugs and drug paraphernalia had been discovered by the firefighters. There was also some doubt as to whether the chemicals might be explosive. The appellate court justified the officer's warrantless entry as either "like the 9:00 a.m. entries in *Tyler*, 'no more than an actual continuation of the first [entry],' ... or a second warrantless entry independently justified by exigent circumstances."\textsuperscript{108} A dissenter in *Callabrass* pointed out that the investigator did not enter to investigate a fire, but instead to search for drugs—a search requiring a warrant based upon probable cause by the usual fourth amendment standards.\textsuperscript{109}

The Ninth Circuit Court of Appeals took the view of the *Callabrass* dissent in *United States v. Hoffman*.\textsuperscript{110} A sawed-off shotgun was discovered by firemen while they were fighting a fire in defendant's trailer. A policeman, who arrived on the scene while firemen were still present, went into the trailer and seized the gun within thirty minutes after the fire was reported, but the court refused to justify the entry under the exigent circumstance of the fire. The court stated that the gun was not a fire hazard and there was no reason to worry about it being destroyed.\textsuperscript{111} "The mere fact that a fire has occurred does not give police officers *carte blanche* to enter one's home, even when armed with probable cause to suspect that evidence of a crime may be within the premises."\textsuperscript{112}

In *State v. Hansen*,\textsuperscript{113} the Iowa Supreme Court decided the Fire

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\textsuperscript{105} See 3 LAFAYE, supra note 17, § 10.4 & Supp. 1984.

\textsuperscript{106} See supra note 16 and accompanying text.

\textsuperscript{107} 607 F.2d 559 (2d Cir. 1979). Accord United States v. Urban, 710 F.2d 276 (6th Cir. 1983). The dissent in that case emphasized that factors which hinder the initial investigation are important in determining whether the second search can be justified as a continuation of the first search. *Id.* at 282.

\textsuperscript{108} 607 F.2d at 563 n.2.

\textsuperscript{109} *Id.* at 565.

\textsuperscript{110} 607 F.2d 280 (9th Cir. 1979).

\textsuperscript{111} *Id.* at 283.

\textsuperscript{112} *Id.*

\textsuperscript{113} 286 N.W.2d 163 (Iowa 1979). This case expressly overruled State v. Rees discussed infra. See supra notes 40-45 and accompanying text.
Marshall's inspection on the afternoon following the fire was not an "actual continuation" of a valid entry, but rather was an "additional entry." The court noted that no investigation had begun on the first day which could be continued on the second.

Numerous other cases have focused on the justification of a warrantless post-fire search. If confusing doctrine breeds litigation, or at least creates disarray among lower court decisions, the Supreme Court had an indication that something about Tyler was confusing. The Court responded by granting certiorari in Michigan v. Clifford.

V. CLARIFYING TYLER

While the Court announced it had the commendable objective of clarifying Tyler, it divided four-one-four in a plurality decision with very little precedential value. The decision is far from worthless, however, because there are many issues on which a majority agrees. Careful analysis of the several opinions indicates some conclusions as to what set of circumstances would change the various votes and achieve a majority.

Justice Powell wrote for the plurality in an opinion joined by Justices Brennan, White, and Marshall. The plurality opinion first made it clear that administrative investigations into the cause and origin of a fire will not be exempted from the warrant requirement on a reasonableness standard, then stated that the constitutionality of a warrantless, nonconsensual entry will normally turn on several factors: (a) whether legitimate privacy interests remain in the fire-damaged property; (b) whether exigent circum-

114. Hansen, 286 N.W.2d at 167.
115. United States v. Parr, 716 F.2d 796 (11th Cir. 1983); Romano v. Home Ins. Co., 490 F. Supp. 191 (N.D. Ga. 1980); Passerin v. State, 419 A.2d 916 (Del. 1980); People v. Holloway, 86 Ill. 2d 78, 426 N.E.2d 871 (1981); Shaffer v. State, 640 P.2d 88 (Wyo. 1982). Two other cases were granted certiorari to decide the same issues as presented by Clifford and both were remanded in light of the decision in Clifford. Connecticut v. Schonagel, 104 S.Ct. 990 (1984); Zeisler v. Illinois, 104 S.Ct. 990 (1984). (Neither of these cases had been reheard at the time of this writing).
116. Clifford, 464 U.S. at 288. It is interesting to see where these Justices stood in Tyler: Justice Powell apparently agreed with the majority, Justice Brennan took no part in that decision, and Justices White and Marshall dissented from the portion of the opinion concerning the search the following morning.
117. Id. at 291. The plurality observed that a carefully defined class of cases are excepted from the administrative warrant requirement, but noted that those exceptions are not applicable here. Id. at 292 n.2 (citing the "heavily regulated" business cases).
stances justify the invasion of privacy interests; and (c) the object of the search.\textsuperscript{118} As to the first of these factors, the Court noted that \textit{Tyler} and other cases have recognized that reasonable privacy expectations may remain in fire-damaged premises,\textsuperscript{119} and therefore only consent or exigent circumstances will justify warrantless entry. Under the second factor, a fire will create exigent circumstances sufficient for warrantless entry to fight the blaze and to remain for a reasonable time to investigate the cause of the fire. "Because determining the cause and origin of a fire serves a compelling public interest, the warrant requirement does not apply in such cases."\textsuperscript{120} The plurality also noted that exigencies may create a situation where a warrantless search may be necessary to preserve evidence.\textsuperscript{121} Finally, the object of the search, the third factor, is important in determining the type of warrant required. If the object is determining the cause and origin of the fire, an administrative warrant will suffice; if the object of the search is evidence of criminal activity, a showing of probable cause is necessary. An administrative warrant is justified by showing "that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time."\textsuperscript{122} Evidence seized under the "plain view" doctrine during an administrative search may be used to establish probable cause, but \textit{cannot} be used to expand the scope of an administrative search.\textsuperscript{123}

Powell's opinion next applied the outlined factors to the search of the Clifford home. The plurality distinguished the delayed search of the basement from the subsequent intensive search of the upstairs.\textsuperscript{124} The first factor, the reasonable expectation of privacy, was assessed first. The Court noted that while the house was

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.} The Court also pointed out that this test is an objective one and there may be some fires so devastating that no reasonable expectation of privacy still exists. This could be an important factor in the decision of Schonagel on remand. \textit{See supra} note 115.

\textsuperscript{120} \textit{Clifford}, 464 U.S. at 293.

\textsuperscript{121} \textit{Id.} at 293 n.4.

\textsuperscript{122} \textit{Id.} at 294.

\textsuperscript{123} \textit{Id.} at 295. \textit{Accord United States} v. \textit{Parr}, 716 F.2d 796 (11th Cir. 1983) (although decided before \textit{Clifford}, this case seems to follow the same rationale in limiting the scope of the search).

\textsuperscript{124} \textit{Id.} A review of the facts of \textit{Clifford} might be necessary at this point. \textit{See supra} notes 1-15 and accompanying text.
uninhabitable as a result of the fire damage, personal belongings remained and the owners had arranged to have the house secured.\footnote{125} This, in addition to the strong expectations of privacy traditionally granted to a home, led the plurality to conclude reasonable expectations of privacy could be retained in the home.\footnote{126} The plurality next turned to the second factor—what exigent circumstances could justify the search? The State argued that the same circumstances which justified the delayed search in \textit{Tyler} were present in \textit{Clifford}, but the plurality distinguished the cases on several grounds.\footnote{127} First, there had not been an earlier search for the investigators to continue, and the owners had taken steps to insure their privacy interests would be maintained; secondly, the privacy interests are greater in a home than in a furniture store.\footnote{128} The plurality held in a situation like that in \textit{Clifford}, where an attempt has been made to secure the home and the fire units have left the scene, a non-consensual search must be made pursuant to a warrant or some new exigency.\footnote{129} The plurality further distinguished the upstairs search from the downstairs search and held that the upstairs search was unreasonable regardless of the validity of the downstairs search.\footnote{130} Since it had been determined that the fire started in the basement, any search upstairs must have been to obtain further evidence of arson—a search which would require a criminal search warrant. \textquoteleft\textquoteleft The scope of such a [valid administrative] search is limited to that reasonably necessary to determine the cause and origin of a fire and to ensure against rekindling.\textquoteright\textquoteright \footnote{131} The plurality concluded that the only evidence admissible against the respondents would be the fuel seized by the firemen while initially fighting the blaze.\footnote{132}

Justice Rehnquist wrote for the dissent and was joined by Chief Justice Burger and Justices Blackmun and O'Connor.\footnote{133} The dissent-
ing opinion is limited to discussing the search of the basement, the dissenters agreeing that the upstairs search could only have been made under a criminal warrant. The dissenters viewed the search of the basement as an "actual continuation" of the original entry to fight the fire, just as the search the following morning was viewed in *Tyler*. Justice Rehnquist explicitly disagreed with the factors used by the plurality to distinguish *Tyler*. He maintained the attempt by the homeowners to secure the residence was not a distinguishing feature since "[I]t has no bearing on the question of whether there were exigent circumstances which constitute an exception to the warrant requirement..." Rehnquist also attacked the plurality's distinction between commercial and residential property: "It is also well established that private commercial buildings in this context are as much protected by the Fourth Amendment as are private dwellings." The dissent concluded that on the basis of *Tyler*, the search of the basement in *Clifford* should have been upheld.

In Part II of the dissenting opinion, the dissenters argued that post-fire scene inspections should be excluded from the warrant requirement. The dissenters felt the justification for administrative search warrants does not apply to a post-fire investigation conducted within a reasonable time after a fire. If a warrant is required simply to assure individuals are not subject to arbitrary searches, "[A] warrant is simply not required in these circumstances to limit the authority of a fire inspector, so long as his authority to inspect is contingent upon the happening of an event over which he has no control." The suggested approach is that the post-fire search is not unreasonable under the first clause of the fourth amendment, and therefore not subject to the warrant requirement in the second clause.

The dissenters' position is not far removed from Justice Stevens' lone opinion which concurred in the plurality's judgment, but reached this determination on different grounds. First, Justice Stevens argued that the search of the Clifford home was not a

134. *Id.* at 306. The dissent stated that there does not seem to be any reason to treat the six-hour delay in *Clifford* any differently than the five-hour delay in *Tyler*.
135. *Id.* at 307.
136. *Id.* The dissent cited See v. City of Seattle, 387 U.S. 541 (1967) for support of this point.
137. *Clifford*, 464 U.S. at 309.
138. *Id.* at 310.
139. *Id.* at 299-305.
continuation of an earlier search like Tyler. Unlike Tyler, there was no suspension of an earlier search resulting from conditions on the scene. Justice Stevens indicated that a "continuation" should be allowed only where

At least some of the same personnel are involved in a return to the premises and the temporary departure was justifiably and actually occasioned by the conditions at the premises, otherwise I would apply the test expressed by Justice White for measuring the scope of the emergency that justified the initial entry and search: 'Once the fire has been extinguished and the firemen have left the premises, the emergency is over.'

Justice Stevens argued that the firemen's departure should create a presumption that no exigency exists justifying re-entry, rebuttable only by information of a new exigency.

Justice Stevens, like the dissent, felt that a fire investigator's warrantless entry could be characterized as reasonable under the fourth amendment, but he would require the inspector give the owner advance notice of the inspection, or at least make a reasonable offer to give the owner sufficient notice to be present while the investigation is made.

Justice Stevens concluded that since no effort was made to provide notice to the Cliffords, the warrantless search was unreasonable by fourth amendment standards.

Some interesting observations can be made about Clifford's various opinions and the plurality judgment. Foremost, it should be noted that only the lack of notification to the Cliffords kept this decision from being five-to-four in favor of upholding the search as reasonable under the fourth amendment and not subject to the warrant clause.

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140. Id. at 301. Stevens distinguished the water in the basement from the poor conditions in Tyler. "The delay in their arrival at the scene apparently had nothing to do with the fact that water had collected in the basement." Justice Stevens concluded that the water in the basement would amount to a post hoc justification of the delayed entry. Id. at 301.
141. Id. at 301 (quoting Tyler, 436 U.S. at 516).
142. Clifford, 464 U.S. at 301.
143. Id. at 303. This is consistent with Justice Stevens' dissents in other administrative warrant cases. See, e.g., Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (Stevens, J., dissenting) (Justices Rehnquist and Blackmun joined in advocating that warrantless administrative searches be allowed as reasonable).
144. Clifford, 464 U.S. at 304.
145. Notification would align Justice Stevens with the four dissenters' position that the basement search was reasonable, creating a five-to-four majority on that issue.
creating a post-fire scene exception to the warrant clause. The plurality decision is the result of the difference in fourth amendment interpretation, as pointed out by Justice Stevens' concurrence. Basically, the Court is divided over whether the fourth amendment can be interpreted to allow a warrantless post-fire search as reasonable, or whether a post-fire nonconsensual search without a warrant is per se unreasonable unless it falls within a carefully defined exception to the warrant requirement. It appears the former is the majority interpretation, Justice Stevens differing only by requiring notice to make the entry reasonable.

A second issue which divides the Court is the notion of a "continuation of an earlier search" set forth in Tyler. The judgment of the Court indicates a reluctance to expand upon this premise. The plurality advises us that the State did not claim exigent circumstances which justified the search, and then goes on to show how the search can be distinguished from the valid "continuation" in Tyler. The dissent disagrees, arguing that in both Tyler and Clifford there was an ongoing search at the time of the fire, continued by the arrival of fire inspectors. The notion that a former warrantless search may be "continued" at some future time degrades the rationalization justifying that search in the first place—exigent circumstances. The stopping of the search and the

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146. The author of this paper hopes it is "noteworthy" anyway!
147. Clifford, 464 U.S. at 302. Justice Stevens pointed out that at least four interpretations are possible: (1) No warrantless post-fire search is permitted and a warrant is available only on showing of probable cause (no member of the Court adheres to this strict interpretation); (2) No warrantless search is reasonable, but an administrative warrant will suffice (the view of the plurality with which Justice Stevens vigorously dissents); (3) A warrant is not required for a post-fire search conducted promptly and limited to discovery of the cause of the fire—such a search is reasonable under the fourth amendment with or without probable cause (the dissenters' view); and (4) A warrantless fire scene search is reasonable when the owner of the premises has been given notice (Justice Stevens' view). Id. at 302-03.
148. Id.
149. This issue has also caused confusion in the lower court cases. See supra notes 105-15 and accompanying text.
150. Clifford, 464 U.S. at 296. Why the State did not argue exigent circumstances was probably based on a decision that those circumstances disappeared with the firemen some six hours earlier. It would seem that an argument could be made that exigent circumstances still existed until the water had been removed from the basement and some definite determination of the cause of the fire could be made. As discussed infra, all members of the Court agree that a warrant is not required to remain and investigate the cause of the fire. See infra notes 153-54 and accompanying text.
later continuation would seem to be inconsistent with the notion that some exigency requires the inspectors to be there. Overruling the “continuation” argument would also help clear up a lot of misconceptions about when re-entry is allowed: “Once the fire has been extinguished and the firemen have left the premises the emergency is over.” Even if the foregoing statement was not taken as an inflexible demarcation as to the time when entry would require a warrant, it would provide a guidepost of some significance to the officer and the courts.

Converse to the two major issues which divide the justices, there are several principles upon which the Court is in agreement. Justice Stevens succinctly states three such principles in his concurrence. All justices agree the exigency of a fire permits a warrantless entry into a burning building in order to put out the fire. The justices would also agree the firemen have a right to remain on the premises to verify that the fire is truly abated and to investigate the cause of the fire. Finally, all the justices would agree that once the cause and origin of the fire have been determined, a search of any other portions of the house can be made only under a warrant issued upon probable cause that a crime has been committed.

It was earlier noted that only failure of notification kept Clifford from establishing an exception to the warrant requirement. The question remaining is whether such a fire scene exception should be made. The cases which previously have allowed a warrantless administrative search involved business or industry which could be described as “pervasively regulated.” Allowing fire scene searches is inconsistent with this rationale because they are not “programatic but are responsive to individual events.” that is, they are not conducted according to a predetermined plan, but rather are selected by the occurrence of a fire. As discussed

152. Tyler, 436 U.S. at 516.
154. Id.
155. See supra notes 145-46 and accompanying text.
157. “Pervasively regulated” includes such things as license requirements, frequent inspections set by some statutory system, and strict standards. See cases cited supra note 156.
previously, the administrative warrants' lower level of probable cause is based on a balancing of "the need to search against the invasion the search entails." In the pervasively regulated industry, the need to regulate is very great and the invasion is very limited. In a fire search, on the other hand, while the public interest is great, the intrusion on the individual's privacy is also great. Thus, as the Tyler Court stated, the magistrate can serve to keep the invasion to a minimum. Alternatively, a post-fire investigation exception from the warrant requirement would give greater guidance to both officers and courts as to the scope of their duties. Since a high level of public interest is at stake and a relatively limited showing of probable cause is necessary to secure an administrative warrant, it would appear that a warrantless search, limited in scope to the site and cause of the fire, might be justified under the fourth amendment as reasonable.

If a fire scene exception is to be allowed, however, can it be reconciled with the Supreme Court's denial of a "murder scene" exception? In Mincey v. Arizona, the Court struck down Arizona's murder scene exception which allowed the police to search the premises where a homicide had been committed. The search was conditioned on the officer being legally there in the first place, its scope limited to the cause of death, and the search must have begun within a reasonable time after the officials learned of the murder. In arguing for the constitutionality of its murder scene exception, Arizona pointed to the vital public interest in the prompt investigation of the extremely serious crime of murder. But the Court refuted this argument by noting that the public's interest in the investigation of other serious crimes is just as important. "If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary?" So why allow a warrantless search for arson or other

159. See supra notes 51-63 and accompanying text.
160. Camara, 387 U.S. at 537.
161. Tyler, 436 U.S. at 507-08.
164. Id. at 393. The Court was not impressed by the fact that the search was narrowly confined by guidelines set forth by the Arizona Supreme Court. The guidelines vested the police officer with the type decisions the fourth amendment reserves for a magistrate. Id. at 395.
165. Id. at 393.
cause of a fire? Does something distinguish the fire scene from this rationale? One argument for the validity of the fire scene exception is that the exigency continues after the blaze through possible rekindling or explosions. The murder scene, on the other hand, may present a more definite point in time when the danger is clearly over.

VI. BRIGHT LINES OR SHADOWS

The purpose of the fourth amendment "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." Consequently, each Supreme Court decision interpreting the fourth amendment should attempt to draw "bright lines" whenever possible to aid the police. But "bright lines" must be developed slowly; a "bright line" decided hastily could lead to disastrous results when construed by police. As one commentator stated:

I still believe that it is extremely important that fourth amendment doctrine be expressed in terms understandable to the police, to whom, after all, it is directed. But the quest for clear rules must proceed with caution if reasonable and predictable results are in fact to be obtained. For as Justice Rehnquist has noted: "Our entire profession is trained to attack "bright lines" the way hounds attack foxes. Acceptance by the courts of arguments that one thing is the "functional equivalent" of the other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern."

The Court has indicated a willingness to try to find workable rules and steer away from what is "theoretically" a perfect solu-
tion. Thus, in Belton v. New York, for example, the Court steered away from adding to a long line of cases and instead laid down a bright line rule allowing a policeman to search the passenger compartment of an automobile anytime he arrests one of its occupants. So what “bright lines” are available to the fire inspector from Tyler and its clarifying follower, Clifford?

VII. LOOKING FOR LINES IN TYLER AND CLIFFORD

Joe Stephen Smoke is an arson investigator for Hamletsville. Joe is very conscientious about his duties and decides that the best way for him to ascertain his fourth amendment responsibilities is to go to the Hamletsville University Law Library and read the relevant Supreme Court decisions. On arriving at the school, Joe notices a sign saying “Law Review” and decides this could be a significant short cut to the dreary task he had envisioned. Joe proceeds into the Law Review Office and asks to speak to someone who has “reviewed” all the pertinent law on fires and the fourth amendment. One perky young student replies that she is by no means an authority but will gladly relay her interpretation of the rules as gleaned from a thorough, recent study of Michigan v. Tyler, Michigan v. Clifford and their backgrounds. Joe pulls out a list of prepared questions and reads off the first in line.

A. Do Firemen Need a Warrant To Enter a House and Put Out a Fire?

The answer here is clearly no. Justice Stevens stated in his concurrence in Clifford that all the justices agree no warrant is need- ed by the firemen to enter a building and put out a fire. A long line of exceptions to the warrant requirement are based on ex- igent circumstances. The regulatory field also recognizes that

171. Belton v. New York, 101 S.Ct. 2860 (1981); See LaFave, Imperfect World, supra note 170, at 320-333. LaFave comments: “this need to draw ‘bright lines’ to the extent possible has often been disregarded by the courts.” Id. at 321.

172. Belton, 101 S.Ct. at 2864.

173. The following is a hypothetical situation used to more closely approximate what the inspector needs to know, i.e., the bottom line.

174. Joe takes a lot of kidding about his name—“Where there’s a fire there’s Smoke!”

175. She also warns Joe that she is not a lawyer and is not allowed, under the MODEL CODE OF PROFESSIONAL RESPONSIBILITY, to give legal advice.

176. See supra notes 153-54 and accompanying text.
emergency situations do not require an administrative warrant. 177

B. If Firemen Fighting the Fire See Evidence of Arson or Other Criminal Activity, Can It Be Seized?

Clearly the doctrine of "plain view" 178 allows the seizure in this situation. The officer is allowed to seize evidence of criminal activity falling in his view, as long as he has a right to be where he is. This doctrine was used in Tyler 179 to allow admission of the plastic containers, and in Clifford 180 to admit the one Coleman fuel can.

C. Once the Fire Is Out Can the Firemen and Inspectors Look for the Cause?

Again the answer is yes. Both Tyler and Clifford reach this conclusion. Justice Stevens, in Clifford noted that this is another area in which the Court is in entire agreement. 181 The search is limited to a reasonable time and must stay within scope of the exigency; that is, it must be a search only for the cause of the fire. 182

D. If the Search Turns Up Evidence of Arson or Some Other Crime May We Look Further for Incriminating Evidence?

No. This is another area where all justices agree “fire officials may not . . . rely on this [incriminating] evidence to expand the scope of their administrative search without first making a successful showing of probable cause to an independent judicial officer.” 183 This rationale was used to exclude the evidence seized in the upstairs of the Clifford home and all justices agreed in this result. 184 The area that is not totally clear is whether the criminal warrant must be obtained at the first sighting of some criminal evidence, or whether the search may continue until the actual cause of the fire is determined. It seems reasonable that the justification to search for the cause of the blaze remains until it is found,

177. See supra note 61 and accompanying text.
179. Tyler, 436 U.S. at 509.
181. See supra notes 153-54 and accompanying text.
182. Tyler, 436 U.S. at 510. See also United States v. Parr, 716 F.2d 796 (11th Cir. 1983).
184. Id. at 298-99.
or at least for a reasonable length of time to search for it, and any evidence of criminal activity found is admissible under plain view.\textsuperscript{185}

\textbf{E. If the Inspector Gets to the Scene of The Fire After The Firemen Have Left, May He Go in and Investigate Without a Warrant?}

The answer here may vary with the circumstances, although it is basically the situation covered in both \textit{Clifford} and \textit{Tyler}. First, if any exigent circumstances can be perceived by the inspector, such as possible danger of explosion or rekindling, it would justify warrantless entry. This is hard to argue, however, when the firemen were not concerned enough to stay on the scene.\textsuperscript{186}

If the arriving inspector can establish that he and others were involved in a search justified by the initial entry to fight the fire, but were hindered by circumstances at the scene from completing that investigation, the entry could be considered a "continuation" of an earlier justified search.\textsuperscript{187} \textit{Clifford}'s plurality judgment indicates the "continuation" rationale will not be readily expanded.

A third possible way to justify this entry in the future is by notification to the owners that the inspection would occur. Five justices would then consider such a post-fire inspection reasonable and thus excepted from the warrant requirement. Currently, \textit{Tyler} says a post-fire search, separated from the primary exigency, requires an administrative warrant.\textsuperscript{188}

\textbf{F. Can a Theory that the Fire Damaged Building Is Abandoned Justify a Warrantless Search?}

Generally, no. People retain an expectation of privacy in property, even though damaged by fire.\textsuperscript{189} The Court in \textit{Clifford} noted,

\textsuperscript{185} LaFave points out the interesting situation occasioned by the accumulation of evidence of arson. If the cause of the fire is discovered and suspected to be arson, but not enough evidence is collected to meet probable cause, the investigators may not be able to return. On the other hand, if too much is seized, it might be excluded. See 3 \textit{LaFave}, supra note 17 at 270-75. LaFave notes that the \textit{Tyler} court did not exclude evidence seized even though evidence of arson was seized earlier. \textit{Id.} at 272.

\textsuperscript{186} \textit{Clifford}, 464 U.S. at 293; \textit{Tyler}, 436 U.S. at 511 (entries occurring after Jan. 22 were clearly detached from initial exigency, and therefore subject to warrant requirement).

\textsuperscript{187} \textit{Tyler}, 436 U.S. at 511.

\textsuperscript{188} \textit{Id.} at 508.

\textsuperscript{189} \textit{Id.} at 505.
however, that fires may be so devastating that no reasonable privacy interests remain in the ash and ruins, regardless of the owners' subjective expectations.190

G. If a Private Individual Seizes Evidence in a Fire Damaged Residence, Is It Admissible in Court?

Situations like this commonly occur when the insurance company sends out an arson investigator. The fourth amendment applies only to governmental action; therefore such evidence is admissible in both civil and criminal trials. One caveat here: if the individual is acting in concert with government officials or under color of state law, the evidence will be excluded.191

VIII. CONCLUSION

In granting certiorari to hear Michigan v. Clifford, the United States Supreme Court responded to an apparent need to clarify doubts as to the application of various principles promulgated in Michigan v. Tyler. While the plurality decision has very little precedential value, the Court's analysis and reasoning is an immense aid to understanding exactly what factors the Court looks at in deciding whether a post-fire search falls under the warrant requirement. In light of the slight difference between the opinions of Justice Stevens and the four dissenters, a case may be envisioned in which a fire scene exception to the warrant clause would result. This would have tremendous ramifications as another step in loosening the power of the exclusionary rule.

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AN OVERVIEW OF THE COMPETENCY OF CHILD TESTIMONY

The question of whether a child is competent to testify as a witness arises in many and varied contexts. The child may have witnessed a criminal act, be the subject of a civil action involving custody, be involved as a plaintiff or witness in a tort action, or be the victim of a crime. Courts and legislatures have long pondered how to deal with the competency of children to testify. Recent publicity in popular media has focused on the extent of child abuse and child molestation. Additionally, highly publicized cases involving dramatic incidents of such abuse of children have triggered increased interest and concern in the subject.

What may appear on its face to be a relatively simplistic issue is, upon further examination, full of complexities. Does a child understand the importance of telling the truth? Is it necessary for a child to take an oath? Is a child likely to be easily swayed by leading questions and answer so as to please the adult authority figure regardless of the truthfulness of the reply? Should spontaneous out-of-court statements made by victims too young to testify be allowed? Is there, in fact, a specific age at which a child should be presumed to be too young to testify? Is the courtroom experience, confrontation with the accused, severity of cross-examination, and the whole judicial process too traumatizing an

1. In re Welfare of Chuesberg, 305 Minn. 543, 233 N.W.2d 887 (1975).
9. See Note, Evidence—Competency of Child Witness—Four Year Old Is Not Per Se Incompetent and Need Not Be Sworn By An Adult Oath, Nor Have Independent Recollection In Order To Be Adjudged Competent, 11 RUT. CAM. L.J. 339, 346 & n.43 (1980).
experience to subject a young child? On the other hand, is the defendant denied his constitutional right of confrontation if a child is protected from testifying or if hearsay statements are admitted into evidence? Is the jury apt to be overly sympathetic and place too much credence on the testimony of a young child it feels is an innocent victim, regardless of the strength of the defendant's case?

This comment will examine how the competency of child testimony has been dealt with historically and will discuss more current treatments by courts and legislatures, specifically in cases in which the child is the victim. It will look at how many of the above questions have been handled, examine some innovative approaches suggested by commentators on the subject, and suggest a potential solution combining features courts and legislatures have already used with some of the more innovative ideas that have been advanced. Further, it will suggest how such an approach can solve the constitutional problems involved.

I. HISTORICAL BACKGROUND

Rules under early canon law in England excluded as a competent witness anyone who had not yet reached puberty. In an early case, Rex v. Travers, the court refused to admit testimony of a seven-year-old rape victim, saying, "the reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish betwixt right and wrong: no person has ever been admitted as a witness under the age of nine years, and very seldom under ten." A later English case, Rex v. Braiser, laid the foundation for several premises regarding child testimony: the oath requirement, introduction of hearsay when a child could not testify, and the lack of a restrictive age requirement. In this case, a child of under seven was allegedly raped, and the defen-
The defendant was convicted by the trial court. The child was considered incompetent to testify, but the trial court allowed hearsay statements by the child's mother and a friend. The defendant was pardoned on appeal because of the admission of the hearsay testimony. However, the court did hold there was no specific age at which a child, upon taking an oath, could be admitted as a witness. The result was, as summarized by Blackstone:

"[I]t is now settled ... that no hearsay evidence can be given of the declaration of a child who hath not capacity to be sworn, nor can such child be examined in court without oath; and that there is no determinate age at which the oath of a child ought either to be admitted or rejected."

Previously, other courts had held a child "could be heard without an oath to give the court information" and that hearsay evidence of what the child had told others could be admitted. The idea of instructing a child prior to trial on the nature of the oath also had been advanced.

England changed its position following the enactment of the Children and Young Persons Act to allow the testimony, though unsworn, of a child of tender years "[I]f, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth." The Act, however, requires such evidence to be corroborated by additional material evidence and also makes willful false testimony a punishable offense. The evidence of an unsworn child may even be used to corroborate the evidence given by another child who does testify under oath.

18. Id.
19. Id.
20. Id. at 203.
21. Id.
22. 4 W. BLACKSTONE, COMMENTARIES *214.
23. 1 Hal. P.C. 634.
24. 4 W. BLACKSTONE, supra note 22.
25. Chitty, Bac. Abr. Evid. a Leach, 430 n., "When the child does not sufficiently understand the nature and obligation of an oath the judge will put off the trial, for the child to be instructed in the meantime."
26. YOUNG PEOPLE'S ACT, 1933, 23 Geo. 5, c. 12 § 38.
27. Id.
28. Id.
29. D.P.P. v. Hester [1973] A.C. 296; [1972] 3 All. E.R. 1056; [1972] 3 W.L.R. 910 (H.C.) (Hester was accused of indecent assault of a twelve-year-old girl. The victim testified under oath and the jury was instructed that the unsworn testimony of her nine-year-old sister
In the United States, the Supreme Court held in an early case, *Wheeler v. United States*,30 that a child's capacity, intelligence, appreciation of the difference between truth and falsehood and the duty to tell the truth were matters to be determined by the trial judge and that there was no precise age in the determination of competency.31 A specific oath was not made a requirement, nor was the English rule of corroboration of unsworn testimony adopted. An earlier Kentucky case, *White v. Commonwealth*,32 took the even broader view that the true test of competency was intelligence, and that "[A] child may be ignorant of God, and the evil of lying, and of the punishment prescribed therefore ... and yet have sufficient intelligence to truthfully narrate facts to which its attention is directed."33 However, the *Wheeler* requirement of knowledge of the difference between right and wrong and the rejection of a specific age as part of the criteria for competency34 have been reiterated by leading commentators on evidence.35 The Federal Rules of Evidence also do not require a specific age as a determining factor in establishing competency to testify,36 though some oath or affirmation is required of every witness.37

II. CURRENT TREATMENT OF AGE AND OATH REQUIREMENTS

Although age alone has become less of a factor in determining competency to testify, the statutes of several states include language fixing a set age, usually ten, under which children may not testify if they "appear incapable of receiving just impressions of the facts respecting which they are to testify, or of relating them truly."38 However, determining competency is left to the

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30. 159 U.S. 523 (1895).
31. Id. at 524.
32. 96 Ky. 180, 28 S.W. 340 (1894).
33. Id. at 341.
34. See supra notes 30 and 31 and accompanying text.
35. See, e.g., 2 WIGMORE ON EVIDENCE §§ 505-06 (Chadbourn rev. 1979) and J. McKELVEY, HANDBOOK ON THE LAW OF EVIDENCE § 288 (5th ed. 1944).
36. FED. R. EVID. 601.
37. FED. R. EVID. 603.
38. ARIZ. REV. STAT. ANN. § 12-2202 (1956); see also COLO. REV. STAT. § 13-90-106 (1973);
discretion of the court, and children under ten are often found competent and their testimony allowed. 39

Statutes of three states, Colorado, Minnesota, and Missouri, all of which have wording limiting the testimony of children under ten years of age, 40 allow exceptions for victims of child abuse. 41 Missouri’s more liberal approach provides that, unless mentally incapacitated, “[A] child under the age of ten who is alleged to be a victim of [a sexual offense] shall be allowed to testify without qualification in any judicial proceeding involving such alleged offense. The trier of fact shall be permitted to determine the weight and credibility to be given the testimony.” 42 Colorado and Minnesota limit exceptions to the general restrictions of their statutes to victims of sexual offenses (in Minnesota, only intrafamilial sexual abuse) to when a child “is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined.” 43

Apart from any statutory requirement, the courts use various criteria to determine whether a child is competent to testify, most of which center around the child’s intelligence, ability to distinguish right from wrong, and understanding of the meaning of an oath. 44 If, after voir dire examination, the court concludes the child is not intelligent enough to relate the facts or does not know the difference between truth and a lie, the child will not be permitted


39. See, e.g., State v. Parton, 487 S.W.2d 523 (Mo. 1972) (seven-year-old rape victim who was six at the time of the occurrence was permitted to testify); Burnam v. Chicago Great Western Railroad Co., 340 Mo. 25, 100 S.W.2d 858 (1936) (a personal injury case in which a child eight years-old was found competent to testify about events that occurred when he was five); State v. Lee, 9 Ohio App. 3d 282, 459 N.E.2d 910 (1983) (permitting a five-year-old rape victim to testify was not an abuse of discretion even though she could not define “oath” and could not remember who told her about God); State v. Ross, 92 Idaho 709, 449 P.2d 369 (1968) (five-and six-year-old girls were found competent to testify in a case involving lewd acts on minors).

40. See supra note 38 and accompanying text.


Some courts have solved the problem of rejecting a child witness who lacks understanding of an oath by deferring the child's testimony until after the child has been instructed concerning the nature of an oath. This same approach was suggested in early England by Chitty, and by a more recent commentator on evidence, F. Wharton. Courts have also refused to overturn convictions based in part on the testimony of a young child when the defendant failed to object to the witness' competency to testify.

If the trial court has decided, upon a reasonable examination of a child, that the child is competent to testify, its decision is unlikely to be reversed on appeal. However, admission of such testimony has been held an abuse of discretion where the trial court's examination of the child was superficial and not sufficient to determine if the child was really competent to testify.

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45. See, e.g., State v. Dykes, 440 So.2d 93 (La. 1983) (The testimony of a three-year-old who said he knew the difference between the truth and a lie, but did not explain the difference was not permitted); Jennings v. Ebie, Ct. App. O. 143 N.E.2d 744 (1957) (six-year-old plaintiff in negligence action was not permitted to testify when examination by the court showed he was in first grade a second time and did not know about God), and State v. Ranger, 149 Me. 52, 98 A.2d 652 (1953) (Testimony of ten-year-old and eight-year-old witnesses should not have been admitted since each had stated in the preliminary examination that she did not know the difference between truth and falsehood.)

46. See, e.g., Harrold v. Schluep, 264 So. 2d 431, 435 (Fla. Dist. Ct. App. 1972) "Additionally, the child must appreciate the nature and obligation of the oath before he is allowed to testify. If he does not understand the nature of the oath, it is up to the trial court's discretion to instruct him regarding the nature and obligations of the oath;" and Commonwealth v. Tatisos, 283 Mass. 322, 130 N.E. 495, 498 (1921), "If a child does not have the necessary understanding to comprehend the nature of the obligation imposed by the oath of a witness, he may be instructed in open court, or his testimony deferred until such instruction has been given." (In this case, the child of six was examined by the judge on two different days and instructed by a priest in the interval).

47. See supra, Chitty, note 25.


49. State v. Olson, 113 Wis. 2d 249, 335 N.W.2d 433 (Wis. Ct. App. 1983).

50. See, e.g., Hendricks v. Commonwealth 550 S.W.2d 551 (Ky. 1977) (the trial court judge did not abuse his discretion in allowing the testimony of children aged thirteen, eight and seven, after they had demonstrated their ability to observe, recollect and narrate facts and recognized their moral obligation to speak the truth); Capps v. Commonwealth, 560 S.W.2d 559 (Ky. 1977) (trial court did not err in allowing a five and a half year-old child victim to testify after questioning her in order to determine her competency to testify); and State v. Young, 477 S.W.2d 114 (Mo. 1972) (no abuse of discretion to allow an eleven-year-old rape victim to testify even though she appeared to be of less than normal intelligence when she testified at trial she knew what it meant to tell the truth).

51. Whitehead v. Stith, 268 Ky. 703, 105 S.W.2d 834 (1937); Moore v. Commonwealth, 384 S.W.2d 498 (Ky. 1964).
III. USE OF HEARSAY EXCEPTIONS TO ALLOW CHILD TESTIMONY

When a child is found incompetent or for some reason cannot testify, courts have often used exceptions to the hearsay rule to allow otherwise impermissible testimony of out-of-court statements relating to the incident involving the child. There is a special necessity for allowing such out-of-court statements as evidence in child abuse cases; the child victim is usually the only witness, and often there is no physical evidence for the court to rely upon.

A hearsay exception frequently used is the "excited utterance" exception. The Federal Rules of Evidence define an excited utterance as, "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." An inherent factor of this hearsay exception is that the startled utterance must have been part of the res gestae.

A commentator has queried, "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Courts have arrived at varying results as to what falls into this exception and just how long a lapse is acceptable between the occurrence of the incident and the excited utterance. Louisiana, for example, has permitted the excited utterance exception in all sexual assault cases, even though considerable time has passed since the incident. Other jurisdictions

53. Id. at 1749-51.
54. FED. R. EVID. 803(2).
55. Id.
56. BLACK'S LAW DICTIONARY (5th ed.) defines res gestae as used in FED. R. EVID. (803)(2) as "[a] spontaneous declaration made by a person immediately after an event and before the mind has an opportunity to conjure a falsehood."
58. See, e.g., State v. Hatcher, 372 So. 2d 1024 (La. 1979) (an original hearing). (A fourteen-year-old girl was photographed nude, raped, and forced to perform fellatio upon the defendant with the threat of physical violence. She then rode home on a bus, bathed and lay down. She failed to answer her mother's questions as to why she was so upset, but later went to her sister's home and told her about the incident. The court held the description of the sexual offenses of the young victim to her sister was spontaneous and made under immediate pressure of the occurrence). See also State v. Pace, 301 So. 2d 323 (La. 1974) (A mother's testimony of the statements of a six-year-old attempted rape victim were allowed. The court stated, "[I]n prosecutions for sex offenses, the overwhelming weight of author-
also have given the exception broad interpretation concerning just what constitutes an excited utterance and how much time can lapse before the utterance is no longer part of the res gestae. Michigan allows out of court statements of young victims no matter how much time has passed since the occurrence; however, the delay must be explicable by some other circumstance. An additional criterion of the Michigan rule is that the hearsay statement can be used only to support the in-court statements of the child. Not all courts allow such leniency, and those which do not will accept such hearsay statements only when the time lapse between the act and the utterance is brief.

Another hearsay rule which has been used to admit statements made by a child who, had he been available, may not have been considered competent to testify is the “dying declaration” exception. The supposed rationale for this exception is that no one “[w]ho is immediately going into the presence of his Maker, will do so with a lie on his lips.” However, it is more likely that this common law exception resulted from the need for evidence in homicide cases. In Boone v. State, the defendant’s four-year-old son died of peritonitis resulting from a blow to the abdomen which had ruptured his intestine. There was testimony by the assistant state medical examiner that the injuries and bruises he found on the child indicated “battered child syndrome.” The grandfather and
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grandmother testified that shortly before the child's death he had said to each of them, "Steve [his mother's boyfriend] beat me last night," and about thirty minutes later the child said to his mother, "Mama, am I going to die?" to which she answered that he was not.69 The trial court suppressed the evidence on the basis the child did not know he was going to die because no one had told him he was.70 The Arkansas Supreme Court affirmed the conviction of second-degree murder by the court of appeals, concluding the statement proffered as a dying declaration was erroneously suppressed.71 The court found it significant that the child made his statement before his mother told him he was not going to die, and thought the child's statement, combined with the fact he had vomited blood, strongly suggested the child sensed his impending death.72

In United States v. Nick,73 the declarant, a three-year-old boy, did not testify, and there was a question whether hearsay statements alone could be used without violating the defendant's confrontation rights.74 More than one of the hearsay exceptions was involved. The court found the child's statements to his mother were admissible under the excited utterance exception.75 Further, the court stated:

[The child's declarations were corroborated by the doctor's examination of the child and the child's clothing. The doctor's quotations of the child were hearsay, but they were admissible under Federal Rules of Evidence Rule 803(4), admitting hearsay statements 'made for the purpose of medical diagnosis or treating and describing . . . the inception or general character of the cause or external source [of pain or symptom] insofar as reasonably pertinent to diagnose treatment.'76

In addressing the confrontation issue, the court's language almost paraphrased yet another hearsay exception, Federal Rules of Evidence Rule 803(24),77 stating:

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69. Id.
70. Id.
71. Id.
72. Id.
73. 604 F.2d 1199 (9th Cir. 1979).
74. Id. at 1203.
75. See supra note 5 and accompanying text.
76. 604 F.2d at 1202.
77. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstances guarantees of trustworthiness, if the court determines that (a)
The question in each case must be whether a particular hearsay declaration, otherwise inadmissible, has such great probative value as evidence of a material fact and such a high degree of trustworthiness under all of the circumstances that its reception outweighs any risk to a defendant that unreliable evidence may be received against him, the deficiencies of which he cannot adequately test because he cannot cross examine the declarant. 78

IV. EFFORTS OF COURTS AND LEGISLATURES TO PROTECT CHILD VICTIMS

Recent legislation in some states has attempted to deal with the problems of young victims, trying to balance the need to protect the child from the traumatizing effect of the judicial process 79 with the rights of the accused. 80 Alaska, for example, permits videotaping the testimony of victims of sexual offenses under the age of sixteen. 81 The trial judge determines who, other than the prosecuting attorney, the defendant, and the defendant’s attorney, may attend the videotaping proceeding. 82 The videotaped evidence is then admissible in evidence in the criminal trial of the defendant. 83 Arizona permits questioning of a minor witness to be videotaped in the judge’s chambers in the presence of the defendant, defendant’s counsel, the prosecuting attorney, or the plaintiff and the plaintiff’s attorney. 84 Videotaped testimony is permitted by similar statutes in several other states. 85 Minnesota courts

the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement. . . .

78. 604 F.2d at 1203. For an unusual use of the “catchall” hearsay exception to permit a child’s out of court statements, see State v. Posten, 302 N.W.2d 638 (Minn. 1981) (the court permitted statements implicating the defendant that the six-year-old child abuse victim made while she was dreaming, on the basis the statements were trustworthy and were not made by a conniving person, but a child who had suffered).

79. See supra note 11.

80. U.S. Const. amend. VI.

81. ALASKA STAT. § 12.45.047 (Supp. 1982).

82. Id.

83. Id.

84. ARIZ. REV. STAT. ANN. § 12-2312 (added by Laws Chap. 89 § 1, 1978).

85. See, e.g., ARK. STAT. ANN. § 43-2036 (Supp. 1983); COLO. REV. STAT. § 18-3-411 (Supp. 1983); FLA. STAT. ANN. § 91.18.17 (West Supp. Oct. 1984); IOWA CODE ANN. § 232.96 (West 1985); KY. REV. STAT. ANN. § 421.350 (Bobbs-Merrill 1984); LA. REV. STAT. ANN. § 4440.2-5 (West Supp. 1984); ME. REV. STAT. ANN. tit. 15 § 1205 (Supp. 1984) (Maine’s statute also
have also allowed videotaping of interviews with victims of child abuse, although this writer could find no express statutory provisions covering the subject. Kentucky's statute permitting videotaped testimony of child victims was recently ruled unconstitutional by the Fayette County Circuit Court because it denied the defendant's constitutional right of confrontation. The court questioned whether "viewing a witness through a one-way mirror or video monitor is a constitutionally acceptable substitute for face-to-face confrontation" and concluded it was not.

Bills permitting victims of child abuse to testify on videotape have been introduced in Ohio, both in the Senate Judiciary Committee and the House Children and Youth Committee. Hearings are being conducted as of this writing.

Courts also have attempted to assist young child-abuse victims in testifying about their experiences by permitting the use of anatomically correct dolls to illustrate what happened to them. In an Ohio case, State v. Lee, the defendant objected to this as an "improper courtroom demonstration." The appeals court, however, found the trial court's finding was not an abuse of discretion because "the witness [a five-year-old rape victim] was unable to relate to the jury the events using the appropriate sexual or physiological terminology. The dolls were used to clarify the witness' explanation and to insure a common understanding between the witness and jury as to the events which took place."
The success child-abuse teams and courts have had in allowing sexually-abused children who are unable to verbalize their experiences to show what occurred by using dolls has been highly publicized. Pennsylvania legislators recently passed a provision expressly permitting young victims to use anatomically correct dolls while testifying in court.

V. CAN A COMPETENT CHILD WITNESS REFUSE TO TESTIFY?

Considering the efforts courts and legislatures have made and are making to protect child victims, a curious anomaly occurs when the child victim, although deemed competent to testify, refuses to do so. The question in these cases is not whether the child is competent to testify, but rather, must the child testify. Efforts to protect the child from further physical harm and to punish the offender may be hampered by the child's reluctance to testify; a reluctance generated not only by the trauma of testifying that would be experienced in confronting the accused, but by the additional pressure, possibly exerted by his or her family, not to break up the family unit.

The increased emphasis on protection of child-abuse victims has led many states to enact statutes requiring citizens in various professions, or in some states any citizen, to report suspected child abuse. Once a child is a victim of abuse or molestation, the report has been made, and the accused has been indicted, the child, when competent to testify, may not have the option of refusing to do so. In a Maine case, State v. DeLong, a fifteen-year-old girl was...


99a. Id.
the alleged victim of sexual abuse by her stepfather. Although she testified before the grand jury, she refused to testify at trial. She claimed she did not want to testify because she loved her stepfather and had forgiven him. She also presented a letter from her physician recommending she be excused from testifying. The trial court found her in contempt of court and sentenced her to seven days in county jail. The Supreme Judicial Court of Maine affirmed the decision, finding there was no abuse of discretion on the part of the trial court.

A similar case occurred in California in which a twelve-year-old girl, under circumstances much like those in DeLong, refused to testify against her stepfather and was charged with contempt of court and confined. In this case, the charges against the stepfather were finally dismissed when the child steadfastly refused to testify.

The irony of such a turn of events is expressed in Judge Nichol’s dissent in DeLong: “I find it anomalous indeed that in this case of alleged sexual misconduct it is the young victim of that misconduct who now goes off to county jail.”

VI. SUGGESTED APPROACHES FOR DEALING WITH CHILD ABUSE VICTIMS

One commentator, Libai, has proposed that child victims be protected from the trauma of the courtroom setting, and particularly from having to see the accused while testifying, by creating a “Child Courtroom.” Libai’s “Child Courtroom” would be arranged to permit the child to see the judge, the prosecutor, the attorney for the defense, and a special child examiner, but not the defendant.

100. Id. at 878.
101. Id.
102. Id.
103. Id.
104. Id. at 879.
105. Id. at 883.
106. An unreported case in Solano County, California, Municipal Court, described in 123 TIME 35 (Jan. 23, 1984).
107. Id.
108. 456 A.2d 877, 886 (Me. 1983) (Nichols, J., dissenting). For another case in which a molested child was held in contempt for refusing to testify against the alleged perpetrator, see In Re Balucan, 44 Hawaii 271 (1960).
110. Id. at 1017.
The accused, the jury, and any spectators would watch the proceedings via a one-way glass. The defendant would be able to communicate with his counsel by the use of a microphone and earphones. This way, the defendant's right to trial would not be denied and the jury could watch the reactions of the accused while the child testified. What this arrangement would not allow is for the jury to see the child's demeanor while making accusations in the presence of the person the statements are about, a defect some courts would not permit, even with the other safeguards provided to assure the protection of the defendant's rights.

Libai also proposes admitting into evidence a child victim's videotaped testimony taken at a special hearing. As an answer to the question of confrontation, it is posed that the videotaped testimony would meet all requirements to make it admissible as an exception to the hearsay rule (i.e., the trial proceedings would be between the same parties, the same issues would be involved, and cross-examination would have taken place), with the exception of the requirement that the witness be unavailable to testify.

The solution proposed for this defect is that state legislatures declare by statute that child victims be made "unavailable witnesses" for purposes of trial unless the judge rules otherwise.

Another approach suggested, specifically to protect child victims of incest from the traumatizing experience of giving in court testimony, is to limit contact with the child to one expert trained in interviewing child victims. The defense and prosecution would be permitted to watch videotaped sessions between the child and the expert and to pose additional questions for the expert to pursue during the next session. Although the questioning theoretically would continue until both parties were satisfied, the expert would have the option of ending the interrogation if convinced the child had told everything he or she could remember or would be

111. Id.
112. Id.
113. Id.
114. See infra notes 138-39 and accompanying text.
115. Libai, supra note 109, at 1028-32.
116. Id. at 1032.
117. Id.
119. Id. at 140.
COMPETENCY OF CHILD TESTIMONY

harm by further examination. The defendant's right to confrontation would not be denied because the videotaped testimony of the victim would meet the Supreme Court's requirement that for prior statements of unavailable witness to be admitted, they must bear an "indicia of reliability." 

Another commentator has taken the unavailability reasoning of Libai even further. This theory analogizes a "psychological unavailability" privilege to other privileges (e.g., attorney-client, doctor-patient, priest-penitent) which excuse certain witnesses from testifying "because there is a stronger public policy interest in protecting these relationships than in receiving the evidence" and concludes that "there should be a stronger societal interest in protecting the mental health of an innocent child witness than in preserving a mere hope that exculpatory evidence will emerge. ..." Thus, it is argued, such legislation would represent a legitimate state interest and pass constitutional muster.

In an analogous situation, the Supreme Court has ruled the States have a compelling state interest in protecting children. The Court in Ginsberg v. New York upheld a New York law prohibiting the knowing sale to minors under seventeen of any picture depicting nudity which predominantly appeals to the prurient interest of minors and is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable to minors. Although a magazine sold to a sixteen-year-old boy was not obscene under the tests established by the Supreme Court,

120. Id. at 140, n.44 and accompanying text.
121. Id. at 150. The author summarizes the Court's analysis of "indicia of reliability" as allowing admissibility if the statement "(1) is not inherently deceptive, (2) raises no problems of false identification or faulty recollection, (3) was made in circumstances not suggesting a motive to lie, and (4) was given under oath (5) in a judicial hearing which provided a reliable record (6) at which the accused was represented by counsel, and (7) at which the accused had an adequate opportunity to question the witness through cross-examination or of its equivalent in form and purpose." Id. citing Ohio v. Roberts, 448 U.S. 56, 65-66, 70-71 (1980); Maneus v. Stubbs, 406 U.S. 204, 215-16; Dutton v. Evans, 400 U.S. 74, 88-89 (1970).
123. Id. at 701.
124. Id. at 704.
125. Id.
126. Id. at 704-05.
127a. Id.
128. Id. at 636-37.
the Court held that a state can, because of its exigent interest in preventing distribution to children of objectionable material, exercise its power to protect the health, safety, welfare, and morals of its community by barring the distribution to children of certain books, even though they may be suitable for adults. Here, although the case dealt with a constitutional right, the Court found the state's interest in protecting its children prevailed.

VII. DOES PROTECTION OF CHILD VICTIMS VIOLATE A DEFENDANT'S RIGHT TO CONFRONT HIS ACCUSERS?

The main opposition to allowing videotaped testimony of children in child abuse or molestation cases is that it denies the defendant's sixth amendment right to confront his accuser. This right was reaffirmed in *Pointer v. Texas*, which held the confrontation clause to be a fundamental right to which the states are subject to by reason of the fourteenth amendment. A federal court in *United States v. Benfield*, found, "A videotaped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally in-"

The court did, however, say the "decision should not be regarded as prohibiting the development of electronic video technology in litigation." In a California case, *Herbert v. Superior Court of California*, the five-year-old victim was reluctant or unable to testify at a preliminary examination and consequently was positioned in the courtroom so the defendant could hear her testimony and she could be seen by the judge and attorneys. The court held that the arrangement violated the defendant's right of confrontation saying: "The historical concept of the right of confrontation has included the right to see one's accusers face-to-face, thereby giving the fact-finder the opportunity of weighing the de-

129. *Id.* at 639.
130. *Id.* at 636.
131. *Id.* at 640.
132. U.S. CONST. amend. VI.
133. 380 U.S. 400 (1965).
134. *Id.* at 403-05.
135. 593 F.2d 815 (8th Cir. 1979).
136. *Id.* at 821.
137. *Id.*
meanor of the accused [sic] when forced to make his or her accusa-
tion before the one person who knows if the witness is truthful." 139

However, in Ohio v. Roberts, 140 the Supreme Court stated that it "has recognized that competing interests, if 'closely examined'
. . . may warrant dispensing with confrontation." 141 Additionally,
the Court said that to give the confrontation clause an unqualified
scope, "would abrogate virtually every hearsay exception . . ." 142

Earlier, in Douglas v. Alabama, 143 the Court observed that, "[O]ur
cases construing the [confrontation] clause hold that a primary in-
terest secured by it is the right of cross-examination; an adequate
opportunity for cross-examination may satisfy the clause even in
the absence of physical confrontation." 144

One lower state court which has recently dealt directly with the
question of whether admission of videotaped testimony is a viola-
tion of the defendant's sixth amendment right to confrontation has
concluded "the use of videotaped testimony of the child victim . . .
will be permitted because: (a) it will not unduly inhibit the defen-
dant's right of confrontation . . . (b) the testimony of a child victim
in a child sexual abuse case may be presented by videotape on
an exception to the confrontation requirement." 145 Whether this
holding will be overruled on appeal is uncertain.

CONCLUSION

The reasons for questioning the competency of children to testify
are valid. A very young child may not be able to relate events
with reasonable accuracy. Moreover, even if a child knows the mean-
ing of telling the truth and promises to answer questions truth-
fully, to a young impressionable child truth may be blurred with
fantasy. Child victims may find it impossible to articulate the details

139. 172 Cal. Rptr. at 855, 117 Cal. App. 3d at 671.
140. 448 U.S. 56 (1980).
141. Id. at 64. See also Chambers v. Mississippi, 410 U.S. 284, 295 (1972) (The Court in
Roberts held that it was constitutionally permissible to introduce evidence at trial of the
preliminary hearing testimony of a witness who did not appear where there had been ques-
tioning at the hearing equivalent to cross-examination and the witness was unavailable
to appear).
142. 448 U.S. 56, 63.
144. Id. at 418.
145. New Jersey v. Sheppard, Superior Court of New Jersey, Criminal Law Division,
Burlington County, August 29, 1984. (This unreported case is on file with the NORTHERN
KENTUCKY LAW REVIEW).
of the acts the accused committed because they are unfamiliar with the terminology or are embarrassed to talk about things which they have learned are "bad." They may feel guilty. They may fear repercussions if they tell, especially if the molester has threatened them. Or, if the offense was intrafamilial, they may feel pressure to prevent the break-up of the family.

Additionally, children want to please adults; this contributes to their being easy targets for child molesters. Similarly, it also makes them susceptible to suggestion by well-meaning child-abuse teams and prosecutors. The very nature of the offense may make those trying to bring a child molester or abuser to justice overly zealous and unaware they may be influencing the child to agree that events occurred which, in fact, did not.

The fact remains, however, that child abuse and molestation are widespread and their affects are devastating to their young victims. The problems are varied, and it is difficult to imagine a perfect answer to resolve all the many-faceted questions involved. The courts' difficult task is to discover the truth without subjecting the child to further trauma or the accused to any infringement of his constitutional rights.

The solution that seems to be the best for the child, and perhaps for the defendant, combines many of the concepts discussed in this comment. First, the child's version of what happened should be videotaped as soon as possible after the event is discovered. The taping should take place in a comfortable, non-threatening atmosphere with a trained expert conducting the questioning. In order to make explanation easier for the child and eliminate the difficulty of describing the offense in adult terminology, the child should be allowed to use dolls to point out what happened. The videotape should be permitted as evidence at the trial without further participation by the child.

The advantages would be numerous. It is more likely the child would relate the occurrence accurately. The fact finder could observe the demeanor of the child and, more importantly, be able to decide if the child was being unduly led or influenced by the examiner. It would eliminate the need for the child to participate further in the judicial process. The child's competency to testify would not need to be an issue. If necessary, the judge could view the tape prior to trial and decide if the videotaped testimony reflected enough competency in the child's testimony to be admitted into evidence. The examiner would ask the type of questions
typically asked by the judge to determine competency so there would be no need for the judge to interview the child personally. There would be less time or opportunity for the child to be influenced by others to tell a different story, however inadvertently suggested.

The advantages to the defendant would be the greater possibility of accuracy since the child would be interviewed as soon as possible after the incident occurred and the events would be fresh in the child's mind, and lack of influence since there would be no intervening time for the child to be coached or subjected to suggestion; any influence exerted by the interviewer would be readily apparent through viewing the videotape. Another benefit would be the absence of the child in the courtroom; the appeal of a young child on the witness stand cannot help but arouse the sympathy of the jury. Moreover, cross-examination, though it may bring out inconsistencies in the child's testimony, may also work against the defendant if the defendant's counsel is viewed by the jury as being overly harsh to an innocent, and allegedly victimized child.

It seems inevitable that the United States Supreme Court ultimately will need to address the issue of acceptability of videotaped testimony of child victims. As more states enact legislation permitting videotaped testimony, the Court will be called upon to decide the constitutionality of such statutes. The Court will have to balance the fundamental right of the defendant to confront his accuser with the interest of the States in protecting children. Considering the exceptions to the confrontation clause the Court has allowed in the past and its acceptance of state laws conflicting with constitutional rights when the state's interest involved the protection of children, there is a good possibility the Court will find the States have a compelling interest which will override, and not substantially impinge upon, the defendant's constitutional confrontation rights.

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