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EDITOR'S PREFACE

Since this is my last issue, it seems fitting that I thank those who helped the Law Review accomplish what it set out to do this year. Of course, a long thank-you list might prompt the reader to turn the page. That is why my deepest thanks is not to a person, but for an ideal that many people at Chase College of Law have chosen to foster—editorial independence.

Editorial independence is a vague concept, but one that is necessary for the functioning of a good law journal. It begins with the principle that no author will be denied publication because someone simply disagrees with his or her political outlook or political ties. What counts for publication are timeliness, originality, documentation, and readability. For example, because I am a newspaperman by training, I philosophically disagree with Gregory Moore's conclusions about fact-opinion libel law in this issue. Yet, he has met our criteria for publication. Editorial independence also has meant that the Chase administration has not dictated to our staff what can or cannot be printed. I wish to thank Dean Henry S. Stephens and Professor David Elder, the faculty advisor, for allowing us to operate free from undue restraint during the past year and for fostering the idea of editorial independence at Chase.

This year's staff can be proud of a long list of accomplishments. It has caught up on publication schedules for the first time, replaced all computer equipment, brought computerized legal research into the law review office, improved billing and circulation, and planned all of next year's issues. To each member of the staff and editorial board—and especially to my friends James Frooman and Sheila Kelley—I thank you for "just doing it" when it had to be done.

All these accomplishments would not have been possible without extensive help on finances and resources whenever we needed it. I wish to thank Dean Stephens and his assistants, Roberta Brinkley and Millie Wisneski, for providing us the resources, money, and support to accomplish these goals. Finally, I extended my heartfelt gratitude to Professor Elder, who never hesitated to support any reasoned decision that the staff made during the year—and whose door was always open.

—R. Stephen Burke
Editor-in-Chief
ARTICLES

HOSPITAL MEDICAL STAFF PRIVILEGE ISSUES:
“BROTHER’S KEEPER” REVISITED

William M. Copeland* and Phyllis E. Brown**

About 12 years ago, this commentator wrote an article1 analyzing the responsibility of a hospital governing body for the quality of care provided by medical staff members and the privileges of the hospital’s medical practitioners. Since that time, the climate in which hospitals and medical practitioners must function has changed dramatically. The purpose of this paper is to revisit the relationship between a hospital governing body and its medical staff with regard to the quality of care and professional review actions.2

I. CORPORATE RESPONSIBILITY DOCTRINE

The notion that a hospital governing board bears some responsibility for the quality of care practiced within its walls was first adopted in 1965 by the Illinois Supreme Court in Darling v. Charleston Community Memorial Hospital.3 In Darling, the court enunciated a “corporate responsibility doctrine.” That doctrine

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1. Copeland, Hospital Responsibility for Basic Care Provided by Medical Staff Members: “Am I My Brother’s Keeper?” 5 N. Ky. L. Rev. 27 (1978).

2. The authors will not discuss the federal Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101, 11101 note, 11111-11115, 11131-11137, 11151, and 11152 (1989), because its impact has not yet been felt on professional review cases.

holds that a hospital has a duty to provide adequate medical care, including nursing staff capable of recognizing the dangerous condition of a patient and of informing the attending physician of his condition. The corporate responsibility doctrine replaced a standard under which hospitals were immunized from responsibility for medical care on the theory that lay persons were incapable of judging the quality of care. Accordingly, boards of trustees of hospitals had little choice but to accept physicians' recommendations.

*Darling* holds a hospital responsible, in consultation with its medical staff, for establishing policies and procedures and monitoring the quality of medicine practiced to assure that physicians granted clinical privileges are competent. Corporate responsibility must be distinguished from vicarious responsibility: *Darling* does not hold that a hospital may be vicariously liable for the negligence of a member of its hospital staff, as an employer is responsible for the acts of its employees. Rather, *Darling* is limited to the concept that a hospital bears some responsibility for the quality of medicine practiced within it.

Courts in other jurisdictions have followed *Darling*. Application of the corporate responsibility doctrine undoubtedly expanded the liability of hospitals for the quality of medical care. At the same time, however, the doctrine expanded hospital authority to limit or completely bar a physician's practice at the hospital for incompetence, inexperience, and recklessness.

Corporate responsibility does not depend on any intentional or negligent action by the hospital's governing body:

8. See, e.g., Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967) (hospital has independent duty to ensure that patient is not injured through hospital's failure to supervise medical staff members); Joiner v. Mitchell County Hosp. Auth., 125 Ga. App. 1, 186 S.E.2d 307 (1971), aff'd, 229 Ga. 140, 189 S.E.2d 412 (1972) (when medical staff acted as hospital's agent delegated to screen new physicians, hospital was responsible for negligence in their selection).
I have reached the conclusion that the hospital is liable with great reluctance, because I am sure that the Sisters of Mercy have done everything within their power to run a proper institution. But they, like every hospital governing board, are corporately responsible for the conduct of their medical staff.... As for doctors on the Mercy staff, two thoughts keep going through my mind. The one is from Dr. Jones: "No one told me anything." The other is from Edmund Burke: "The only thing necessary for the triumph of evil is for good men to do nothing." 10

An Arizona appellate court carried the hospital’s responsibility even further. 11 The court held a hospital responsible for professional review of the qualifications of members of its medical departments:

[If the Department was negligent in not taking any action against [the surgeon] or recommending to the board of trustees that action be taken, then the hospital would also be negligent. 12

The review must be based upon qualifications that are reasonably related to the hospital’s operation and be fairly administered:

It is the board, not the court, which is charged with the responsibility of providing a staff of competent physicians. The board has chosen to rely on the advice of its medical staff, and the court may not surrogate for the staff in discharging this responsibility. 13

A hospital cannot adopt standards for staff membership or clinical privileges that are not "reasonably related to accepted measures of skill, education, and competence." 14 For example, an Ohio hospital had adopted a standard for podiatrists that required two years of post-graduate education. The prevailing post-graduate education for podiatrists throughout the nation was a one-year internship. The court concluded that the hospital’s standard was not reasonably related to accepted measures of skill, education, and competence. 15

12. 500 P.2d at 341.
15. Id. at 222, 465 N.E.2d at 64.
When there is no evidence of classwide discrimination, a hospital can evaluate the ethics, conduct, and degree of cooperation of each applicant for medical staff privileges. Absent any evidence of classwide discrimination:

[T]he Board of Trustees of a hospital has substantial discretion in adopting bylaws and standards applicable to all applicants for medical staff privileges, provided such criteria are reasonable and non-discriminatory ....

A hospital's standards for the granting of physicians' privileges should be reasonably related to the operation of the hospital and fairly administered:

[A] private hospital, regardless of the breadth of discretion that may be extended to it, cannot revoke the staff privileges of a physician in the absence of a sufficiently definite standard prescribing the conduct for which revocation is adjudged.

A hospital may adopt a standard for suspension or termination of staff privileges because of an inability to work in harmony with other hospital personnel, and it may revoke staff privileges on these grounds. Revocation of privileges may be based upon a disruptive activity of the physician and not on patient care considerations.

These results have been reached in other jurisdictions as well. The Washington Supreme Court ruled that the doctrine of corporate negligence imposes an independent duty owed directly by the hospital to the patient. The hospital must exercise reasonable care in selecting, retaining, and supervising the performance of its medical staff. The court distinguished a hospital's duty under corporate negligence from vicarious liability: The court found that increasing public reliance on hospitals favored a more active role of the hospital in the quality of care.

The Connecticut Supreme Court has carried the doctrine of corporate responsibility one step further. That court character-

17. Siegel, 35 Ohio App. 3d at 143-44, 520 N.E.2d at 257.
ized the medical staff bylaws as a contract between the hospital and its existing staff members that had to be followed. The court declined, however, to extend this holding to new applicants.\textsuperscript{20}

A finding against a hospital based upon its supervision of a physician requires that the plaintiff establish (1) that the hospital knew or should have known that the physician was not competent to provide certain care and (2) that the hospital's failure to supervise the physician caused injury to the plaintiff.\textsuperscript{21} The corporate negligence doctrine demands an alert and active governing body. That governing body, however, has wide discretion in its supervisory role as long as it exercises its discretion in a reasonable manner and under established standards that preclude arbitrary or capricious decisions.

\section*{II. ANTITRUST LIABILITY OF HOSPITALS}

In seeking to fulfill their corporate responsibility, hospitals have been attacked from another direction. As hospitals exercise their corporate responsibility and deny, suspend, and revoke physicians' privileges, those physicians are bringing actions against the hospitals and their medical staffs alleging conspiracy in restraint of trade in violation of the Sherman and Clayton Acts. Congress has stated that a partial rationale for providing immunity under the Health Care Quality Improvement Act of 1986 is that the Act's reporting requirements may cause the volume of such cases to increase.\textsuperscript{22}

Sherman Act liability requires the plaintiff to establish that a combination or conspiracy exists in restraint of trade,\textsuperscript{23} and that the defendant's conduct has a demonstrable effect upon interstate commerce.\textsuperscript{24} The most frequently asserted affirmative defense by

\begin{itemize}
\item 21. Tucson Medical Center, Inc. v. Misevch, 113 Ariz. 34, 36, 545 P.2d 958, 960 (1976).
\item 22. 1986 U.S. CODE CONG. & ADMIN. NEWS 6287, 6391. The Health Care Quality Improvement Act of 1986 requires anyone making a payment in settlement of a malpractice action — or any health care entity, professional medical association, or state medical board that takes an action that has an adverse impact on a physician's membership or privileges — to report that action to a "national clearing house," required by the Act and currently being established by the Department of Health and Human Services.
\end{itemize}
hospitals to these charges is immunity based upon state action. Actions performed by a state or private actions at state direction are generally immune from liability, even if such actions would constitute violations when performed by private individuals for private purposes.25

A. What Constitutes State Action

The most visible of the antitrust cases is Patrick v. Burget.26 In Patrick, the Supreme Court upheld a $1.9 million jury verdict against physicians participating in peer review that resulted in the dismissal of a staff physician. The facts of the case were particularly egregious: The Court of Appeals for the Ninth Circuit characterized the physicians' conduct as "shabby, unprincipled, and unprofessional." 27 Although Patrick focused on peer review, the Court's holding turned on the state action exemption to antitrust laws. The Supreme Court reversed the appellate court, which had found the physicians' actions immune from antitrust scrutiny because the State of Oregon supervised the peer review process.

The Supreme Court reaffirmed the proposition enunciated in Parker v. Brown, that the Sherman Act was not intended to restrain state action ornullify state control of its officers and agents.28 The Court also reaffirmed its two-pronged test to determine whether anti-competitive conduct of private parties is properly deemed state action. The two-pronged test requires: (1) the challenged restraint must be clearly articulated and affirmatively expressed as state policy; and (2) the anti-competitive conduct must be actively supervised by the state itself.29

In applying this test, the Supreme Court found that the state action exemption did not apply to hospital peer review activities. Although Oregon law required that hospitals establish and periodically review peer review procedures, there was no active state

27. Patrick v. Burget, 800 F.2d 1498, 1509 (9th Cir. 1986).
28. 108 S. Ct. at 1662.
29. Id. at 1662-63.
supervision of the substance of these decisions and no opportunity to correct abuses. Peer review did not pass the second prong of the test: active state supervision. The Court stated:

The active supervision requirement ... is designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct.\(^{30}\)

Active supervision must encompass more than mere review of procedural aspects. The Supreme Court limited the active supervision to a supervision under which a state official exercises ultimate authority over private privilege determinations. The Court then reviewed the authority of the Oregon Health Division, its Board of Medical Examiners, and the judicial system. None had the power to overturn a peer review decision. The agency closest to exercising active supervision was the judicial system. However, Oregon courts did not address the merits of dismissal, only procedural protections and whether the physician's conduct threatened patients. Therefore, in Oregon, judicial review failed to satisfy active supervision. The *Patrick* Court left open the question of whether judicial review under other state statutes might constitute active supervision.\(^{31}\)

The Court of Appeals for the Eleventh Circuit considered this question in *Bolt v. Halifax Hospital Medical Center*.\(^{32}\) The court expanded upon *Patrick*, finding that judicial review constituted active state supervision when state law expressed a clearly articulated policy sanctioning the kind of peer review used to revoke a physician's privileges.\(^{33}\) Noting that the Supreme Court left open the question of whether judicial review constitutes active state supervision, *Bolt* found "no principled basis for dis-

\(^{30}\) Id. at 1663.

\(^{31}\) Id. at 1665.

\(^{32}\) 851 F.2d 1273 (11th Cir. 1988).

\(^{33}\) Bolt v. Halifax Hosp. Medical Center, 874 F.2d 755 (11th Cir. 1989). This holding was vacated when the case was reheard *en banc* and is without precedential value. The remainder of the original opinion was reinstated. At the hearing, the defendants waived their state action immunity and the question became moot. Nonetheless, its analysis of judicial review is significant.
tinguishing traditional judicial review from agency review..."\textsuperscript{34} State supervision required that the scope of judicial review encompass the fairness of procedures, whether criteria used by decision-makers were consistent with State policy, and the factual basis of the decision.\textsuperscript{35} The Bolt court interpreted Patrick to require that a state official have "power to review private peer-review decisions and overturn a decision that fails to accord with state policy."\textsuperscript{36} After concluding that the state agency did not have this kind of authority, the Bolt court turned its attention to the state judiciary and found active state supervision.

The Bolt court based its finding on two factors. First, state policy allowed the medical staff of any licensed hospital to suspend, deny, revoke, or curtail staff privileges of a member for good cause. Second, state law required every licensed hospital to "set standards and procedures to be applied by the hospital and its medical staff in considering and acting upon applications for staff membership or professional privileges."\textsuperscript{37}

A Kansas district court examined the same issue\textsuperscript{38} and found that neither the Kansas statutory scheme, which the court characterized as similar to that in Oregon, nor the judicial system provided for "active supervision" of peer review decisions. Therefore, the court concluded, the hospital's action cannot be considered state action for purposes of immunity from federal antitrust laws.

\textbf{B. What Constitutes a Combination or Conspiracy in Restraint of Trade}

In addition to state action, liability under the Sherman Act requires a combination or conspiracy in restraint of trade.\textsuperscript{39} The Bolt court differed with a majority of circuits in its holding that a hospital and members of its medical staff "are legally capable of conspiring with one another."\textsuperscript{40}

\begin{flushright}
34. 851 F.2d at 1282.
35. \textit{Id.} at 1282.
36. \textit{Id.} (citing Patrick v. Burget, 108 S. Ct. at 1663)).
37. \textit{Id.} at 1281.
40. 851 F.2d at 1280 (emphasis added). This part of the decision was reinstated and
Most courts compare a hospital and its staff with a corporation and its agents and conclude that it is impossible for a hospital to conspire with its staff:

[T]he hospital could not, as a matter of law, conspire with the medical staff. The medical staff was empowered to make staff privilege decisions on behalf of the hospital. As such, with regard to these decisions, the medical staff operated as an officer of the corporation would in relation to the corporation. Although the members of the medical staff had independent economic interest in competition with each other, the staff as an entity had no interest in competition with the hospital.41

By contrast, the Bolt court distinguished a hospital and its staff from a corporation and its agents:

A hospital and the members of its medical staff, in contrast to a corporation and its agents, are legally separate entities, and consequently there is no ... legal danger that what is in fact unilateral activity will be bootstrapped into a "conspiracy." In sum, then, we hold that a hospital and the members of its medical staff are all legally capable of conspiring with one another.42

Bolt followed tradition on the issue of whether members of a medical staff may conspire with one another. The Bolt court adopted the view articulated in Weiss v. York Hospital that the members of a medical staff may legally conspire. Because each member of the medical staff practices medicine in an individual capacity, the court characterized each member as a separate economic entity potentially in competition with other physicians. Thus, when the medical staff acts, a combination is comprised and "the absence of evidence of other co-conspirator(s) is irrelevant."43 Economic competition of members of the medical staff as individual economic entities extends to podiatrists.44
Even though members of the medical staff could be found to conspire, Weiss allowed a medical staff to exclude individual doctors on the basis of lack of professional competence or unprofessional conduct.\textsuperscript{45} Other courts have expanded the right of exclusion by a medical staff. Relying on medical staff review of competency, the Court of Appeals for the Third Circuit found that an antitrust staff privileges case turns on the professional competency of the individual physician. The court stated:

The hospital misreads Weiss. Nothing in that case suggests that the usual antitrust inquiry may be avoided merely because the conspiracy alleged involves a hospital.

In Weiss, the jury had found in favor of the plaintiff class of osteopaths on its claim that in refusing to grant staff privileges the members of the defendant hospital's medical staff had conspired in violation of section 1 of the Sherman Act. On appeal, this court applied traditional antitrust analysis to the defendants' exclusionary conduct. In contrast, the substantial evidence test used by the district court here ... is derived from administrative law and reflects the deference that a judicial body owes to the administrators entrusted with regulatory authority. That test has no place in an antitrust case where Congress has given the jury the responsibility of resolving disputed fact issues.\textsuperscript{46}

The court stated that alleged incompetence and unprofessional conduct are questions of fact that must be decided by the jury. If these facts are proved, a hospital will be absolved of antitrust

\textsuperscript{45} 745 F.2d at 820. The Weiss court rejected the "rule of reason" test in favor of the per se test, limiting use of the "rule of reason" test to hospital privileges cases based upon lack of professional ability. Where the claim is based upon the denial of privileges to a class of practitioners, such as the osteopaths in the Weiss case, the hospital's actions are the equivalent of a group boycott, which is illegal per se under § 1 of the Sherman Act. Under the "rule of reason," a court examines a number of factors to determine whether the practice is on balance pro-competitive or anti-competitive. Such factors include the history of the practice, market power of the participants, the degree to which the arrangement forecloses other competitors, etc. This is in contrast to the stricter per se analysis under which certain practices, such as price-fixing, are presumed to be illegal without any elaborate inquiry into their competitive effects. Compare Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), and Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958). Another means for a physician to challenge loss of staff privileges is to allege discrimination under Title VII of the Civil Rights Act of 1964. In re Doe v. St. Joseph's Hosp., 788 F.2d 411 (7th Cir. 1986) (even though the physician was not an employee, she had a cause of action for employment discrimination).

liability for its revocation of privileges. The physician plaintiff bears the burden of proof.

For example, when a neurologist who was denied the prerogative of performing interpretations of head scans because of an exclusive contract between the hospital and a corporation of radiologists, he alleged a conspiracy to restrain trade through an illegal tying arrangement between a hospital and a corporation of physicians in violation of the Sherman Act. The court held that the physician had failed to present sufficient evidence of an unlawful tying arrangement or of concerted action. The court found the physician's claim unconvincing because the hospital was not a competitor for the tied product (scanning services) and received no fee or part of a fee for interpretation of the scans.

Similarly, in Shah v. Memorial Hospital, the court placed the burden of proof upon the plaintiff physician to establish the existence of a conspiracy and to exclude the possibility of independent action. The Shah court quoted with approval the White court:

[C]onduct as consistent with permissible competition as with illegal conspiracy does not itself support an inference of antitrust conspiracy.

In addition to tying, physicians may also claim violation under the "essential facilities doctrine." This doctrine provides that monopolistic control of essential facilities constitutes a restraint of trade. To establish liability under the essential facilities doctrine, a plaintiff must show: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the facility; (3) denial of the use of the facility; and (4) feasibility of providing the facility.

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50. Id. (quoting White, 820 F.2d at 102).
51. McKenzie v. Mercy Hosp., 854 F.2d 365, 368 (10th Cir. 1988) (when an osteopath maintained a substantial obstetrical care practice and competed with the hospital's emergency room, he failed to demonstrate hospital control of essential facilities, despite his loss of staff privileges). In a footnote, the court questioned whether the essential facilities doctrine was even applicable to hospital staff privilege decisions "for public policy reasons."
C. What Constitutes Effect upon Interstate Commerce

The Sherman Act also requires the showing of a demonstrable effect upon interstate commerce. In examining a hospital's impact on interstate commerce, the physician must offer some factual support for his allegations of the impact on interstate commerce. The Jaffee court observed that "recent cases suggest a new realization that federal antitrust litigation is often harmful." Perhaps Jaffee signals a hard look by courts at the use of antitrust litigation in staff privilege cases.

III. Conclusion

These most recent cases hold generally that a medical staff is a combination of independent practitioners who are in economic competition with each other and who can conspire with each other. The joint action of the medical staff in a privileges case satisfies the conspiracy requirement of the Sherman Act. While medical staff members can conspire with each other, traditional logic holds that the medical staff cannot conspire with the hospital because the medical staff carries out peer review functions on behalf of the hospital and functions as its agent. By contrast, in Bolt, members of the medical staff are viewed as "outside agents." Even without a conspiracy, however, a hospital is liable if it prevents a physician from access to essential facilities, to that physician's economic detriment.

The future application of antitrust law to hospital professional staff relations is uncertain. No federal court has yet interpreted the 1986 Act. The most recent attempts to apply the Sherman Act to hospital relationships with professional staff have, for the most part, shown a trend toward requiring the physician to

56. For a discussion of this position, see, for example, Kissam, Webber, Bigus & Holzgraefe, Antitrust and Hospital Privileges: Testing the Conventional Wisdom, 70 CALIF. L. REV. 595, 639-40 (1982).
57. The only application of the Act thus far is VanKirk v. Board of Trustees, No. 91CO1-8809-CP-123 (Ind. Nov. 9, 1988). In that case, the hospital's medical staff bylaws were in conflict with both the state and federal statutes on peer review. The Indiana Peer Review Statute, adopted on April 16, 1987, opted into the Act under the early opt-in provisions. The court found that the hospital's medical staff bylaws must comply with state and federal law.
provide a more rigorous showing of jurisdictional requirements, including "substantial" involvement in interstate commerce and some evidence of a combination or conspiracy beyond bare allegations.

One of the avowed purposes of the 1986 Act is to provide some legal immunity to physicians and hospitals engaged in peer review activities. Therefore, it is probable that the trend toward more rigorous application of the jurisdictional requirements for antitrust actions combined with the protections under the Act will limit the use of antitrust law in hospital relations with professional staff, as long as hospitals heed the due process protections required under law.
FALSE TEETH? THORNBURGH'S CLAIM THAT TURNER'S STANDARD FOR DETERMINING A PRISONER'S FIRST AMENDMENT RIGHTS IS NOT "TOOTHLESS"

Alphonse A. Gerhardstein*

I. INTRODUCTION

Prison rules are easy to create. "Once established, rules have great success at survival.... By ... accumulations of permanent rules passed in reaction to episodic disturbances, many prisons have evolved into places of extreme regimentation."

While not all rules trace their roots to a specific incident, many restrictions imposed on prisoners are in fact premised on a belief by the administration that relaxation of a particular restriction would pose a threat to security or create administrative chaos.

Prisoners challenge these rules on their face and as applied in a wide variety of cases, alleging that the rules abridge constitutional rights. For the last decade prisoner rights litigation has been marked by a determined effort to exclude what some believe are inappropriate prisoner rights claims from federal court. The Supreme Court, in search of a standard for reviewing these claims, has generally, regardless of the substantive constitutional right invoked by the prisoner, balanced the need for deference

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When a disturbance occurs, for example, as men are going from one place to another, it is decreed that if any group of five or more men is moving from one building or area to another, they must walk in a line and be accompanied by an officer. Later an argument between two men in such a line escalates to a fist fight, and henceforth no talking is allowed in line. Someone is attacked with a "shiv" made from a table knife smuggled into a cell and sharpened to a point, and henceforth no forks or knives may be used by inmates in the dining hall. Id.


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to prison administrators against the constitutional deprivations claimed by the prisoner. The result has been an overall reduction in the type of prisoner rights claims that remain viable.

Several recent decisions from the Supreme Court have excluded certain prisoner claims from court altogether. For example, in Kentucky Dept. of Corrections v. Thompson, prisoners sought a hearing to challenge the exclusion of certain persons from inmate visitation. The Supreme Court, after reviewing the state regulations setting out inmate visitation rules, held that the prisoners had no liberty interest in receiving visitors that was protected by the Due Process Clause. The inmates were therefore not entitled to sue over the exclusion of certain visitors. Similarly, in Parratt v. Taylor, a prisoner suffering a property loss was not permitted to sue in federal court since a state tort claims procedure existed to redress deprivations caused by random, unauthorized acts by state officials. Congress has further acted to cut back on prisoner cases in federal court by requiring a 90-day continuance of prisoner rights cases if the trial court believes it appropriate. During this period a prisoner must exhaust grievance procedures in those states such as Ohio where procedures have been approved by the United States Attorney General.

The growing number of theories that exclude prisoners from court will not stop prisoner rights litigation completely. The courtroom remains the only place that prisoners can fight for their rights outside of their own institutions. Prisoners have no political clout. Non-litigatory avenues for advocacy are closed to them. Thus, carefully applying the standard of review for those


6. Id. at 1911.


claims that remain viable carries heightened importance.

The standard now used and reaffirmed this past term by the Court for challenges to inmate restrictions based upon the First Amendment requires that regulations be "reasonably related to legitimate penological interests."\textsuperscript{11} That standard of review, we are told, is not "toothless."\textsuperscript{12} Dissenters warn, however, that this "reasonableness" standard is "manipulable" because speculation may be accepted by the trier of fact over concrete, documented reasons for the restrictions.\textsuperscript{13}

This article explains the emerging standard of review in cases challenging prison regulation of Free Exercise and First Amendment rights. A return to a modified doctrine of overbreadth is urged for reviewing regulations subjected to attack on their face and as applied. This article further argues that deference to prison administrators should not cause courts to accept watered-down evidence in support of challenged regulations. Finally, as it is written by a practitioner, this article emphasizes that thorough discovery and presentation of the facts will ensure a vigorous inquiry under the current standard.

II. \textit{Turner and Thornburgh}

A. \textit{Summary of Developments Leading to Turner}

Prisoner rights have been on a pendulum in the courts. Historically judges followed a hands-off doctrine, refusing to hear any complaints about prison regulations. The movement away from that doctrine accelerated in the 1960s, tracking two related trends: first, the expansion of rights for persons charged with crime and, second, the rise of \textsection 1983 litigation after the decision in \textit{Monroe v. Pape}.\textsuperscript{14} During the 1970s, prisoners won Supreme Court victories regarding censorship of mail\textsuperscript{15} and procedural due process in disciplinary matters.\textsuperscript{16} The Court also recognized a

\textsuperscript{12} Id. at 1882.
\textsuperscript{13} Id. at 1889.
\textsuperscript{15} Procunier v. Martinez, 416 U.S. 396 (1974).
constitutionally based right to medical care.17 During that decade, the "big" prison cases flourished. Major correctional institutions and even entire prison systems in many jurisdictions came under court order.18 In contrast, the pendulum began swinging in the other direction during the 1980s. The Court re-established deference to prison administrators as the major factor in prisoner-conditions cases.19

B. Turner v. Safley

1. The Turner Standard

The current standard for review in prisoner First Amendment cases was generally set out in Turner v. Safley.20 The Court had before it regulations affecting the right of prisoners to correspond with each other and to marry while incarcerated. The Court set out two principles in formulating a standard. First, prisoners do indeed have constitutional rights: "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."21 Second, courts should give deference to prison administrators.22 These principles reflect the fact that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."23 Judicial restraint was therefore required.24

The balance between these principles caused the Court to establish a reasonable-relation test to determine the validity of a prison regulation challenged on First Amendment grounds:

19. See, e.g., Bell v. Wolfish, 441 U.S. 520, 561 (1979) ("restrictions and practices were reasonable responses by MCC [Metropolitan Correctional Center] officials to legitimate security concerns"); Rhodes v. Chapman, 452 U.S. 337, 352 (1981) ("courts cannot assume that ... prison officials are insensitive to the requirements of the Constitution or the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system....").
21. Id. at 84.
22. Id. at 85.
23. Id. at 84-85.
24. Id. at 85.
"[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."²⁵

Four factors are to be applied in making determinations under this test. First, there must be a valid, neutral governmental purpose for the prison regulation and a "rational connection" between that purpose and the regulation.²⁶ Second, the court will look at whether alternative means of exercising the constitutional right remain available to the prisoner.²⁷ Third, the court will examine the impact that accommodation of the right will have on other inmates, staff, and prison resources.²⁸ Fourth, the court will determine whether obvious alternatives to the regulation exist. In that event, the regulation might be an "exaggerated response" to prison administration concerns.²⁹ The availability of alternatives that fully accommodate the prisoner's rights at little or no cost will weigh heavily toward a finding that the reasonable-relationship test is not met.³⁰

*Turner* did not overrule *Procunier v. Martinez.*³¹ That case struck down California regulations authorizing censorship of letters that "unduly complain," "magnify grievances," or express "inflammatory ... views."³² Those regulations were held to be facially overbroad.³³ The *Martinez* standard has been described as weaker than strict scrutiny but not "undemanding." The standard allowed "censorship if it furthered 'an important or substantial governmental interest unrelated to the suppression of expression' and 'the limitation of First Amendment freedoms [was] no greater than [was] necessary or essential.' "³⁴ *Martinez* was distinguished in *Turner* as a case turning on the "First and Fourteenth Amendment Rights of those who are not prisoners."³⁵

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²⁵. Id. at 89.
²⁶. Id.
²⁷. Id. at 90.
²⁸. Id.
²⁹. Id.
³⁰. Id. at 91.
³². Id. at 415.
³³. Id.
³⁴. Id. at 413.

As stated above, the inmate plaintiffs in *Turner* challenged the Missouri prison restrictions on prisoner correspondence and inmate marriages. Only the marriage rule implicated non-prisoners. The Court stated that this fact may have been sufficient to support application of the *Martinez* test, which it viewed as more stringent that the reasonableness test. The Court did not apply *Martinez* at all in *Turner*, however, as the marriage rule even fell short of the reasonableness test.

2. Application of the Standard to the Correspondence Rule

The Missouri regulation considered in *Turner* prohibited correspondence between inmates in different institutions, but allowed exceptions for correspondence with immediate family members, for correspondence concerning legal affairs, or if the treatment team at each institution deemed such correspondence to be in the best interests of the inmate. The Court held that this regulation, on its face, did not violate the First Amendment rights of the inmates.

The Court found that the valid penological purpose behind the regulation was security. Prison officials had testified about a growing gang problem and stated that restricting correspondence reduced the ability of violent inmates to "communicate escape plans and arrange assaults." This reason served as a logical connection between the restriction and the purpose, so the first factor was satisfied. The second factor was also satisfied since the restriction did not deprive inmates of all means of expression—only communication with a narrow group of persons: other inmates presently incarcerated. No obvious alternative was seen by the majority since the prison officials testified that it would be impossible to read and monitor all inmate-to-inmate correspondence if the regulation were changed. Nor was the rule, therefore, an exaggerated response to the problem.

37. *Id.*
38. *Id.* at 81-82.
39. *Id.* at 99.
40. *Id.* at 91.
41. *Id.* at 92.
42. *Id.* at 93.
43. *Id.* at 100.
Though the rule survived a facial challenge, the Court did remand the case for trial as to whether the correspondence regulation had been “applied by prison officials in an arbitrary and capricious manner.”

3. Application of the Standard to the Marriage Rule

State officials had also imposed a nearly complete ban on inmate marriages. This regulation was held in Turner to be facially invalid. Prison officials had cited security and rehabilitation as rationales for the rule. The security argument rested on an effort to avoid “love triangles.” The rehabilitation rationale focused on the female inmates’ need for developing self-reliance. The first factor was satisfied by these rationales, but the Court found the regulation to be an “exaggerated response” to these reasons. “Common sense,” the Court stated, “suggests that there is no logical connection between the marriage restriction and the formation of love triangles.” Rivalries over female prisoners would likely be the same whether marriage restrictions existed or not. Furthermore, rehabilitation concerns about the development of self-reliance in female prisoners offered no justification for this broad regulation, which also restricted male prisoner marriages. Thus, the Court held the marriage regulation to be “facially invalid.”

C. O’Lone v. Estate of Shabazz

Eight days later, the Court decided O’Lone v. Estate of Shabazz. The challenged regulations in that case prohibited Muslim inmates on work details from returning to the institution to participate in weekly Jumu’ah, a prayer service considered central to and obligatory in the Muslim religion. The Court applied
the Turner standard and affirmed the regulation. Security concerns supported the assignment of inmates to work details that served to relieve tension within the institution and to reduce overcrowding while the inmates were on detail. The additional policy of prohibiting returns to the institution during the day also was supported by a valid purpose—relieving congestion at the main gate, a high-risk area. Another goal served was rehabilitation because the policy simulated working conditions within society. The Court held that alternative means for exercising their religious rights existed for the Muslim prisoners. Although all Jumu'ah attendance was foreclosed for certain Muslim inmates, other Muslim practices were permitted which, the Court held, was sufficient under the standard. Finally, the Court held that accommodating any alternatives would unduly drain prison resources. Therefore, there were no “obvious, easy alternatives” to the rule adopted by the state.

D. Turner and O'Lone Dissents

In Turner, four Justices concurred on the marriage regulation and dissented from the ruling on the facial validity of the correspondence regulation. Those same four also dissented from the holding in O'Lone. First, these justices disagreed with the standard. They preferred a standard that varied the degree of scrutiny applied to prison regulations according to “the nature of this right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation)

55. Id. at 349.
56. Id. at 353.
57. Id. at 350-51.
58. Id. at 351.
59. Id. Note, however, that in civilian working situations, the employer would have a duty to reasonably accommodate the sincerely held religious beliefs of the employee, as long as there were no undue hardships on the employer’s business. See 42 U.S.C. § 2000e(j) (1982) and Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).
61. Id.
62. Id. at 352-53.
63. Id. at 353 (quoting Turner v. Safley, 482 U.S. 78, 93 (1987)).
64. See Turner, 482 U.S. at 100 (separate opinion of Justice Stevens, with whom Justices Brennan, Marshall, and Blackmun concurred).
on the exercise of that right."66 Under this alternative standard, if the exercise of the asserted right is not "presumptively dangerous" and if the prison has completely deprived prisoners of the right, then prison officials would be required to demonstrate that the restriction furthers an "important governmental interest" and that the restriction is limited to the extent necessary to effectuate that interest.67

Thus, in *O'Lone*, the dissenters would have held for the prisoners because many alternatives existed to denying inmates on work detail the right to attend Jumu'ah.68 Further, since the regulation worked a complete deprivation of important Muslim religious practices, higher scrutiny would apply.69

The application of the more stringent standard, however, was not the focus of the dissent in *Turner*.70 With respect to the correspondence restrictions, the dissent stated that "the actual showing that the court demands of the State in order to uphold the regulation" is far more important to the outcome of a prisoners' rights case than the standard of review adopted by that court.71 Nevertheless, the *Turner* dissent attacked the "open-ended reasonableness standard" utilized by the majority because it made it much too easy to uphold restrictions on prisoners' First Amendment rights on the basis of "administrative concerns and speculation about possible security risks rather than on the basis of the evidence that the restrictions are needed to further an important governmental interest."72 Instead of findings of fact describing actual security risks, the dissent argued that the majority opinion permits the "disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security reason."73

The dissent demonstrated that the inmates in *Turner* attacked the correspondence regulation as it was applied,74 while the

66. Id. at 358 (Brennan, J., dissenting) (quoting Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985)).
67. O'Lone, 482 U.S. at 358 (Brennan, J., dissenting).
68. See id. at 363-67.
69. Id. at 359.
71. Id.
72. Id. at 101 n.1.
73. Id. at 100-101.
74. Id. at 102.
majority, viewing it mainly as a facial challenge, chose to remand for analysis of the "applied" arguments. The dissent showed that the evidence of escape concerns and other security problems was "backed only by speculation," and that the Court was markedly inconsistent in its analysis of the correspondence restrictions as compared with the marriage ban that it did strike down.

E. Thornburgh

The Court revisited this debate during this past term in Thornburgh v. Abbott. At issue was the validity of the Federal Bureau of Prisons regulations authorizing prison officials to exclude incoming publications from the institutions. The regulation was affirmed on its face, but the case was remanded for trial on the application of the rule to the 46 publications excluded by prison officials.

Justice Blackmun, in the minority on Turner and O'Loné, wrote the opinion for the Court. His opinion makes it clear that the prison regulation was attacked both on its face and as applied, a distinction glossed over by the majority in Turner. He states that the majority adopts the Turner standard in this case "with confidence . . . [that] a reasonableness standard is not toothless."

He rejects application of the Martinez standard to these incoming publications even though the censorship clearly impacts on

76. Id. at 100.
77. Turner, 482 U.S. at 109 (Stevens, J., dissenting).
78. Id. at 112-13.
80. Id. at 1877. In part, the regulations state that the "Bureau of Prisons permits an inmate to subscribe to or to receive publications without prior approval." 28 C.F.R. § 540.70(a) (1989). "The Warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." 28 C.F.R. § 540.71(b) (1989). See also Thornburgh, 109 S. Ct. at 1877 n.5.
81. Thornburgh, 109 S. Ct. at 1884-85. The Court's previous, more deferential standard continues to apply to regulations concerning outgoing correspondence to non-prisoners. Id. at 1879. That standard, set out in Procunier v. Martinez, 416 U.S. 396 (1974), required the practice to further an important governmental interest "unrelated to the suppression of expression." Id. at 413. The regulation must impose no greater restriction to expression than is necessary to protect the governmental interest. Id.
82. Thornburgh, 109 S. Ct. at 1876.
83. Id.
84. Id. at 1882 (quoting Pet. for Cert. 17, n.10).
the rights of nonprisoners to communicate.\textsuperscript{85} \textit{Martinez} is specifically limited by the \textit{Thornburgh} decision to "regulations concerning outgoing correspondence."\textsuperscript{86} Security implications for outgoing correspondence are of lesser magnitude than regulations governing material coming into the prison.\textsuperscript{87}

Blackmun applied the four factors from \textit{Turner}. The first factor is satisfied by the Bureau of Prisons censorship regulations since the regulations are supported by security concerns, a purpose "central to all other corrections goals."\textsuperscript{88} The Court also holds that the regulations are "neutral" even though content is weighed in the determination of what to censor.\textsuperscript{89} Under the rule, prison officials may censor only where it serves an important governmental interest unrelated to the suppression of speech.\textsuperscript{90} The second factor is also satisfied since the right at issue must be viewed expansively.\textsuperscript{91} Though the Bureau of Prisons rule completely deprives inmates of access to certain publications, this factor is satisfied because inmates still have access to many other publications not affected by the regulations.\textsuperscript{92}

The third factor, the impact of accommodation on others, is also satisfied.\textsuperscript{93} Only publications found to be "potentially detrimental to order and security" are to be excluded by the warden.\textsuperscript{94} The "prospect" of a "ripple effect" caused by circulation of such material impacts on the safety of other staff and inmates.\textsuperscript{95} Finally, the rule is not seen as an "exaggerated response" since no easy alternative was proposed by the plaintiff.\textsuperscript{96} The Court applies this conclusion even to the "all-or-nothing" rule, which permits the prison officials to exclude an entire publication even if only one page is determined to pose the potential threat.\textsuperscript{97}

In dissent, Justices Stevens, Brennan, and Marshall are not satisfied. The \textit{Turner} standard itself is still under attack: "[T]he

\textsuperscript{85} \textit{Thornburgh}, 109 S. Ct. at 1881.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 1882 (quoting \textit{Pell v. Procunier}, 417 U.S. 817, 823 (1974)).
\textsuperscript{89} \textit{Thornburgh}, 109 S. Ct. at 1882.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 1883.
\textsuperscript{92} Id. at 1884.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
Court applies a 'manipulable' reasonableness standard to a set of regulations that too easily may be interpreted to authorize arbitrary rejections of literature addressed to inmates." The dissent urges continuation of the more demanding standard set out in *Procunier v. Martinez*.

The dissent concludes that the *Turner* standard is, indeed, toothless. No connection between the goal of maintaining security and such unrestrained censorship is presented by these regulations. The dissent insists that the regulations permitting publications to be rejected if the contents are "detrimental" to "security, good order or discipline," or "might facilitate criminal activity" provide no check on or guidance to prison administrators making censorship decisions. The dissent takes particular issue with the court's approval of the "all-or-nothing" rule, finding no burden to administrators if they simply clip the offending material rather than toss the entire publication: "[I]f, as the regulations' text seems to require, prison officials actually read an article before rejecting it, the incremental burden associated with clipping out the offending matter could not be of constitutional significance."

**F. Turner, O'Lone, Thornburgh and Overbreadth**

In drawing the distinction between facial invalidity and invalidity as applied, the Court is modifying traditional overbreadth doctrine without mentioning the doctrine at all. The Court, in *Martinez*, struck down the California correspondence/censorship rules as overbroad on their face. In that case, the Court stated that even a "restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad." In *Thornburgh*, the Court noted that *Martinez* had held regulations "facially overbroad," but in restricting the application

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98. *Id.* at 1874, 1889 (Stevens, J., dissenting).
99. *Id.*
100. *Id.* at 1892 n.18.
101. *Id.* at 1889.
102. *Id.* at 1892.
104. *Id.* at 413-14 (emphasis added).
of Martinez, no discussion of that doctrine is pursued. This failure to explore the doctrinal foundation of the First Amendment's application to the case is serious. Already earmarked as an exception to normal First Amendment doctrine, prison cases will completely escape a constitutional tether if the basic constitutional rules are not stated before exceptions are defined.106

A law or regulation challenged under the First Amendment is invalid on its face under the overbreadth doctrine if it "does not aim specifically at evils within the allowable area of control [by the government] but ... sweeps within its ambit other [constitutionally protected] activities."107 In Broadrick v. Oklahoma,108 the doctrine was first extended to civil laws. In that case, the Court rejected an attack on the facial validity of a state law prohibiting civil service employees from engaging in a variety of

106. The constitutional tether may have been broken. Just before this article went to the printer, the Supreme Court issued its decision in Washington v. Harper, 110 S. Ct. 1028 (1990). In that case, the plaintiff prisoner had been forced to take psychiatric medication without first receiving a judicial hearing. The Washington Supreme Court had held that a judicial hearing was necessary before forcing medication. Harper v. State, 110 Wash. 2d 873, 759 P.2d 358 (1988). The U.S. Supreme Court rejected that view and held that the "standard of reasonableness" set out in Turner should be applied to these facts. The Washington Supreme Court had rejected the Turner standard as limited to First Amendment issues. A wholesale expansion of the Turner standard into areas outside the First Amendment causes prisoner claims to be decided first by where the violation has occurred, rather than by what right is at stake. Such analysis will surely dilute constitutional rights within prisons.

None of these developments, however, may affect challenges to regulations that subject inmates to discipline. Many regulations that are challenged do expose inmates to discipline in the event of violation. If the regulation fails to give fair notice to an inmate that certain conduct is prohibited, the regulation may be vulnerable under the vagueness doctrine. Laws should "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." United States v. Thompson, 603 F.2d 1200, 1203 (5th Cir. 1979).

In Adams v. Gunnell, 729 F.2d 362 (5th Cir. 1984), a prison rule that prohibited "conduct which disrupts the orderly running of the institution" was held to be vague as applied to inmates who circulated a petition alleging racial discrimination. Id. at 363. The doctrine was also utilized in Rios v. Lane, 812 F.2d 1032 (7th Cir. 1987), to hold a rule prohibiting gang activity vague as applied to conduct consisting of passing a note card listing radio stations and revolutionary slogans to a known gang member. Id. at 1034-38.

Another related theory not directly addressed by the trilogy is retaliation. Inmates who are punished in response to their exercise of First Amendment rights state a claim for relief. See Newsom v. Norris, 888 F.2d 371 (6th Cir. 1989); Jackson v. Cain, 864 F.2d 1235 (5th Cir. 1989). See, e.g., Abernathy, Section 1983 and Constitutional Torts, 77 GEO. L.J. 1441 (1989).

political activities.\textsuperscript{109} The Court agreed that the statute could be read to reach clearly protected conduct, such as wearing a campaign button,\textsuperscript{110} but held that such applications were insubstantial compared with the large amount of unprotected conduct that the statute legitimately reached.\textsuperscript{111} The Court concluded that facial invalidity depended on overbreadth that was both "real" and "substantial" compared to a statute's legitimate reach.\textsuperscript{112}

The doctrine was recently applied by the Court to strike down as facially invalid a Lakewood, Ohio, law giving the Mayor unbridled discretion to grant or deny licenses for newspaper vending boxes.\textsuperscript{113}

The four factors set out in the \textit{Turner} trilogy, thus, are what courts should look to when determining, in the prison context, whether overbreadth is "real" and "substantial" when compared to the legitimate reach of the challenged regulation.\textsuperscript{114} This is essentially what the court did when it invalidated the marriage rule in \textit{Turner}. The Court conceded that some legitimate security risks justify placing restrictions on the right of some inmates to marry.\textsuperscript{115} However, the broad language of the regulation allowed prison officials to prohibit almost all marriages even though such prohibition would likely have no effect on the professed goal of preventing violence.\textsuperscript{116} Furthermore, the Court held that even though rehabilitation was a legitimate penological objective, this near-complete ban on inmate marriage swept "much more broadly" than necessary.\textsuperscript{117} The principles of overbreadth, though not stated, did guide the Court in \textit{Turner}.

Ignoring those principles and the doctrine of overbreadth, however, led to a serious error in \textit{Thornburgh}. The all-or-nothing aspect of the rules permitted entire publications to be seized even though only one article or picture might be objectionable.\textsuperscript{118} Traditional overbreadth cases support the notion that the Court

\begin{enumerate}
\item[109.] Id. at 602.
\item[110.] Id. at 618.
\item[111.] Id. at 615.
\item[112.] Id.
\item[114.] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).
\item[115.] Turner v. Safley, 482 U.S. 78, 97 (1987).
\item[116.] Id. at 98.
\item[117.] Id.
\end{enumerate}
can, in some instances, sever those aspects of a rule which make it overbroad.\footnote{Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985) (term "lust" could be struck from a statute without invalidating the entire statute).} The all-or-nothing rule should have been severed and struck down as overbroad. Striking at least the all-or-nothing aspect of the prison rule in \textit{Thornburgh} also would have served another purpose behind the overbreadth doctrine—reduction of the chilling effect of overbroad rules.\footnote{Alexander, \textit{Is There an Overbreadth Doctrine?}, 22 SAN DIEGO L. REV. 541, 552 (1985).} The all-or-nothing rule deters publishers from including any references to controversial themes in publications sent to prisoners for fear that entire books and magazines will be seized as a result. It also deters prisoners from subscribing to publications that might contain such themes. The rule deters the exercise of massive amounts of protected speech.

The failure to anchor its analysis in overbreadth also caused the Court in \textit{Thornburgh} to needlessly leave open the question of whether special evidentiary burdens or burden-shifting should be utilized when applying the \textit{Turner} test.\footnote{\textit{Thornburgh}, 109 S. Ct. at 1882 n.12.} The district court had required the prison only to "articulate" a relationship between its regulations and the goal of security or other corrections purpose. Then the court shifted the burden to the plaintiffs to prove by "substantial evidence" that the challenged action was an "exaggerated response" to the problem identified by the prison.\footnote{\textit{Id.}} No basis in the overbreadth cases exists to support this extra burden upon prisoner plaintiffs.\footnote{Another related issue under the \textit{Turner} standard is who decides fact questions. In Siddigi v. Leak, 880 F.2d 904, 909-10 (7th Cir. 1989), this inquiry was held to be a jury question.}

Finally, the absence of serious discussion of the doctrinal foundation of overbreadth caused the Court, in \textit{Thornburgh}, to provide little direction to the trial court on remand, which must determine the validity of the publication rule as applied to the publications.

The \textit{Thornburgh} dissent discussed an article in \textit{Labyrinth} magazine that detailed medical malpractice claims resulting in the death of inmate Joseph Jones at the federal prison in Terre Haute, Ind.\footnote{\textit{Thornburgh}, 109 S. Ct. at 1885.} A copy of the magazine containing that article was
intercepted by prison officials in Marion, Ill. The officials justified the censorship based upon that portion of the rule permitting suppression of material that "would be detrimental to the good order and discipline of this institution." However, Joseph Jones' story was already available within the prison. His case came before the Supreme Court in 1980, and the Court's decision was available in the prison library. The question is, if the regulation relied upon by the prison officials is facially valid under Thornburgh, what is the lower court supposed to consider in reviewing the regulation as applied to censorship of the Labyrinth article?

The Court did provide a small amount of guidance by footnote in Thornburgh:

Respondents have argued that the record does not support the conclusion that the exclusions [of publications] are in fact based on particular events or conditions at a particular prison; they contend that variability in enforcement of the regulations stems solely from the censors' subjective views.... These contentions go to the adequacy of the regulations as applied, and will be considered on remand. 127

Thus, in challenging the exclusion of a particular publication, prisoner plaintiffs in Thornburgh will be able to bring in past practices and inconsistent current practices. It is inconsistent, for example, for a prison to make copies of Joseph Jones' case available to prisoners in a legal publication while censoring a similar account in a magazine. Overbreadth provides a way to evaluate such an inconsistency. First, the rule as applied clearly chills free speech since the magazine was seized. Second, the material clearly was protected speech. Third, the record (consisting, e.g., of evidence of the handling of this article and similar articles) demonstrates no basis for concluding that the material would be "detrimental ... to good order." 128

Deference shown to the opinions of prison administrators must be less when the rule is challenged "as applied." The application of the rule should be justified by the actual evidence surrounding

125. Id. at 1886. See also 28 C.F.R. § 540.71(b) (1989).
126. The lawsuit by Jones' mother was addressed by the United States Supreme Court and reported as Carlson v. Green, 446 U.S. 14 (1980).
127. Thornburgh, 109 S. Ct. at 1883 n.15.
128. 28 § C.F.R. 540.71(b) (1989).
the challenged action and not simply by the undocumented conclusion of prison officials.

Under this formulation, a prison rule can meet the *Turner* standard on its face but "sweep too broadly" as applied in light of the relevant past and present practices within the prison. Evidence weighed under this overbreadth standard will not be easily "manipulable."

### III. Post-*Turner* Cases in the Sixth Circuit Court of Appeals

Most cases challenging prison rules address the application of the rule to the plaintiff. Some raise arguments that suggest facial invalidity as well. Thus, courts must be vigilant to hear evidence relating to the actual enforcement of the rule by the defendant prison officials in addition to arguments raising the application of the four *Turner* factors to a prison rule. A good example of a thoughtful and correct treatment of a First Amendment challenge after *Turner* is represented by *Whitney v. Brown.* The Sixth Circuit struck down a 1985 Michigan prison policy that prohibited Jewish inmates from traveling between complexes at the State Prison of Southern Michigan to attend weekly Sabbath services and annual Passover services. The Sixth Circuit issued a stern warning to prison administrators that a probing look at the evidence is required under the *Turner-O'Lone-Thornburgh* trilogy of cases:

Perhaps the greatest weakness in the prison officials' arguments is their misunderstanding of *Turner* and *O'Lone* as holding that federal courts will uphold prison policies which can somehow be supported with a flurry of disconnected and self-conflicting points. They seem to read *Turner* and *O'Lone* as saying that anything prison officials can justify is valid because they have somehow justified it. In an argument typical of their conclusory approach to the problem, the prison officials maintain that the Passover Seders should be banned because "[a]ny time the normal routine of an institution is altered, the good order and security of that facility are potentially compromised." The fact remains, however, that prison officials do not set constitutional standards by fiat.

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130. *Id.* at 1078.
131. *Id.* at 1074 (citation omitted) (emphasis added).
Both the trier of fact and the appellate court in that case took great care to evaluate the evidence in deciding whether the prison was justified in abandoning its 45-year rule permitting Sabbath services. The analysis included application of the four factors as well as a review of the history of the application of the rule in previous years. 132

The Sixth Circuit has upheld prison regulations under Turner after a less thorough but nonetheless fact-based review of the issues. In Pollock v. Marshall, 133 the court upheld a hair-length regulation as applied to a Lakota Indian inmate. 134 In Ward v. Washtenaw County Sheriff’s Dept., 135 the court upheld a rule that permitted inmates to receive periodicals only from publishers. 136

IV. FACTS—THE PROTECTION FROM A “MANIPULABLE” STANDARD

The lesson for trial courts, from the trilogy of cases and their application in this Circuit, is careful review of the evidence. Great deference will be given to the trial court’s factual findings. 137 Since most of the evidence is in the hands of the prison administrators, discovery rulings must make those records available to the plaintiff. Prison rules are normally found in state statutes, state regulations, post orders (standing orders that are posted at various stations in the prison), and institution handbooks, all of which should be open to discovery.

Evidence of past practices and the application of rules generally can be ascertained from institution records. Logs are normally maintained on all ranges of activities. Count sheets normally record unusual incidents; inmate grievances and institution responses to grievances are also available. Many times, wardens maintain files on all of the complaints they have received from prisoners and their responses to these complaints.

All prison personnel have files covering all details of their employment, training, and discipline on the job. Inmates also

132. Id. at 1073-74.
134. Id. at 659-60. See also Fromer v. Scully, 874 F.2d 69 (2d Cir. 1989) (upheld one-inch beard rule).
136. Id. at 329.
have extensive files that include data concerning discipline, medical care, housing unit activities, employment, education, and counseling. Discipline is normally initiated with a written charge or "ticket," followed by documents from a disciplinary board that often records its hearings. All of these written records and audio tapes are discoverable under Federal Rule of Civil Procedure 26, although a protective order may be required for certain information that should not be freely available to inmates in the institution.

In addition to the records described above, evidence of past practices and pre-litigation reasons for rules can be found in accreditation surveys, studies done for administrative reasons, investigations by law enforcement agencies in related cases, responses to inquiries from legislators, and affidavits presented to courts in previous prisoner cases dealing with similar issues.

Expert witnesses are very important to the presentation of any case in this area. All four factors identified by Turner suggest the need for an expert, especially with respect to the question of accommodations and alternatives. Note that in Turner the Court compared the Missouri rules under scrutiny to those regulating similar conduct in the Federal Bureau of Prisons. Under federal regulations, correspondence was restricted in similar fashion but the right to marry was more readily exercised than in Missouri.138

V. Conclusion

In its most recent trilogy of cases, the Supreme Court has established a standard for the review of prison regulations challenged by prisoners on First Amendment grounds. The Court, confident that the standard is not "toothless," has invalidated one regulation under the standard and affirmed three others. Interestingly, however, two of those three were remanded to determine whether they were unconstitutional as applied. Some theory is needed through which courts can test all of the actual applications of these contested regulations to particular facts. This article has argued that the overbreadth doctrine serves that purpose. Further, it is evident that the Turner factors and the reasonableness test are merely false teeth unless a solid eviden-

Tiary record is presented. Trial courts must insist on such a record to ensure that First Amendment challenges to prison regulations receive the greatest scrutiny possible.
COMMENTS

THE ROAD TO HELL? — THE UNINTENDED CONSEQUENCES OF UNWISE FEDERAL CAMPAIGN FINANCE REFORMS

Marilee Stephenson-Horne

INTRODUCTION

The oft-used maxim, "The road to hell is paved with good intentions," aptly describes the ambitious federal election campaign finance reforms of the 1970s. While the reformers' original intention may have been to ensure competitive elections by limiting the appearance of special interests in the electoral process, the application of current election law has had an opposite effect.¹

A competitive two-party system is one of the most revered tenets of American government. Recent election history, however, reveals that competitive elections, especially in the U.S. House of Representatives, have become an endangered species. The Democratic Party has controlled the House for the past 35 years, the longest span of continuous party control since the Civil War. House Republicans remain a frustrated minority in spite of their party's repeated presidential victories. Current campaign finance law not only has contributed to single-party dominance of Congress, but has perpetuated that dominance.

This paper shall examine the decrease in competitive elections for House seats and the increase in the appearance of corruption that are the result of the election law reforms enacted in the 1970s. Part I will examine the historical background and evolution of campaign finance law. Part II is a discussion of the law's intent to limit the appearance of corruption and its failure to achieve that goal. Finally, Part III will focus on the law's negative effects on competitive congressional elections and will suggest appro-

appropriate remedies, including the strengthening of political parties and the Federal Election Commission, and balancing the contribution limits placed upon individuals with the higher limits placed on political action committees.

I. HISTORICAL BACKGROUND

A. Tillman to Watergate

Andrew Jackson accused his political rivals of concocting "corrupt bargains." Warren G. Harding was catapulted to the presidency by boss extraordinaire Mark Hanna and the money-grubbing Ohio Gang. Elections and corruption have been interwoven throughout American political history.

Concern about the possible corruption of elected officials has existed since the days of the founding fathers. The first major attempt to regulate election finances, however, did not appear until the Tillman Act of 1907. Unbridled growth of the role of giant corporations in federal and state politics was the impetus for the legislation, which declared:

[I]t shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office.

Penalties for violation of the Act included a fine of up to $5,000 for a corporation. Additionally, any corporate officer or director who had consented to an illegal contribution could be fined up to $1,000 and imprisoned for up to one year.

Further legislation, enacted in 1910, required disclosure of election contributions to candidates for the House of Representatives. Each contributor of $100 or more was to be identified by name and address, while a candidate's total contributions and expenditures were to be reported and filed with the Clerk of the House. Enthusiasm for reform continued into 1911, when amending legislation expanded coverage to the Senate and broadened

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3. Id.
4. Id.
6. Id. at §§ 5-6. The file was to be preserved for 15 months and open for public inspection. Id. at § 5.
the disclosure requirements to include primary, convention, and pre-election contributions. In addition, spending limitations were imposed on congressional elections.

The Supreme Court sounded the death knell for the Tillman reforms. In 1921, in Newberry v. United States, the high tribunal overturned the conviction of a U.S. Senator for violations of campaign expenditure limitations. The Court held that federal legislation restricting expenses and activities relating to primary and/or convention periods was not within the authority of Congress.

After the Court's vivisection of the Tillman Act, Congress responded with the Corrupt Practices Act, which covered only general election activities. Like its predecessor, the Corrupt Practices Act required disclosure of contributions and expenditure limitations by congressional candidates and political action committees active in two or more states. Another innovation of the Act made it an offense to receive as well as to contribute an illegal donation.

Although surgically altered by amendment and modification, the Corrupt Practices Act formed the major body of U.S. campaign finance law for nearly five decades. Candidates and contributors, however, discovered and leaped through gigantic loopholes in the Act. Finally, the Act was shelved by the passage of the modest reforms contained in the Federal Election Campaign Act of 1971 (FECA).

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8. Id.
10. Id. at 257.
12. Id. The Act defined a "political committee" as "any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors (1) in two or more States, or (2) whether or not in more than one State if such committee, association, or organization (other than a duly organized State or local committee of a political party) is a branch or subsidiary of a national committee, association, or organization." Id.
13. Id.
The essential provisions of the 1971 Campaign Act, which became effective in 1972, were contribution and spending limits coupled with disclosure requirements. Individuals contributing in excess of $100 and political committees spending more than $1,000 were to be properly reported and disclosed. These provisions were a noble attempt to "discourage the solicitation and acceptance of large sums of money from single contributors." Companion legislation, the Revenue Act of 1971, established the tax checkoff system to fund presidential campaigns. The 1971 Campaign Act's noble attempt at election reform appeared to be an inadequate preventative for political corruption after the disclosures of the Watergate investigation. Shock and indignation at illegal donations, secret slush funds, and the use of campaign money for political "dirty tricks" provided the catalyst for more powerful reforms.

B. Watergate, Buckley, and Beyond

Traumatized by the revelations of Watergate, the American public demanded a remedy to cure the excesses and corrupt practices of past elections. In the midst of an era of national indignation and outrage, Congress crafted the Federal Election Campaign Act Amendments of 1974. The 1974 Amendments established, inter alia, partial public financing of presidential campaigns, campaign contribution and expenditure limitations, official permission for government contractors to establish political action committees, and the Federal Election Commission (FEC).

Before the ink had dried on the 1974 Amendments, they were subjected to constitutional challenge by one of history's strangest groupings of political bedfellows. Conservative Senator James Buckley aligned himself with the New York Civil Liberties Union,

16. Id.
20. See A. Matasar, CORPORATE PACS AND FEDERAL CAMPAIGN FINANCING LAWS (USE OR ABUSE OF POWER) (1986) for a more complete analysis of the 1974 Amendments.
21. On Jan. 2, 1975, the day after the Amendments became legally effective, the Buckley suit was filed.
CAMPAIGN FINANCE REFORM

former presidential aspirant Eugene McCarthy, and a host of other assorted conservatives and liberals. Unsatisfied with a Court of Appeals majority decision strongly supportive of the reform legislation and upholding the limitations upon expenditures as well as contributions, the plaintiffs appealed to the nation's highest tribunal.

In one of its longest per curiam opinions on record, the Supreme Court reversed in part the Court of Appeals and set the course for modern campaign finance law. After permitting the existence of the FEC, the high court declared the government had a legitimate interest in "the prevention of corruption and the appearance of corruption" in the electoral process. The Court also upheld provisions for voluntary public funding of presidential campaigns and the spending limits that were the conditions of receiving such funding. The reporting and disclosure requirements for all federal candidates were also upheld.

Paradoxically to some observers, the Court upheld contribution limits to candidates but found limits on spending to be violative of freedom of speech under the First Amendment. As a result, a wealthy candidate with the ability to self-finance his/her own campaign could not be denied that privilege, while independent spending by an individual or group in support of or against a candidate was also free of monetary restrictions. A governmental interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections" was constitutionally forbidden. "[The] concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

23. See generally id.
25. Buckley v. Valeo, 424 U.S. 1 (1976). The Supreme Court did alter the appointment mechanism of the FEC by declaring its original means of appointment unconstitutional, but a discussion of the Appointments Clause is beyond the scope of this paper, as are many other additional issues covered by the Buckley decision.
26. Id. at 45.
27. Id. at 58-69.
28. Id. at 45.
29. Id. at 48.
30. Id. at 48-49.
Subsequent to *Buckley*, amendments to the FECA have been modest. The 1976 Amendments\(^{31}\) were primarily concerned with minor restraints upon political action committees. Most importantly, the PAC proliferation following the 1974 Amendments, was curbed when all affiliated committees, controlled by the same corporation, were held under one contribution limit.

Simplification of reporting requirements, encouragement of party activities, and an increase in public funding for presidential nominating conventions were added to FECA in 1979.\(^{32}\) Further amendments added during the '80s, were primarily statutory clarifications and not changes of substance.\(^{33}\)

II. THE APPEARANCE OF CORRUPTION

A. PACs: Reincarnation of the Fat Cat

Competitive, democratic elections should be free from *actual* corruption as well as the *appearance* of corruption.\(^{34}\) Ideally, individual contribution limitations and disclosure requirements would suppress the "appearance of corruption" by freeing candidates from "the danger of ... dependence on large contributions."\(^{35}\) The real world of American politics, however, is not an ideal world. Presidential hopefuls may become eligible for public funding. Congressional candidates are forced to raise money wherever they can.

Before the '70s reforms, a congressional hopeful might have accepted unlimited support from any and all "fat cat" benefactors available. The $1,000 per election cap placed upon individual contributors purportedly de-clawed the "fat cat."\(^{36}\) The demise of

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31. Act of May 11, 1976, Pub. L. No. 94-283, 90 Stat. 478, 496, 496 (codified as amended at 2 U.S.C. §§ 431-455 (1980)); Additionally, trade associations, membership organizations, cooperatives, and corporations without stock were allowed to have political action committees. Id. at § 441(a)(5)(2).
34. *Buckley*, 424 U.S. at 45.
35. Id. at 55.
36. Even this argument of control is weak. A wealthy individual may use independent expenditures as a form of "indirect" contributions to benefit his chosen candidate. See FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987).
the "fat cat" coincided with an escalation in campaign costs triggered by: (a) technological sophistication; (b) the perceived necessity of telecommunications; and (c) ordinary inflation.

Fortunately for modern candidates, an alternative source to the "fat cat" has developed. Just as the FECA had taken away, the FECA would give. While emphasis was placed upon attempts to curb individual "fat cats" and secret corporate slush funds, the organized fund-raising of political action committees was legitimatized.37

The first modern political action committee,38 CIO-PAC, was established in 1943 by the Congress of Industrial Organizations because the Smith-Connally Act prohibited unions from making direct contributions to federal candidates.39 While the structure for PACs was already in existence, the FECA defined the mechanics for their operation. Corporations and labor unions were still forbidden to make direct contributions to candidates, but were granted "[the] right to create, administer, and raise funds for their PACs and cover all organizational expenses from corporate and union treasuries."40

From the viewpoint of many candidates, the resultant PAC funds were a godsend. Multi-candidate political action committees could contribute $5,000 per election, five times the maximum individual contribution.41 Obviously, the efficient allocation of a Congress member's time would favor PAC solicitation. Time is truly money, especially when one considers a member of the House should raise a minimum of $15,000 a month during his entire term in order to finance a viable campaign.42 Since the FECA limited other sources of funds, political action committees have become more attractive to donors and donees. While the donees desire a seat in Congress, PAC money is a means of

40. L. SABATO, supra note 37, at 8.
41. The FECA Amendments provide for a $10,000 total for primary and general elections. Another advantage of PACs is the fact that there is no cumulative limit on the amount they may give all candidates in any given year.
legally achieving and maintaining that objective. On the other hand, the human motivation of self-interest in seeking to gain access to and to influence powerful elected officials could never be legislated or reformed out of existence. The PAC donors perceive that they are buying access to promote their own objectives to influential policymakers. In other words, “PAC money is interested money given to candidates the interest group thinks can help it or whose potential to do damage it wants to minimize.”

The amount of interested money in congressional campaigns continues to grow. In the 1977-78 election cycle, PAC money accounted for $35.2 million in contributions to federal candidates. Ten years later, PAC contributions were $159.4 million, a more than quadruple increase.

The early pre-1974 PACs were primarily the creation of organized labor, but today, corporations parent the majority of political action committees. Besides the FECA’s encouragement of PACs in general, the landmark “SUNPAC” Advisory Opinion issued on November 24, 1975, provided a special incentive to the growth of corporate PACs. Sun Oil had requested an opinion pertaining to the establishment, administration, and funding of its political action committee, SUNPAC. As long as Sun Oil maintained a separate, segregated fund for SUNPAC use, the FEC permitted the use of general treasury funds dispersal to defray start-up expenses, administration, and costs in soliciting contributions to the PAC. In summary, the corporation could finance its PAC.

Another important aspect of the opinion gave the PAC, within certain guidelines, the permission to solicit donations from Sun Oil stockholders as well as employees. Control of contributions

44. FEC Press Release, Apr. 9, 1989, at 1.
45. Id.
46. These contribution figures may deceptively minimize the influence of PACs, since independent expenditures are not considered. A corollary to the money increase is the geometric increase in the number of political action committees themselves. In 1974, there were 608 PACs registered with the Federal Election Commission; in 1988, there were 4,268. FEC Press Release, Jan. 13, 1989. In 1972, when FECA took effect, there were only 113 PACs.
47. FEC Press Release, Apr. 9, 1989, at 3. The number of corporate PACs in 1987-88 was 2,008, while labor had only 401.
and expenditures was granted to the decision-making unit of the PAC and not its membership, a privilege that was confirmed by the Supreme Court holding in *Cort v. Ash*.

In an effort to restrain PACs, the 1976 Amendments were added to FECA. Limitations upon multiple PACs by affiliated entities and stricter solicitation requirements to ensure the voluntariness of contributions were restraints on political action committee power on one hand, while the amendment added to the PACs' potential power by the exclusion of honorariums from the definition of PAC contributions and allowed membership organizations, trade associations, cooperatives, and corporations without stock to establish PACs. The floodgates were open, and PAC proliferation was under way in virtually all segments of society.

PACs are the modern-day reincarnation of the "fat cat." Political action committee contributions constituted the largest single source of campaign finances in the 1988 congressional elections, ahead of party and self-financing. By percentage, PACs accounted for 45 percent of House members aggregate election receipts. These aggregate figures, however, understate the role of political action committees, because a substantial number of individual congressmen depend upon PACs for over two-thirds of their personal campaign funding.

### B. Evasive Maneuvers of PACs

Not only have PACs risen in numbers and monetary power, but they have acquired sophistication and expertise in the "ins and outs" of campaign law. PACs wishing to raise the $5,000-per-candidate contribution level may do so. If a candidate runs in both a primary and general election, even if only against token opposition, $5,000 for each election may be contributed. Through

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49. *Id.*
52. *Id.*
53. *Id.*
55. *Id.*
56. FEC Press Release, Feb. 24, 1989. Two examples of House members receiving an inordinate amount of PAC money are Ronnie Flippo, D-Ala., and Beryl Anthony Jr., D-Ark., both of whom are from particularly poor congressional districts.
a process called bundling, a PAC may stretch the legal contribution limits even further. A single PAC may appeal to its individual members for contributions for a specific candidate. The PAC will act as a collection point for the individual contributors, then "bundle" all the separate contributions and present them to the grateful politician. Advantages to the PAC are that the "bundle" does not count against the PAC's contribution limit, and the capability of producing a sizable "bundle" is undeniably memorable to the recipient.

The independent expenditure\(^{57}\) is another potent weapon used by PACs to evade the contribution limits imposed by the FECA. A constitutional distinction was articulated between direct contributions and independent expenditures in *Buckley*,\(^{58}\) and this distinction may continue to enlarge the role PACs play in American elections.\(^{59}\) Since the independent expenditure was equated with freedom of speech and freedom of association, theoretically, there is no limit on the amount PACs could spend on advocating the election or defeat of a candidate.\(^{60}\) Judicial decisions after *Buckley* not only reaffirm the distinction between contributions and expenditures, "the government enjoys greater latitude in limiting contributions than in regulating independent expenditures,"\(^{61}\) but broadened the doctrine to protect a non-stock corporation.\(^{62}\)

During the 1980 elections, the National Conservative Political Action Committee gained attention by using independent expenditures for negative advertising calling for the defeat of six prominent Senators. Four of the Senators were defeated, and the potential of independent expenditures began to be realized. Clearly, the elected opponents of the NCPAC targets were ben-

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60. No consultation may be made with the candidate or his/her agent concerning these expenditures or they lose their independent classification and the attendant benefits. In actual practice, many candidates and committees share political consultants and can keep informed of each other's actions by press releases. Legislation following *Buckley* does require reporting and disclosure of independent expenditures exceeding $200. 2 U.S.C. § 434(b)(3) (1982).
62. *Id.* at 259.
eficiaries of the expenditures and aware of the role NCPAC played in their victories.

Another way PACs may participate in campaigns is by in-kind or non-monetary contributions, such as a leave of absence granted to an employee for the purpose of working on a campaign or the rent-free use of a PAC's facilities. These in-kind items are subject to FEC regulations, and qualify as "hard money," but are desirable nonetheless. The PAC is given a feeling of control over the use of its contribution in the campaign. Additionally, PAC employees and/or members can cement social relationships with the candidate's staff to be used for future advantages.

A political action committee's participation in activities such as independent expenditures, bundling, and in-kind contributions may be entirely legal, but it is viewed by the PACs' opponents as improper influence upon a candidate or even outright bribery. Critics of PACs will contend that PAC money buys votes, corrupts the electoral process, and prostitutes members of Congress.

Proponents of PACs declare they are simply obtaining needed access in the political system for the viewpoint of their individual members.

C. Decline in Grass-Roots Support Coupled with PAC Growth

A distinction can and must be made between actual corruption and the appearance of corruption. Actual corruption should be viewed on the level of a criminal offense with the appropriate burden of proof required. The appearance of corruption may be

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63. "Hard money" denotes any contribution that shows up in FEC reports, while "soft money" may remain undisclosed.


66. Sen. John Glenn, D-Ohio, has said, "The PACs and the people's support of them is a vital part of our political process." (quoted in L. Sabato, supra note 37, at xiv). Contrast this remark with that of Sen. Robert Dole, R-Kan.: "When these political action committees give money, they expect something in return other than good government." (also quoted in L. Sabato, supra note 37, at xiv).
satisfied by the lower standard of preponderance of the evidence. Using this criteria, a strong case can be made that PAC activity has the appearance of corruption.

While cumulative PAC contributions have astronomically increased since the FECA reforms, small individual contributions have declined both in numbers and aggregate amount. Richard P. Conlon, in *The Declining Role of Individual Contributions in Financing*, drew the following inferences from the decline:

[T]here is a growing feeling among average citizens that their small contributions are meaningless given the enormous sums needed to run a campaign, the flood of big contributions coming from Washington-based PACs, and the trend toward $1,000-a-plate fund-raising events. Moreover, the proliferation of magazine and newspaper articles suggesting that Senate and House members are on the auction block to PACs and other special interest groups has in all probability caused many potential contributors to find other uses for their money.

Small individual contributions are comprised of grass-roots constituency donations and reflect citizens' participation in the political process. Furthermore, these grass-roots contributions may provide the preferred source of funding because their relatively small amounts do not expose the candidate to the accusations of undue influence that are associated with large single contributions, i.e., the appearance of corruption.

Skeptics may not accept Conlon's explanation of the small contributor's decline as being caused by frustration over large PAC contributions. Nevertheless, his observation of the growing media attention devoted to campaign finance corruption cannot be questioned. *Newsweek*, the *Wall Street Journal* and others have focused attention on the appearance of corruption caused by special-interest contributions to various members of Congress.


68. Id. at 479.

69. Id. at 469.

70. Id.

71. Among the many examples of such articles: *Congress and the Culture of Money, Newsweek* 21 (June 5, 1989); *Frenzy on the Hill, Newsweek* 14 (June 12, 1989); *Grabbing for Dollars, Newsweek* 22 (July 3, 1989); *Special Report: PACs, Legal Times*, Nov. 7, 1988; *PAC Power Reaches a New High in Current Congress, Wall St. J.*, Feb. 24, 1989, in "Washington Wire," at 1; and *Loophole Lets Ex-Members Cash In on Way Out, Cong. Q.*, Jan. 21, 1989, at 103.
Even members of the hallowed halls have admitted the growing public distrust. On January 25, 1989, Senator Robert Dole commented, "Members from both parties are concerned about the growing perception that Members of Congress are 'bought and paid for' by PAC's [sic] and special interests." 72

III. HOUSE ELECTIONS, PACS, AND THE PARTIES

A. Disappearing Coattails, Split Tickets, and the Automatic Seat Bonus

In their wisdom, the founding fathers provided for two chambers of the legislative branch of federal government. The lower chamber, the House of Representatives, based upon population-determined constituencies, was envisioned as responsive to and expressive of the views of the people. Closely spaced two-year elections were necessary safeguards to insure the public accountability of members of the House.

After the advent of well-organized political parties, party identification and accountability were often as important as the individual's accountability. Throughout most of the nation's history, the major parties have alternated periods of dominance in which a single party controlled both the Congress and the presidency. 73 House elections were intertwined with presidential politics. Dozens of newcomers advanced to seats in Congress via a popular president's lengthy coattails. 74

Sometime within the last 35 years, presidents lost their coattails. Straight-ticket voting declined, 75 and House elections were divorced from presidential preferences. Since 1968, with the exception of the four Carter years, a Republican has been Chief Executive, while Congress has been predominantly Democratic. This "split-level realignment," 76 i.e., divided partisan control of the legislative and executive branches of federal government, reached an apex in the 1988 elections. While George Bush soundly

75. Id.
76. Jacobson, supra note 73, at 127.
defeated Democrat Michael Dukakis\textsuperscript{77} the House Democrats broadened their advantage to a 260-175 seat edge.\textsuperscript{76}

Undeniably, congressional redistricting, carried out by predominantly Democratic state legislatures, has constructed lines favoring the status quo.\textsuperscript{79} While the effects of partisan redistricting cannot be overlooked, the decline in party allegiance coupled with the geographic mobility of today's voters may serve to diminish this partisan advantage.

A companion problem that continues to plague the Republican minority is the very structure of House apportionment determined by electoral results. The electoral system offers an automatic seat bonus to the victorious party, which then receives a larger percentage of seats than popular votes because Congress represents districts, not numbers of people. An extreme example of this bonus system would occur if the Democrats received 50.1 percent of the vote in every congressional district and were awarded 100 percent of the seats in Congress.\textsuperscript{80} Realistically, the electoral structure of Congress may be imperfect, but it is unlikely to be improved upon or changed. Moreover, the seat-bonus incentive could ideally spur the competing party to future electoral successes.

While the effects of partisan redistricting and the majority party bonus may be arguably significant, the interrelated problems of incumbency advantage and campaign financing threaten to make the Republicans a permanent minority in the House. In 1988, 98.5 percent of incumbents up for reelection were returned to their House seats by the electorate.\textsuperscript{81} This 1988 incumbency rate is not an aberration, but the continuation of a political trend. Two years earlier, in the 1986 elections, 97.7 percent of House incumbents were reelected. All in all, the 1980s have been the decade of incumbent security.\textsuperscript{82}

B. The Insurmountable Incumbents

Advantages of incumbency are an inherent part of being a member of Congress. Name recognition, large, professional staffs

\textsuperscript{77} Id. Jacobson says Bush's margin of victory was 12 percentage points.

\textsuperscript{78} Id. at 129.

\textsuperscript{79} Cook, supra note 74, at 1061; H. Smith, supra note 39, at 680; and Jacobson, supra note 73, at 127.

\textsuperscript{80} H. Smith, supra note 39, at 681.

\textsuperscript{81} Id. See also Jacobson, supra note 73, at 128.

\textsuperscript{82} Jacobson, supra note 73, at 127-31.
to tend to constituency demands, access to the media, and the franking privilege are all necessary and natural accoutrements of the office. Of these benefits, the frank is the most often cited vehicle of abuse.73 Although there are cutoff dates before election periods when mass “newsletter” mailings are not permitted, the Congress member can use the frank to endear himself to the voters during the remainder of his/her term. Since the Democrats have had more incumbents (as well as retained their majority status) in the House since the Eisenhower years, the cumulative incumbency advantage favors them over the Republicans.

Another aspect of the incumbency reelection phenomenon is the increasing uncompetitiveness of the contest for House seats. Not only are fewer incumbents defeated, but fewer incumbents are being challenged, much less threatened. Fully 20 percent of the House faced no major party opposition in 1988.74 In the 40 years between 1948 and 1988, incumbents receiving less than 60 percent of the major party vote has declined by two-thirds, from 39 percent to only 13 percent.75 Political scientists refer to the decline in competitiveness as “vanishing marginals.” Political scientist Gary Jacobson views the 1980s as the most critical decade “extending the historical trend toward diminished competition into uncharted territory.”76

[U]ncompetitiveness feeds on itself. The fewer the incumbents who are defeated or even threatened with defeat, the more reluctant good candidates are to run and contributors are to support challengers. The cumulative lesson taught by recent elections is particularly discouraging to Republicans.77

The formidable support of political action committees is a central cause of the “vanishing marginals.” Political action committees exist to promote the interests of their members to politicians who are in a position to advance those special interests. To achieve its objectives, a PAC must gain access to the congressional member it wishes to influence. Money contributions

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83. Cook, supra note 74, at 1060-61 (quoting Newt Gingrich, R-Ga.: “The No. 1 requirement for the Republican Party in the near future is to destroy the unlimited frank mail.”).  
84. Id. at 1061.  
85. Jacobson, supra note 73, at 131.  
86. Id. at 132.  
87. Id. at 133.
insure access, and once the congressional member is perceived as friendly to PAC interests, a reward in the form of additional contributions or support will be forthcoming.

Quite rationally, PACs favor proven friends over anticipatory friends and will usually favor a dependable incumbent over an unknown quantity. Incumbents received 74 percent of all 1988 PAC contributions, while challengers received only 12 percent of the PAC largess. Thus, incumbency has come to perpetuate incumbency.

As discussed in Part II, PACs have become the largest single source of funding for campaign finances. The importance of PAC money is not only its immense quantity, but its strategic timing. PAC money can be early money, often going into an incumbent's war chest, where a sufficient amount can scare off any serious challenger. Even if the incumbent faces no opposition, the PAC's contribution buys goodwill, particularly if it is given to an incumbent who can take advantage of the "1979 Loophole" and squirrel it away for retirement.

Overall, senators are more likely to get larger contributions per PAC. However, PAC money is more pervasive in House races because:

1. House members run more often.
2. House members have less personal wealth.
3. Single-entity contribution ceilings reduce the importance of PAC contributions to Senate races.
4. Senate races are more competitive and riskier.

C. Democrats, Republicans, and PAC Contributions

In the world of privileged House incumbents, there is no equality. PAC support markedly favors Democratic incumbents.

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88. FEC Press Release, Apr. 9, 1989, at 1. Obviously 74 percent plus 12 percent totals only 86 percent of PAC contributions. There were "open seats" in Congress where there was no "incumbent" or "challenger," which accounts for the remaining 14 percent of contributions.

89. Alston, Loophole Lets Ex-Members Cash In on Way Out, CONG. Q., Jan. 21, 1989, at 103-105. Some recent departees from Congress who left office with large cash balances eligible to be converted for their personal use are Gene Taylor, R-Mo., $467,369; Fernand J. St. Germain, D-R.I., $249,867; Samuel S. Stratton, D-N.Y., $192,006; Ed Jones, D-Tenn., $140,010; and Delbert L. Latta, R-Ohio, $123,061. Id. at 105.


91. MATASAR, supra note 37, at 55.
over their Republican counterparts. Official sources reveal that $54.3 million in PAC contributions filled the coffers of 1988 Democratic House incumbents, while the GOP incumbents were given only $29.6 million. Equally revealing is the FEC's 1988 listing of the 50 top House recipients of PAC contributions. Only one Republican, Bob Michel, the powerful Minority Leader, is in the top 10, while only six Republicans are in the top 50.

GOP incumbents may be given short shrift by PACs, but a Republican challenger's position is even worse. The 1988 election figures show Democratic challengers amassing nearly four times the PAC contributions of Republican hopefuls. The Democrats were not always so successful in their monopolization of PAC money. Labor union PACs have consistently favored the Democrats, but corporate PACs, as a group, lead the way in House contributions. Until 1982, the corporate PACs, led by the U.S. Chamber of Commerce, were lopsidedly pro-Republican. Stung by unfulfilled GOP promises to regain the House majority in 1982, the PACs felt disappointed and betrayed.

The Republicans had miscalculated the business PACs' loyalty quotient, because PAC managers are paid to direct their members' money into winning campaigns to insure their success when and where it counts. Unlike labor, corporate PACs are "extremely independent. They are going to do what's right for them and their membership, and they aren't going to do what is right for the party."
Opportunist par excellence Tony Coelho, former Congressman and head of the Democratic Congressional Campaign Committee, actively solicited contributions from the corporate PACs with his own particular brand of persuasion.

Look, if your shot was to beat us in '80 and you didn't, you're not going to beat us in '82, and we're going to stay in the majority. And it doesn't make any sense that you people treat us as the enemy.100

Coelho coupled persuasion with realistic campaign assessments and a top-notch organizational system to deal with PACs. Following Coelho's departure from Congress, his successor, Arkansas Congressman Beryl Anthony Jr., continued the successful organization.101 After the corporate PACs were convinced to share their wealth with the Democrats, the party was in an enviable position. In all other types of PACs,102 the Democratic Party has had an edge in the rate of contributions.103

Any PAC with a modicum of political savvy may legally go beyond the federal election campaign finance contribution limits. As mentioned earlier in this paper, a determined political action committee can expand these limits by use of independent expenditures, in-kind contributions, and "soft money" variations limited only by the creativity of the PAC's management.104 Considering all the possibilities of PAC support for favored candidates beyond those reflected in the required FEC disclosures, the cash contributions record may represent only a small fraction of actual political action committee support.105 Therefore, the monetary advantage given by PACs to incumbent House Democrats over Republican challengers is even greater than the 23-to-1 odds reflected by FEC statistics.106 Such staggering odds do not support competitive elections and paint the appearance of corruption

102. The FEC classifications of PACs include corporate, labor, non-connected, trade/membership/health, cooperative, and corporations without stock.
104. A portion of a PAC's "soft money" may be used for voter education. However, the PAC will insure the voter is educated in a way that favors the PAC-supported candidates.
105. A PAC is a political "iceberg." Only a small portion of its mass may be visible to the ordinary observer or in FEC reports.
in PAC-financed candidates who may be totally free of any hint of wrongdoing.

D. COPACs — Dangerous Liaisons

Recognizing a political action committee’s advantages under the FECA, many candidates have organized PACs of their own. Candidate organized political action committees (COPACs) became extremely popular in the 1988 election cycle. Presidential hopefuls, Senators, and House members were all founders of COPACs. Proponents of the COPACs emphasize that their committees serve to promote the campaigns of fellow party members and not just to aid the candidacy of the founder. Theoretically, the name recognition of the founder will be used to facilitate fund-raising, while the funds themselves will be distributed to deserving candidates. If the candidate wins a congressional seat, a unique situation exists for political compromise and undue influence.

While traditional PACs are concerned with gaining access, the founder of a COPAC already has access and uses the PAC to expand political power by establishing “goodwill” and cementing political alliances. Members of the House should represent the interests of their constituents. If and when constituency concerns conflict with the COPAC leader’s purposes, the beholden member may decide to subjugate the desires of his constituents to political expediency.

According to FECA regulations, a candidate may not be given more than $1,000 by an individual contributor. A candidate’s PAC, however, may contribute five times that amount. It is conceivable that a handful of powerful COPAC sponsors could influence or even control the actions of the entire legislative branch. This untenable possibility makes COPACs objectionable in a representative government.

Borrowing a page from the textbook of the more conventional PACs, the COPAC may time its donations strategically to receive

108. Id. at 518.
109. Id.
110. Id.
112. Candidate Organized Political Action Committees, supra note 107, at 523.
the most visibility. Early $5,000 contributions are noticed, because start-up money tends to be scarce.\textsuperscript{113}

Hence, the potential for candidates to become or seem to become beholden to wealthy [$5,000] givers is heightened. COPAC donations allow the big givers of pre-FECA elections to reassume their unduly powerful positions, and thereby a critical purpose of federal election regulation is thwarted.\textsuperscript{114}

Another major criticism\textsuperscript{115} of COPACs is their semi-evasion of disclosure requirements. The name of the organizer of a COPAC is usually absent from the COPAC's title. Therefore, an examination of the FEC reports will not readily disclose the candidate associated with the organization.\textsuperscript{116}

In considering the power structure of the House, it is apparent that just as the application of the FECA to conventional PACs has favored the majority party, so does the treatment of candidate-organized committees controlled by House members. Only a powerful member can maintain an effective multi-candidate PAC. Most of the powerful members are, of course, members of the majority party and will support their like-minded fellows.

\textit{E. Reforming the Reforms}

Not only do traditional PAC and COPAC activities allowed under federal election law encourage the continuation of majority party control in the House, but the Federal Election Commission itself has been criticized for not upholding its role in overseeing federal campaign finance law. Instead of being a watchdog, the FEC has been described as a "pussycat,"\textsuperscript{117} inadequately equipped to deter violaters. The Commission must depend upon Congress for its funding (\textit{i.e.}, its effective existence) and may be hard-pressed to bite the hand that feeds it. Therefore, it is under-

\begin{enumerate}
\item\textsuperscript{113} Id.
\item\textsuperscript{114} Id.
\item\textsuperscript{115} See id. at 516-20 for other problems presented by COPACs, including their use as all-purpose expense accounts by their founders.
\item\textsuperscript{116} Some examples of COPACs not revealing the founders' names in their titles: Fund for a Democratic Majority, Campaign for Prosperity, Valley Educational Fund, and Campaign America. The founders of these COPACs are, respectively, Edward Kennedy, Jack Kemp, Tony Coelho, and Robert Dole. Going one step further, tax-exempt foundations have been founded by a few politicians, which can prove even more advantageous than COPACs.
\item\textsuperscript{117} P. STERN, THE BEST CONGRESS MONEY CAN BUY 175 (1988).
\end{enumerate}
standable if the FEC does not maintain a full-fledged contingent of crack investigators and seldom exercises its power of subpoena.\textsuperscript{118} If enforcement is weak, many politicians are willing to risk the benefits of taking tainted money against the slim chances of being caught and fined.\textsuperscript{119} Furthermore, the structure of the FEC promotes stalemates and deadlocks. The Commission (including the Chairman) consists of six members who possess an equal voice in all matters. Procedural requirements that are met before the FEC can impose sanctions for violations usually take several months.\textsuperscript{120} Thus, indiscretions taking place during a campaign are not adjudicated until after the election.

Modification in the number of Commission members and funding provisions, tied to increases in inflation that can be raised but not lowered by Congress, are apparent remedies for strengthening the FEC. In the meantime, the perceived inadequacies of the Federal Election Commission, coupled with the failure of election law to prevent the appearance of corruption and ensure competitive House elections, will prompt renewed calls for reform. Some over-zealous reformers would abolish political action committees or restrain their activities severely. PACs are protected under the constitutional rights of speech and association and cannot or should not be abolished.\textsuperscript{121} Organizations of persons banded together to further their political objectives is historically and philosophically part of the American tradition. PACs created problems in the electoral system because the attempts in the '70s at election reform went too far. By over-regulating and lowering individual and party contributions to congressional candidates, PACs became the only game in town by default.

Restoring competition in congressional races cannot be solved by confining reforms to legitimate political action committees.\textsuperscript{122}

\begin{footnotesize}
\textsuperscript{118} B. JACKSON, supra note 38, at 309.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 311.
\textsuperscript{121} NAACP v. Alabama, 357 U.S. 449, 450 (1958) (quoting Justice Harlan: "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech."). Id. at 460. See also Kusper v. Pontikes, 414 U.S. 51 (1973) (quoting Justice Harlan: "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments."). Id. at 56-57.
\textsuperscript{122} COPACs are not viewed as legitimate PACs by this author.
\end{footnotesize}
The inordinate power of PACs should be balanced and counteracted by raising the contributions limits placed upon individuals and parties. Individual donations to a candidate's campaign should be raised because the value of $1,000 has decreased since 1971, and $1,000 comprises such a small percentage of total campaign expenses that the donor has little chance of "buying" a candidate. Particularly in the beginning stages of a campaign, the challenger needs seed money to establish his/her candidacy. Once the candidate is taken seriously, other financial supporters will jump on the bandwagon. The early money of a few wealthy donors may generate many modest donations from later supporters. It is not suggested there be no limitations upon individual contributions, but reasonable limitations should be imposed that are low enough to prevent one lone contributor from becoming indispensable to the candidate while high enough to put individuals on a more equal footing with political action committees. Furthermore, small individual contributions should be encouraged by providing a tax credit for contributions up to $50.\textsuperscript{123}

The reforms encouraging individual contributions must be accompanied by an increase in the permissible amount a political party can expend in its support of a candidate. Presently, political parties are allowed to provide approximately one-tenth the funds needed for a competitive election.\textsuperscript{124} If a candidate receives significant funding from a party, the candidate will be more accountable to that party—a desirable objective according to political scientist Gary Jacobson, who contends, "Political parties are the only instruments we have managed to develop for imposing collective responsibility on legislators."\textsuperscript{125}

While individuals and PACs require regulation and strictly defined limitations, political parties should have more liberal ceilings and be given preferential treatment by law.\textsuperscript{126} "Individuals and PACs represent special interests and further the atomization of public policy, the parties encompass more general concerns and push the system toward consensus."\textsuperscript{127}

\textsuperscript{123} This is an arbitrary figure; supporters of the tax credit are not in agreement on the specific amount.
\textsuperscript{124} B. Jackson, supra note 38, at 301.
\textsuperscript{125} Id. (quoting Jackson).
\textsuperscript{126} L. Sabato, supra note 37, at 176.
\textsuperscript{127} Id.
CONCLUSION

Assuredly, the proposed raising of individual and party contribution limitations should increase competitiveness in House elections, because Republicans have traditionally been better fund-raisers than the Democrats in these two areas. Fund-raising talents are unimportant, however, if the Republican Party fails to produce quality congressional candidates. The ability to run a financially viable campaign should serve as an incentive to potential candidates. On the other hand, Democrats would still have the incumbency advantage and the accompanying PAC support allotted to the majority party. If Democrats continued to run better campaigns, the House would remain under their control. Elections held under the proposed financing reforms would, however, be more competitive than those held under the present system. Competitive elections would reinforce accountability and responsive representation to constituents. The political parties would be benefited. Republicans would no longer be a frustrated minority without hope of recovery. Democrats would also benefit from meaningful competition.

The Democratic majority may not be convinced of the importance of election finance law reforms, and history may have to repeat itself. Just as public indignation and outrage motivated the reforms of the '70s, the reforms of the '90s may result only when both parties are convinced that voters demand change. Rather, the counter-balancing of individual and PAC limitations with the elevation of party funding are the most necessary changes needed to restore competitive elections, while limiting the appearance of corruption. These proposals are also most adaptable to the American political system.

129. "Large, stable majorities tend to become divided and self-centered. They take for granted the rewards of majority status and lose sight of the importance of the party's collective performance." Mann, Is the House of Representatives Unresponsive to Political Change?, in ELECTIONS AMERICAN STYLE 263 (A. Reichley ed. 1987).
130. The proposals presented for reforms are modifications of regulations already in force. The amounts of limitations are the basic change, and the proposals do not call for abolishment of constitutionally protected organizations. These reforms do not overly restrict group or individual rights, as do many other proposed efforts, such as a reform proposal that would limit speech by forbidding campaigning more than 60 days before an election. Obviously, any restriction on spending and/or speech adversely affects
Substantial changes in federal election campaign finance law should be considered only under extreme circumstances. The endangerment of a competitive two-party system justifies the consideration of legislative reform, but only realistic, well-considered reform. Special interests and their advocacy are an integral part of the American political process. Any legislative attempt that does not acknowledge political reality is doomed to failure. Perhaps American legislators have learned from the failure of past election reform that good intentions cannot compensate for poorly crafted laws.

challengers, who must usually run earlier, harder, and raise more funds to compete with an incumbent. Likewise, public funding of congressional elections would favor an incumbent who needs to spend less, because he has already achieved name recognition in addition to the other advantages of his office.
THE TROUBLE WITH BUBBLES: RAMIFICATIONS OF AGENCY DELAY IN APPROVING SIP REVISIONS

Sean M. Caldwell

I. INTRODUCTION

The air we breathe and the water we drink have become tainted. This is by no means news to anybody. After all, today's society enjoys the benefits of technology. These benefits have exacted a cost in the form of pollution.

Congress has enacted legislation in the hope of reversing some of the damage done to the environment. One aspect of those efforts, the Clean Air Act, has been refined to give the states primary enforcement authority while reserving for the federal government an oversight role. The underlying scheme of the Act involves the promulgation of national ambient air quality standards by the Environmental Protection Agency (EPA). These standards are then incorporated into state implementation plans (SIPs) by the individual states. SIPs are individually tailored to accommodate the various industrial, socio-economic, geographical, and other characteristics unique to the implementing state. These SIPs require sources of air pollution to comply with certain requirements in order to be permitted to operate.

Sources that operate in violation of the applicable SIP are subject to mandatory civil penalties. The penalties are designed to discourage violations of the Act. Consequently, one of the considerations in assessing the penalties is the economic benefit obtained from the decision to operate in violation of the SIP instead of modifying operations in order to achieve compliance. A plant unable to comply has an alternative to operating in violation of the SIP. This alternative is the proposal of a SIP revision. The plant may submit a proposed SIP revision to the state. If the state approves the revision, it is then submitted to the EPA.

The legal problem with SIP revisions is that the Act does not expressly require the EPA to approve or disapprove them within a certain time frame. Since the date of the EPA's final decision is uncertain, the plant submitting the revision must adapt its behavior to the most economically feasible alternative. These alternatives may include a complete shutdown, a partial shutdown, or a continuation of operations in violation of the existing SIP.

The courts that have addressed the problem with EPA delay have generally agreed that the EPA is impliedly required to render a final decision on a SIP revision within four months. In addressing the legal ramifications of EPA delay, however, the courts have adopted differing approaches. The District of Columbia Circuit Court of Appeals has held that while the EPA was barred from collecting noncompliance penalties until final action on the SIP revision was rendered, the EPA could collect the penalty with interest back to the deadline should it ultimately reject the revision.\(^2\) The Fifth Circuit Court of Appeals, however, has held that the EPA was barred from collecting penalties if it failed to act on a revision within the four-month deadline.\(^3\) The First Circuit Court of Appeals has adopted an *ad hoc* approach, according the district court the discretionary authority to consider the reasonableness of the EPA's delay, the prejudice suffered by the plant as a result of the delay, and other factors in determining the penalty to be imposed.\(^4\) The Sixth Circuit Court of Appeals recently adopted the First Circuit's *ad hoc* approach in *United States v. Alcan Foil Prod.*\(^5\)

The *Alcan* decision is significant in that the Supreme Court has recently granted certiorari to resolve the conflict among the circuits.\(^6\) Because of the variables inherent in rendering a final decision on a SIP revision, and because of the Draconian nature of the penalties for noncompliance, the Court should affirm the First Circuit’s *ad hoc* approach and thereby encourage the most equitable solution to the question of EPA delay.

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3. American Cyanamid v. EPA, 810 F.2d 493 (5th Cir. 1987).
4. United States v. General Motors Corp., 876 F.2d 1060 (1st Cir. 1989).
II. BACKGROUND

A. Historical Development of the Clean Air Act

State and local governments were given the primary responsibility for controlling air pollution when Congress enacted the Air Pollution Control Act of 1955.\(^7\) The federal government's information-gathering authority under this state-regulated scheme was significant in that it provided the necessary framework upon which an effective air-pollution control plan could be built.\(^6\) The Clean Air Act of 1963\(^9\) expanded the role of the federal government beyond the information-gathering authority.\(^10\)

The Clean Air Act of 1967\(^11\) represented a further expansion of the federal authority in the area of pollution control.\(^12\) This legislation directed the Secretary of Health, Education, and Welfare to issue "criteria of air quality . . . requisite for the protection of the public health and welfare [and] information on those recommended pollution control techniques the application of which is necessary to achieve levels of air quality set forth in criteria . . . ."\(^13\) This language was borrowed from the Clean Air Act of 1963.\(^14\) While the state and local governments remained the primary authorities for regulating air pollution, the 1967 Act expanded the federal role by giving the Secretary of Health,

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8. D. CURRIE, AIR POLLUTION FEDERAL LAW & ANALYSIS § 1.08 (1989). The federal government played an informational role in that the Surgeon General was authorized to make research grants, conduct research, and disseminate information in an effort to prevent and abate air pollution. These provisions have been incorporated into § 103 of the Clean Air Act (42 U.S.C. § 7403 (1982)).
10. CURRIE, supra note 8, at §§ 1.09-1.11. First, federal grants designed to support state and local government air pollution planning and control programs were authorized. Second, the legislation established interstate compacts, subject to congressional approval, in an attempt to encourage the states to work together and develop a consistent and effective approach to controlling air pollution. And third, the legislation authorized federal enforcement through the use of abatement conferences.
12. CURRIE, supra note 8, at § 1.12.
13. Id.
14. Id.
Education, and Welfare supervisory and enforcement authority.\textsuperscript{15}

The Clean Air Amendments of 1970\textsuperscript{16} were enacted in response to the "regrettably slow" progress made under the predecessor acts.\textsuperscript{17} Congress recognized that "the strategies which ... have [been] pursued in the war against air pollution have been inadequate in several important respects..."\textsuperscript{18} While the states retained the primary responsibility and authority to prevent and abate air pollution, they were now under a congressional mandate to attain specified air-quality standards within a specified timeframe.\textsuperscript{19} This mandate was significant because it required each state to adopt and implement a pollution control plan that incorporated air quality standards at least as stringent as those set by the government. The federal role was expanded by requiring the Secretary of Health, Education, and Welfare to develop air-quality standards for various sources.\textsuperscript{20} The Clean Air Amendments of 1977 were the product of Congress' dissatisfaction with the 1970 Amendments.\textsuperscript{21} "Part of the explanation for the slow pace was that the original timetables for developing and implementing air-quality standards had been overly optimistic in light of the technological, economic, and political complexities of the problem of air pollution."\textsuperscript{22} Additionally, the technology-forcing nature of the Act required sources to either comply or subject themselves to penalties regardless of any technological infeasibility arguments.\textsuperscript{23} Finally, under the 1970 Amendments, little economic incentive existed for sources to comply because the penalties could provide a more attractive alternative when compared with the cost of compliance.\textsuperscript{24} Con-

\textsuperscript{18} Id.
\textsuperscript{20} CURRIE, supra note 8, at § 1.13. The authority originally delegated to the Secretary of Health, Education, and Welfare was later assumed by the Administrator of the Environmental Protection Agency (EPA). The EPA was created by Executive Order in 1970. See 35 Fed. Reg. 15,623.
\textsuperscript{21} Duquesne Light Co. v. EPA, 698 F.2d 456, 462 (D.C. Cir. 1983).
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 463.
\textsuperscript{24} Id.
sequently, § 120, a penalty system, was added to encourage compliance. \(^\text{25}\) Section 120 "is designed to alter economic behavior by changing the costs of emitting pollutants in violation of applicable air quality standards." \(^\text{26}\)

**B. State Implementation Plans**

The 1965 Water Quality Act \(^\text{27}\) provided a model for subsequent state implementation plans (SIPs). \(^\text{28}\) SIPs are now governed under § 110 of the Clean Air Act. \(^\text{29}\) The Clean Air Amendments of 1970 directed the EPA to promulgate national primary and secondary ambient air quality standards pursuant to § 109. \(^\text{30}\) The attainment

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\(^{25}\) *Id. See 42 U.S.C. § 7420 (1982):*

[T]he State or the Administrator shall assess and collect a noncompliance penalty against every person who owns or operates ... a major stationary source ... which is not in compliance with any emission limitation, emission standard or compliance schedule under any applicable implementation plan ... or ... a stationary source which is not in compliance with an emission limitation, emission standard, standard of performance, or other requirement .... The amount of the penalty which shall be assessed and collected with respect to any source under this section shall be equal to ... [an amount] which is no less than the economic value which a delay in compliance ... may have for the owner of such source ... minus ... the amount of any expenditure made by the owner or operator of that source during [the period of noncompliance] for the purpose of bringing that source into, and maintaining compliance with, [the applicable emission limitation, emission standard or compliance schedule].

\(^{26}\) 698 F.2d at 463.


\(^{28}\) *Currie,* supra note 8, at § 4.08.


Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. ... The Administrator shall, within four months after the date required for submission of a plan ... approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing. 

and maintenance of national primary ambient air quality standards by the states is "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air."\textsuperscript{31}

Under the current scheme, each state is required to submit a SIP to the Environmental Protection Agency (EPA) for approval within nine months of the promulgation or revision of either or both the national primary and secondary ambient air quality standards.\textsuperscript{32} The SIP should "provide[ ] for implementation, maintenance, and enforcement of such primary [and secondary] standard[s] in each air-quality control region (or portion thereof) within such State."\textsuperscript{33} The EPA is required to either approve or disapprove the submitted SIP within four months.\textsuperscript{34} If the state fails to submit a SIP, or the submitted SIP is deemed inadequate, then the EPA is required to develop an implementation plan for that state.\textsuperscript{35} The state becomes the primary regulatory and enforcement authority for an EPA-approved SIP.\textsuperscript{36} The EPA, however, retains an independent enforcement authority and an oversight role.\textsuperscript{37}

If a state submits a revision of an existing SIP to the EPA, "[t]he Administrator shall approve ... [the] revision ... if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings."\textsuperscript{38} This provision is the focus of this paper's analysis.

\section{C. The Bubble Concept}

Many SIP revisions involve the application of the "bubble" concept. Compliance with the applicable ambient air quality standards is measured at the source\textsuperscript{39} of the pollution. As such, one

\begin{flushleft}
33. Id.
34. 42 U.S.C. § 7410(a)(2).
36. Id.
37. Id.
39. Section 111 of the Clean Air Act defines "new source" as:
\[\text{\textit{\footnotesize{Any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such}}\]
plant could have numerous "sources" of pollution. If the emissions at any of these sources exceed the ambient air quality standards for the emitted air contaminant, the plant as a whole would be out of compliance. Bubbling enables a pollution-emitting source to comply with the applicable ambient air quality standards by permitting a "supercomplying source" to offset an "undercomplying source." If bubbling is allowed, multiple point sources within a plant are treated as one point source by placing an imaginary bubble over the entire plant. The emissions from the entire plant are then measured for purposes of determining compliance. Bubbles enable the plant to achieve compliance, thereby "producing" economic savings and environmental improvement at the same time. The Supreme Court has upheld the EPA's regulations permitting states to apply the bubble concept.

source... The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.


The Ohio Revised Code provides that: "Air contaminant source" means each separate operation or activity that results or may result in the emission of any air contaminant. OHIO REVISED CODE ANN. § 3704.01(C) (Anderson 1988).

The Ohio Administrative Code provides that: "Source" means any building, structure, facility, operation, installation, other physical facility, or real or personal property that emits or may emit any air pollutant. OHIO ADMIN. CODE § 3745-15-01(W) (1988).

Kentucky's statutory definition is more explicit:

"Air contaminant source" means any and all sources of emission of air contaminants, whether privately or publicly owned or operated. Without limiting the generality of the foregoing, this term includes all types of business, commercial and industrial plants, works, shops, and stores, and structures of all types including single and multiple family residences, apartments, houses, office buildings, public buildings, hotels, restaurants, schools, hospitals, churches, and other institutional buildings, automobiles, trucks, tractors, busses and other motor vehicles, garages and service locations and stations, railroad locomotives, ships, boats and other waterborne craft, portable fuel-burning equipment, incinerators of all types (indoor and outdoor), refuse dumps and piles, and all stack and other chimney outlets...

KY. REV. STAT. ANN. § 224.005(2) (Baldwin 1989).

The Kentucky Administrative Regulations provide: "Source" means one (1) or more affected facilities contained within a given contiguous property line. The property shall be considered contiguous if separated only by a public thoroughfare, stream, or other right of way." 401 KY. ADMIN. REGS. ch. 50-010 § 1(44).

40. United States v. Alcan Foil Prod., 889 F.2d 1513, 1516 (6th Cir. 1989). A "supercomplying source" is one whose emissions fall below the governing standards. Antithetically, an "undercomplying source" emits air contaminants in excess of the allowable standards.

41. Squillace, supra note 35, at 47.


43. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). This case involved an EPA regulation which permitted states to "treat all of the pollution-
D. The Varying Approaches of the Circuits

The disparate treatment in the circuits involves the situation where a source is unable to comply with the existing SIP but would be in compliance with the proposed SIP. The Sixth Circuit recently held that the EPA is required to approve or disapprove revisions to state implementation plans within four months.44 The Alcan court recognized that most courts which have considered the question have held the four-month rule to apply.45 There is, however, a split in the circuits with regard to the legal ramifications of the EPA's failure to meet this four-month deadline. The controversy involves the assessment of penalties against the industry sources of pollution. Typically, an industry source will submit a proposed revision to an existing SIP which, if approved, would enable that plant to be treated for compliance purposes as a single source of pollution rather than a conglomeration of separate sources. These SIP revisions are generally submitted if one of the sources within the plant is a noncomplying source under the existing SIP. Since that single source is unable to comply with the applicable emission standards, the plant is liable for noncompliance penalties. These penalties will accrue upon the issuance from the EPA of a notice of noncompliance.

The circuits vary in their treatment of circumstances under which penalties may be assessed. At one extreme is the District of Columbia approach, which provides that the EPA can assess penalties against a noncomplying source but that these penalties have to be held "in abeyance" until the EPA issues a final decision on the proposed SIP. Should the EPA decide to reject the revision, it could collect the penalty with interest back to the deadline.46 At the other extreme is the Fifth Circuit's approach, which prohibits the EPA from assessing or collecting noncompliance penalties if the agency has failed to act on a proposed SIP revision within the four-month deadline.47 A discussion of the other circuits is necessary to an understanding of the current Sixth Circuit approach.

emitting devices within the same industrial grouping as though they were encased within a single 'bubble.'" Id. at 840. The court upheld the agency's regulation as a permissible interpretation of the statutory term "stationary source." Id.
44. United States v. Alcan Foil Prod., 889 F.2d 1513 (6th Cir. 1989).
45. Id. at 1517.
47. American Cyanamid v. EPA, 810 F.2d 493, 499 (5th Cir. 1987).
1. The Second Circuit

The Second Circuit addressed the issue of SIP revisions in *Council of Commuter Organizations v. Gorsuch*\(^48\) and *Council of Commuter Organizations v. Thomas.*\(^49\) The *Gorsuch* case involved a petition for review of an EPA decision to approve New York's revised SIP.\(^50\) The petitioners, commuter groups in the New York City metropolitan area dedicated to improving mass transit, contended that the mass-transit improvement program adopted by the revised SIP was inadequate and that the SIP contained "insufficient implementing schedules and details."\(^51\) While the congressionally mandated deadline for approval of the SIP revision was August 1, 1978, the EPA did not give final approval until September 9, 1981.\(^52\) The court denied the petition, reasoning that the substance of the EPA's approval of the SIP revision satisfied the substantive requirements of the Clean Air Act.\(^53\) However, in discussing the timeliness of EPA's approval, the court stressed:

By permitting such a blatant departure from the time frame specified by Congress, EPA has impermissibly rewritten the time-specific provisions of the legislation, abrogating to itself a legislative role beyond its power as an administrative agency and frustrating the means for any effective judicial review of its action.\(^54\)

The court held that the EPA was required to approve or disapprove SIP revisions within four months from the date of submission.\(^55\)

The *Thomas* case involved a petition for review of approval by the EPA of New York's SIP.\(^56\) In response to the *Gorsuch* decision, New York City submitted a revised SIP to the EPA for approval.\(^57\) The SIP provided for the requisite basic transportation

\(^{48}\) 683 F.2d 648 (2d Cir. 1982).
\(^{49}\) 799 F.2d 879 (2d Cir. 1986).
\(^{50}\) 683 F.2d at 650.
\(^{51}\) *Id.*
\(^{52}\) *Id.*
\(^{53}\) *Id.* at 661.
\(^{54}\) *Id.*
\(^{55}\) *Id.* at 662 n.2.
\(^{56}\) 799 F.2d at 881.
\(^{57}\) *Id.*
needs but did not contain the detailed transportation-control measures that New York City had promised to include in response to the *Gorsuch* decision. The plan was approved, and an appeal followed. In denying the petition for review of the EPA's decision to review, the court affirmed the *Gorsuch* application of the four-month rule. Additionally, the SIP revision was held to satisfy the substantive requirements of the Clean Air Act. The court noted that an available remedy for undue delay was a § 304 suit to compel Agency action.

2. The District of Columbia

The District of Columbia Circuit addressed the issue in *Duquesne Light Co. v. EPA.* At issue was a § 120 penalty proceeding. Procedurally, § 120(b)(3) requires that a noncomplying source be given notice of the violation through a notice of noncompliance. The source is then required to either submit a calculation of the penalty owed, submit a petition challenging the notice, or assert entitlement to an exemption. In the event the source does not respond to the notice, the EPA may contract for calculation of the penalties. The penalty should reflect the economic benefit of noncompliance, and it is to be calculated from the date the notice was received. There is a provision allowing for a credit to be applied against the penalty for expenditures made in an effort to bring the source into compliance.

The court discussed the industry petitioners' arguments that compliance with SIP revisions should alter the Agency practice of requiring compliance with a current SIP. The court recognized that the standard for determining compliance is the current EPA-

58. *Id.*
59. *Id.* at 888.
60. *Id.*
61. *Id.* See 42 U.S.C. § 7604.
62. 689 F.2d 456 (D.C. Cir. 1983).
63. *Id.* at 465.
64. 42 U.S.C. § 7420(b)(3).
67. *Id.* See also 688 F.2d at 464.
68. 698 F.2d at 464. See also 42 U.S.C. § 7420(c).
69. 698 F.2d at 464. See also 42 U.S.C. § 7420(d)(2)(A).
71. 698 F.2d at 470.
approved SIP.\textsuperscript{72} While the EPA expressed the position that compliance may be measured only against current approved SIPs, it voiced a more flexible approach for SIP revisions that are likely to be approved: "[The EPA] would assign lower priority to issuing a notice of noncompliance against a source in compliance with the proposed revision."\textsuperscript{73} The court held that the §110(a)(2) four-month deadline for approval of original SIPs also applied to SIP revisions.\textsuperscript{74} Additionally, the court held that while the EPA had to hold noncompliance penalties "in abeyance" until final action on the proposed revision, the EPA could collect the penalty with interest back to the deadline should it ultimately reject the revision to the SIP.\textsuperscript{75}

3. The Fifth Circuit

The Fifth Circuit first addressed the issue in 1987 in \textit{American Cyanamid v. EPA.}\textsuperscript{76} This case involved an appeal from a district court finding that American Cyanamid violated a state SIP, rendering it liable to the EPA for a noncompliance penalty.\textsuperscript{77} American Cyanamid owned and operated a chemical plant in Louisiana.\textsuperscript{78} Since the plant emitted or had the capacity to emit more than 100 tons of volatile organic chemicals a year, it was classified as a major stationary source.\textsuperscript{79} American Cyanamid proposed the application of the "bubble" concept in order to bring the plant into compliance with the existing Louisiana SIP.\textsuperscript{80} If American Cyanamid's emissions were measured under the proposed SIP revision, the plant would be in compliance. However, the plant was in violation of the existing SIP.\textsuperscript{81} On appeal, the court recognized the violation but found American Cyanamid to be in compliance with the proposed SIP revision.\textsuperscript{82} Therefore, the

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\textsuperscript{72} Id. at 463.
\textsuperscript{73} Id. at 471. See 45 Fed. Reg. 50,090 (1980).
\textsuperscript{74} Id. at 471.
\textsuperscript{75} Id. at 472.
\textsuperscript{76} 810 F.2d 493 (5th Cir. 1987).
\textsuperscript{77} Id. at 494.
\textsuperscript{78} Id. at 497.
\textsuperscript{79} 42 U.S.C. § 7479(1).
\textsuperscript{80} 810 F.2d at 497.
\textsuperscript{81} Id. at 494.
\textsuperscript{82} Id.
lower court’s finding allowing the EPA to commence enforcement proceedings was reversed.\textsuperscript{83}

This American Cyanamid court followed the position of the District of Columbia and Second Circuits in holding that the four-month time limit applies to SIP revisions: “To hold otherwise would intrude upon the logical pattern of the state and federal relationship set up in the statute which recognized in the time limit the important role of the states.”\textsuperscript{84} The case was similar to Duquesne in that it involved a §120 enforcement proceeding and addressed the question of noncompliance penalties.\textsuperscript{85} As in Duquesne, the “applicable legal requirement” is the approved SIP, not the proposed SIP revision.\textsuperscript{86}

American Cyanamid proposed the application of the bubble concept to one of its plants in order to bring the plant into compliance with the Louisiana SIP (LSIP).\textsuperscript{87} The Louisiana Office of Environmental Affairs authorized American Cyanamid to utilize the bubble concept to offset emissions for noncomplying sources in order to bring the noncomplying sources into compliance.\textsuperscript{88} Two and a half months later, Louisiana submitted this “order” to the EPA as a proposed revision of the existing LSIP.\textsuperscript{89} The EPA’s Regional Office reviewed the application and forwarded it to the EPA with a recommendation to deny the proposed revision.\textsuperscript{90} The EPA sent a notice of noncompliance to American Cyanamid on September 28, 1984.\textsuperscript{91} American Cyanamid challenged the issuance of the notice, alleging that it was in compliance with the bubble and that the EPA was not authorized to commence a noncompliance action until it had either approved or disapproved the revision.\textsuperscript{92} The Administrative Law Judge upheld the EPA’s actions but held that penalties could not be collected until the revision was rejected.\textsuperscript{93} The EPA’s Chief
Judicial Officer affirmed the Administrative Law Judge's decision.94

The American Cyanamid court, recognizing the state's role in satisfying the Clean Air Act as weighed against the Agency's interpretation of the SIP, held that American Cyanamid was not in compliance with the existing SIP and that compliance with the revision is measured only at the time the revised SIP is approved.95 Additionally, the EPA's failure to meet the statutorily imposed four-month deadline rendered it without authority to “adjudicate tentatively the amount of the Noncompliance Penalty but also ... its authority to commence [§ 120] proceedings.”96

In distinguishing Duquesne, the Fifth Circuit reasoned that the Duquesne approach does not encourage the EPA to adhere to the statutorily imposed deadline since “the EPA loses nothing by its contumaciousness.”97 Additionally, such an approach could serve as an incentive to the EPA to reject revisions after long delays since it would collect penalties for rejected plans but not for approved plans. “These incentives may distort the EPA's evenhanded administration of the Act.”98

The court placed a great emphasis on the congressional intent of encouraging cooperation between the states and the EPA.99 It held that the EPA's focus should be a duty to act for the benefit of the state and not for the benefit of industry.100 As such, it disallowed the collection by the EPA of penalties between the period commencing four months after the plan had been submitted and extending until the plan had been rejected.101 “If the EPA bursts American Cyanamid's bubble, it can then undertake to enforce Noncompliance Penalties against the company.”102 If the revision were approved, however, no penalty could be collected.103

The court noted that if the EPA were to issue a notice of noncompliance to a source before the state submitted a revision

94. Id.
95. Id.
96. Id. at 499.
97. Id.
98. Id.
99. Id. at 500.
100. Id.
101. Id.
102. Id. at 502.
103. Id. at 500.
of the SIP to the EPA, then the EPA would be entitled to assess and collect penalties from the date the notice of noncompliance issued until four months after the revision had been submitted.\textsuperscript{104} Penalties would cease at that point and could not be collected until after the EPA rejected the proposed revision.\textsuperscript{105}

In criticizing the \textit{Duquesne} approach, the Fifth Circuit noted that the \textit{Duquesne} court "inadequately recognized the role of the states under the Act..."\textsuperscript{106} The court opined that \textit{Duquesne's} concern that industry sources of pollution would "benefit undeservedly"\textsuperscript{107} should be outweighed by a consideration of Congress' explanation "that the prevention and control of air pollution ... is the primary responsibility of States and local governments..."\textsuperscript{108} The court reasoned that since the state, not the industry source of pollution, undertook authorization of the bubble, the industry source does not benefit "undeservedly" from the court's refusal to allow the EPA to collect § 120 penalties if the EPA has delayed the decision-making process.\textsuperscript{109}

The \textit{American Cyanamid} court also departed from \textit{Duquesne} in the situation where the EPA issues a notice of noncompliance more than four months after a state has submitted a proposed SIP revision.\textsuperscript{110} The Fifth Circuit would disallow the commencement of § 120 actions by the EPA, while the \textit{Duquesne} court would allow the EPA to determine the liability and calculate the penalty pending the approval or disapproval of the proposed revision.\textsuperscript{111} The conclusion here was supported by the reasoning that an eventual EPA approval of a proposed revision would result in unnecessary and excessive expenditures by both the company and the government because of the costs and court time associated with exhausting the Act's procedural remedies.\textsuperscript{112}

A second Fifth Circuit decision involved a § 113(d) deadline and a "conjectured enforcement proceeding" under § 113(b).\textsuperscript{113}

\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 500 (quoting Duquesne Light Co. v. EPA, 698 F.2d 456, 472 (D.C. Cir. 1983)).
\textsuperscript{108} Id. at 500-01 (quoting 42 U.S.C. § 7401(a)(3)).
\textsuperscript{109} Id. at 501.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} General Motors Corp. v. EPA, 871 F.2d 495, 497 (1989).
The court noted that the deadline applicable to delay compliance orders is "no less important than the section [110] deadline [discussed in American Cyanamid] governing revision to state plans."\textsuperscript{114} General Motors had sought and was issued a delayed compliance order (DCO) from Texas.\textsuperscript{115} This DCO enabled it to continue operations for a short period of time with the proviso that it would implement changes during this time in order to bring it into compliance with the ambient air quality standards, which had recently been made more stringent.\textsuperscript{116} The DCO was issued on January 16, 1987, and expired by its own terms on August 28, 1987.\textsuperscript{117} Procedurally, the EPA had 90 days to determine whether or not the DCO satisfied the requirements of the Act once the state notified it that the DCO has been issued.\textsuperscript{118} The EPA was made aware of the DCO on January 26, 1987.\textsuperscript{119} It proposed disapproval on July 31, 1987.\textsuperscript{120} It finally disapproved the DCO in February 1988.\textsuperscript{121}

General Motors appealed the EPA's decision to disapprove the DCO in order to resolve whether the EPA has forfeited the right to disapprove the order and to prosecute for any violations that occurred in response to compliance with the DCO because the EPA had delayed action until after the statutory deadline had run.\textsuperscript{122}

The court proffered three justifications for requiring prompt EPA action. First, DCOs are issued only to noncomplying sources.\textsuperscript{123} Therefore, if the EPA fails to act, the source is faced with a decision to either shut down or risk an EPA enforcement action.\textsuperscript{124} Second, EPA inaction is damaging since it deprives the source of the opportunity to either make a timely appeal of the EPA's decision or to seek a federally issued DCO.\textsuperscript{125} Third, "by issuing the delay order, the state declared its intent to accompl..."
modate the source to secure implementation of an agreed-upon compliance schedule. The EPA's inaction leaves the state without means to achieve these policy goals.\textsuperscript{126}

This court also discussed why prompt action was even more important with respect to DCOs as opposed to SIP revisions. Primarily, DCOs apply only to noncomplying sources and are temporary.\textsuperscript{127} Additionally, the EPA has many incentives for not acting promptly on a DCO. Prompt action may mean that the source is forced to shut down, thereby exposing the EPA to the possibility of having to bear the burden of political responsibility.\textsuperscript{128} Another reason for delaying action is the cost associated with bringing enforcement proceedings.\textsuperscript{129} Disapproval is much more attractive since the EPA can collect penalties from the source and because an enforcement action is less burdensome where the source has already demonstrated that it did not comply and was incapable of complying.\textsuperscript{130}

The court held that delay orders are presumed to be immediately effective and remain so until disapproved by the EPA or until they expire.\textsuperscript{131} The 90-day constraint on the EPA relates to the question of penalties.\textsuperscript{132} Section 113(d)(2) imposes another constraint on the EPA's approval or disapproval: "[T]he constraint forces the EPA to fish or cut bait. The EPA must accept the state's proposed enforcement mechanism — the compliance schedule set out in the delay order — or issue its own delay order, or begin enforcement proceedings."\textsuperscript{133} Reasoning that the EPA cannot comply with this second constraint once the order has expired, the court held that the EPA lacked the statutory authority to disapprove expired DCOs.\textsuperscript{134} Since such a disapproval is invalid and unauthorized, it is not a "final agency action" and as such, is not appealable.\textsuperscript{135} Consequently, the Agency's only recourse after the DCO has expired is to approve the order or

\begin{flushright}
\begin{enumerate}
  \item Id.
  \item Id.
  \item Id. at 501.
  \item Id.
  \item Id.
  \item Id. at 502.
  \item Id.
  \item Id. at 503.
  \item Id.
  \item Id. (quoting 42 U.S.C. § 7607(b)(1)).
\end{enumerate}
\end{flushright}
relinquish the right to take enforcement steps. In light of this analysis, the court held that it lacked the necessary subject-matter jurisdiction.

4. The First Circuit

The First Circuit has also addressed the question of EPA delay with regard to approving SIP revisions. United States v. General Motors Corp., involved an appeal by the EPA to a dismissal of its enforcement action against General Motors. In a factual recitation, the court noted that the EPA issued a statement indicating its willingness to approve SIP revisions that would change the compliance deadline for certain plants from 1985 to 1986 or 1987. General Motors took advantage of this opportunity for three of its plants in other states but took no immediate steps with respect to the Massachusetts plant in question. General Motors eventually submitted a proposed revision to the Massachusetts SIP to Massachusetts, which in turn approved it and submitted it to the EPA one day before the original 1985 compliance deadline.

The EPA Region I entered into negotiations with General Motors in an effort to bring it into compliance with the existing SIP. These negotiations having failed, Region I submitted a proposal on July 2, 1986, to the EPA to disapprove the revised SIP. The EPA issued a notice of noncompliance to General Motors on August 14, 1986. More than a year later, on August 17, 1986, the EPA instituted an enforcement action. It was not until September 4, 1988, that the EPA finally rejected the revision.

136. Id. at 503.
137. Id.
139. Id. at 1062.
140. Id. at 1063.
141. Id.
142. Id. at 1064.
143. Id.
144. Id.
145. Id.
146. Id.
147. Id.
General Motors contended that by taking three years to issue its final decision, "the EPA has given itself what amounts to a 'pocket veto' over SIP revisions, allowing it to frustrate the states' developing policy choices for no reason or any reason, a power the Agency clearly does not have under the Act."\[^{148}\]

The EPA argued that a four-month deadline for final action on revisions should not be inferred because had Congress intended a specific deadline to apply, it would have written one into the legislation.\[^{149}\] The Agency bolstered its argument by contending that a four-month deadline for original SIPs is logical since one of the goals of the legislation was to get "the basic regulatory framework in place as quickly as possible."\[^{150}\] The Agency argued that this logic does not apply to Agency review of SIP revisions.\[^{151}\]

The First Circuit noted that while the question was a "close" one, the EPA's reading of the Act was unpalatable.\[^{152}\] "It seems unlikely ... that Congress also intended for the states' legitimate policy choices to be held hostage to the EPA's schedule."\[^{153}\] The court also noted the danger that were this approach not taken, the EPA would assign a lower priority to SIP revisions from First Circuit states than it would to states from circuits that had adopted the four-month rule.\[^{154}\]

The court then discussed the varying approaches of the Fifth and District of Columbia Circuits. In distinguishing the approach of the Fifth Circuit, the court noted:

> Were we certain that with the incentive of an enforcement bar, the Agency not only would review every SIP revision within four months, but could do so in a thorough and complete manner without sacrificing equally important congressional objectives, we would be willing to consider such a remedy. ... We think that even with the submission of only good-faith proposals, the EPA inevitably will often miss the deadline.\[^{155}\]

With this foundation, the court engaged in a balancing test. It weighed the incentive provided by the enforcement bar and the

\[^{148}\] Id. at 1065.
\[^{149}\] Id.
\[^{150}\] Id. at 1066.
\[^{151}\] Id.
\[^{152}\] Id.
\[^{153}\] Id.
\[^{154}\] Id.
\[^{155}\] Id. at 1067.
“resulting benefit to the States of hurried EPA action” against "the harm done to the general public by prohibiting enforcement actions in those inevitable instances when the Agency fails to meet its deadline.” The result dictated a remedy short of an enforcement bar since the goal of the Clean Air Act, in improving the quality of the nation’s air, outweighs the states’ interests in protecting local industry.

Since the District of Columbia Circuit’s approach provided too little incentive to the EPA, the court “attempted to steer a middle course between those two extremes....” The approach adopted by the First Circuit for EPA delay on SIP revisions involved two remedies. Under § 304(a)(2), industry sources may bring an action in federal district court to compel Agency action. If such an action is brought in response to the Agency’s failure to comply with the four-month time limit, the district court is directed to assess all of the Agency’s reasons for failing to so comply, using the four-month time limit as a “rough guidepost” in order to determine the reasonableness of such an action.

The second remedy is to be employed when the Agency institutes a § 113 enforcement action against a source of pollution.

156. Id.
157. Id.
158. Id.
159. Id.
161. 876 F.2d at 1068.
162. Section 113(a)(1) of the Clean Air Act provides:

Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator’s notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.


Section 113(b) provides:

The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person—

(1) violates or fails or refuses to comply with any order issued under subsection
This remedy enables the district court to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation."\textsuperscript{163} This approach allows additional flexibility in that the court may also factor in the "reasonableness of the Agency's delay and the prejudice, if any, suffered by the company as a result."\textsuperscript{164} These remedies provide the court with a workable, equitable rule.\textsuperscript{165}

5. The Sixth Circuit

The Sixth Circuit had previously addressed the issue of SIP revisions.\textsuperscript{166} The case involved an industry appeal from a district court order requiring the petitioner to pay penalties for violating a consent decree.\textsuperscript{167} The action arose out of a complaint filed by the United States against National Steel pursuant to § 113(b).\textsuperscript{168} The parties entered into a consent decree that was subsequently violated by National.\textsuperscript{169} The consent decree allowed National to seek an alternate emission reduction option subject to compliance with the Clean Air Act.\textsuperscript{170} National sought approval of a "bubble" plan that would bring it into compliance with the consent decree.\textsuperscript{171}

Anticipating that the bubble would be approved, National did not do anything else to bring itself into compliance with the consent decree.\textsuperscript{172} National argued that its inaction was justified since the EPA had encouraged it that the bubble application

\begin{itemize}
\item \textsuperscript{163} 876 F.2d at 1068.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} "Indeed, we have declined to adopt an inflexible rule precisely so that the equities of each case may be considered." Id. at 1069.
\item \textsuperscript{166} United States v. National Steel Corp., 767 F.2d 1176 (6th Cir. 1985).
\item \textsuperscript{167} Id. at 1176.
\item \textsuperscript{168} 42 U.S.C. § 7413(b).
\item \textsuperscript{169} 767 F.2d at 1178.
\item \textsuperscript{170} Id. at 1179.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id.
\end{itemize}
would be approved. The district court found that National had made a business decision to risk the penalties inherent in violating the consent decree on the gamble that the EPA would approve the bubble. The Sixth Circuit noted that the EPA had indicated that its preliminary analysis of the application was negative. This occurred two months after submission. The court was unpersuaded by National’s arguments and affirmed the district court’s decision, finding National liable for violating the consent decree. The court obliquely addressed the question of EPA’s statutory obligation to approve SIP revisions within the four-month deadline applicable to approval or original SIPs.

III. ANALYSIS—UNITED STATES v. ALCAN FOIL PROD.

A. Facts

United States v. Alcan Foil Prod. represents the Sixth Circuit’s current approach to the question of the four-month rule. Alcan owns and operates a laminating facility in Louisville, Ky. The facility consists of 10 rotogravure printing presses that each either emit or have the potential to emit volatile organic chemicals (VOCs). Alcan proposed a revision to the existing Kentucky SIP (KSIP) enabling it to offset emissions by utilizing the bubble concept. The existing KSIP measured emissions at each source. Since each of the 10 printing presses were considered a source for purposes of the KSIP, any violation of the federally prescribed and state incorporated ambient air quality standards for VOCs by one of the sources would be considered a violation by the Alcan facility as a whole. Alcan was not in compliance with the

173. Id.
174. Id.
175. Id. at 1180.
176. Id.
177. Id. at 1182-83.
178. Id. at 1182-83 n.1. The court reasoned that “[s]ection 110(a)(2) requires action within four months for general state plans submitted under section 110(a)(1), not for revisions to state plans governed by section 110(a)(3)(A).”
181. Id.
182. Id.
183. Id.
existing KSIP but contended that if the proposed revision were adopted, it would be in compliance. 184

The proposed revision was submitted to the Air Pollution Control District of Jefferson County (APCDJC) for its approval and subsequent submission to the Kentucky Natural Resources and Environmental Protection Cabinet (Cabinet). 185 The Cabinet submitted the proposed revision to the EPA on March 3, 1986, for a determination of its validity. 186 The EPA advised the APCDJC that the proposed revision was inadequate. 187 The APCDJC then filed suit in district court pursuant to § 304(A)(2) to compel the EPA to approve the proposed revision. 188 Upon reconsideration, the EPA informed APCDJC on July 7, 1986, that the proposed revision was inadequate because it incorporated a 30-day averaging period. 189 The EPA usually requires the use of a one-day averaging period but will occasionally permit the use of a one-week averaging period if sufficient justification is given. 190 The EPA noted that even if the proposed 30-day averaging period were to be adopted, Alcan would still be out of compliance with the revision. 191

On July 14, 1986, EPA, without reference to the revision, issued a notice of noncompliance to Alcan and cited violations of the KSIP by seven of Alcan's printing presses. 192 Alcan then entered into a negotiation period with the EPA. 193 On October 15, 1986, the EPA conducted an on-site inspection and verified that the seven printing presses were still out of compliance. 194 It also determined that the presses were out of compliance with the proposed revision. 195 On December 4, 1986, the EPA published its criteria for approval of bubbles. 196 The proposed revision did not satisfy these criteria. 197 Suit was filed by the United States,

184. Id.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id.
191. Id. at 1517.
192. 694 F. Supp. at 1282.
193. Id.
194. Id.
195. Id.
197. 694 F. Supp. at 1282.
at the request of the EPA, on July 15, 1987.\textsuperscript{198} EPA's Regional Administrator recommended disapproval of the proposed revision on August 26, 1987.\textsuperscript{199} It was not until October 18, 1988, that the EPA finally rejected the revision for a "failure to demonstrate the necessity of employing an averaging period greater than twenty-four hours."\textsuperscript{200}

\section*{B. Procedure Below}

The district court adopted the Fifth Circuit's \textit{American Cyanamid} decision disallowing the collection by the EPA of penalties between the period commencing four months after the plan had been submitted and extending until the plan had been rejected.\textsuperscript{201} Therefore, the district court granted Alcan's motion for summary judgment because as of the March 15, 1988, date of the decision, the EPA had yet to reject the proposed revision.\textsuperscript{202} Alcan's motion was granted over the EPA's argument that \textit{American Cyanamid} should be narrowly interpreted to preclude Agency enforcement actions only if the "alleged violator proves it is in compliance with the proposed SIP revision."\textsuperscript{203} The district court reasoned that such an interpretation "distort[ed] the whole of the opinion."\textsuperscript{204}

\section*{C. On Appeal}

On appeal, the \textit{Alcan} court distinguished \textit{National Steel} on the grounds that the \textit{National Steel} decision involved a due process challenge and that the only reference to the four-month rule in question was in a footnote.\textsuperscript{205} Therefore, the question had not been adequately addressed and the Sixth Circuit was not precluded from resolving the dispute.\textsuperscript{206}

In determining whether Congress intended the four-month deadline to apply to EPA review of SIP revisions as well as

\begin{footnotesize}
\begin{itemize}
\item 198. \textit{Id}.
\item 199. \textit{Id}.
\item 200. 889 F.2d at 1517. See also 53 Fed. Reg. 40,745 (Oct. 18, 1988).
\item 201. 694 F. Supp. at 1283.
\item 202. \textit{Id}.
\item 203. \textit{Id}.
\item 204. \textit{Id}.
\item 205. 889 F.2d at 1517.
\item 206. \textit{Id}.
\end{itemize}
\end{footnotesize}
review of original SIPs, the court stated that "it seems clear . . . that Congress intended to incorporate the time limit."207 The court reasoned that such a conclusion was supported by three arguments. First, a number of other courts had examined the question and had reached the same conclusion.208 Second, the language of the statute permitted such an interpretation.209 Section 110(a)(3)(A) mandates Agency approval of a SIP revision if it is determined "that it meets the requirements of [§ 110(a)(2)]."210 This was deemed sufficient to merit an interpretation allowing the four-month deadline expressly provided by § 110(a)(2) to be incorporated by reference in § 110(a)(3)(A).211 To bolster this argument, the court noted that § 110(g) referred to the four-month deadline with regard to approval of SIP revisions.212 Although § 110(a) and § 110(g) "were enacted within seven years of each other . . . [the court was] persuaded that the ninety-fifth Congress correctly interpreted the intent of the ninety-first."213 Finally, the court reasoned that while Agency decisions and statutory interpretations are normally accorded great deference, "the primary role of the states in implementing air quality standards [makes it] . . . difficult to conclude the EPA is not required to act with dispatch on a revision proposed by a state."214

Having found the four-month deadline applicable to Agency approval of SIP revisions, the court discussed the ramifications of Agency delay. The court found that the Second Circuit did not address the issue but did recognize the remedy for undue Agency delay being a § 103(a) suit to compel action.215 The District of Columbia Circuit had held that the Agency could not collect penalties assessed against an industry source of pollution for noncompliance with an existing SIP until the proposed SIP had been rejected.216 If a revision were rejected, "the penalty should be calculated back to the deadline, with interest."217

207. Id. at 1518.
208. Id.
209. Id.
210. Id.
211. Id.
212. Id.
213. Id.
214. Id.
215. Id.
216. Id. at 1519.
217. Id. (quoting Duquesne Light Co. v. EPA, 698 F.2d 456, 472 (D.C. Cir. 1983)).
The Fifth Circuit had discussed the consequences of Agency delay under four scenarios. First, if the EPA issued a notice of noncompliance to a source after a SIP revision had been submitted and before the four-month period had expired, the EPA was estopped from collecting penalties until it acted on the proposed revision.\textsuperscript{218} Second, if the EPA issued a notice of noncompliance before a SIP revision had been proposed, it was estopped from collecting any penalties during the interval between the expiration of the four-month period and final action on the proposed revision.\textsuperscript{219} Third, if the Agency issued a notice of noncompliance after the four-month period had expired, it was estopped from collecting penalties until the revision had been rejected.\textsuperscript{220} Finally, the court applied the same reasoning to conclude that the EPA is barred from instituting enforcement proceedings for noncompliance violations if, in the event a delay compliance order has been entered into, the EPA has failed to comply with the statutorily mandated 90-day deadline for final Agency action.\textsuperscript{221}

This court adopted the First Circuit approach. The District of Columbia Circuit's approach "offered too little incentive for EPA to act with dispatch."\textsuperscript{222} The Fifth Circuit remedy of an enforcement bar, applied by the district court in the instant case, was too harsh:

We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.\textsuperscript{223}

Noting that the remedy of a § 304(a) suit to compel the Agency to act had been relatively ineffective in the instant case, the court adopted the First Circuit's remedy.\textsuperscript{224} Consequently, the court held that on remand, Alcan would be given the opportunity to prove that it complied with the proposed SIP provision.\textsuperscript{225}

\begin{itemize}
\item \textsuperscript{218} 810 F.2d at 500.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id. at 501.
\item \textsuperscript{221} 871 F.2d at 497-98.
\item \textsuperscript{222} 889 F.2d at 1519.
\item \textsuperscript{223} Id. at 1520 (quoting Brock v. Pierce County, 476 U.S. 253, 260 (1986)).
\item \textsuperscript{224} Id.
\item \textsuperscript{225} Id.
\end{itemize}
Alcan met its burden of proof, the government would then have to prove that the EPA’s delay was reasonable under the circumstances.\textsuperscript{226} The district court would then have the discretionary authority to assess the penalties.

Circuit Judge Ryan concurred with the majority.\textsuperscript{227} However, he cautioned:

\[ \text{IT]he text of the majority opinion should not be read as adopting a rule for this circuit that the way for a polluter to avoid penalties for an out-and-out violation of an existing SIP is to file a proposed revised SIP “wish list” and then when a section 113(a) enforcement action is brought, file an affirmative defense alleging compliance with a proposed revised SIP and take comfort that the enforcement litigation will have to do with compliance with the proposed SIP and not the existing one.}\textsuperscript{228}

Since Congress has failed to adequately address the issue of Agency delay in approving SIP revisions, the court was “duty bound to fashion a remedy formula in a case of this kind, particularly given the diametrically opposite enforcement formulae spelled out in the cited cases from the Fifth and District of Columbia Circuits.”\textsuperscript{229}

\section*{D. The Road Ahead}

The United States Supreme Court has recently granted certiorari\textsuperscript{230} to resolve the issue in question.\textsuperscript{231} The EPA will contend that the current review procedures for SIP revisions

\begin{itemize}
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id. at 1522.
\item \textsuperscript{228} Id. at 1523.
\item \textsuperscript{229} Id. at 1522.
\item \textsuperscript{230} General Motors Corp. v. United States, 876 F.2d 1060 (1st Cir. 1989), cert. granted, 110 S. Ct. 537 (1989).
\item \textsuperscript{231} The questions presented on certiorari review:
\begin{enumerate}
\item If the EPA has failed to act on a SIP revision within four months, may the government bring an action for civil penalties if the company is in compliance with the revision?
\item Did the decision below undermine the ability of states to make ongoing policy choices to air pollution control measures and create disincentives for even-handed administration of the Act?
\item Is the decision below contrary to the language and intent of Congress and decisions of the First and other Circuits?
\end{enumerate}
\end{itemize}
render attainment of the four-month deadline impossible. Since the deadline is not expressed in § 110(a)(3) and the number of SIP revisions submitted to the EPA is so large, the Court will be asked to defer to the Agency's determination regardless of whether the final decision was issued within four months.

The industry petitioners will argue that the deadline is incorporated by reference. Additionally, they will say that the failure to compel Agency action within a specified time-frame will lead to continued delays and therefore derogate the legislative purpose of the Clean Air Act.

IV. CONCLUSION

Of the decisions surveyed, the First Circuit's approach represents the strongest reasoning. It is clear that the circuits which have addressed the question agree that the four-month deadline applies to SIP revisions as well as original SIPs. The disparity is with regard to the legal consequences of Agency delay in acting on the submitted revisions. The First and Sixth Circuits provide an incentive for the EPA to reasonably comply with the deadline. Additionally, they encourage compliance with the applicable emissions standards by affording industry an opportunity to propose the utilization of emissions-trading through concepts such as bubbles — thereby allowing technological and economic infeasibility arguments to be considered. The judicially fashioned balancing test developed by these two courts should be affirmed by the Supreme Court because it provides the most reasonable solution to what has been assailed as inartfully drafted legislation.

232. The EPA issued a notice of procedural changes in its current review policy on Jan. 19, 1989 (EPA State Implementation Plan Processing Reform, 54 Fed. Reg. 2,214 (Jan. 19, 1989)). It expressed concern that "uncertainty and excessive delays in processing SIPs frustrate the development of an optimum State/Federal partnership, cause confusion for sources regarding applicable regulations, and generally dampen initiative in State regulatory programs." It recognized that reviews will increase from the current average of approximately 350 per year and that the 14 months allocated to publish a final decision is "literally impossible to meet for all but the most trivial of actions." Id.
NOTES

YANCEY V. HAMILTON: KENTUCKY ADOPTS THE
RESTATEMENT TEST IN FACT-OPINION LIBEL LAW

Gregory A. Moore

I. INTRODUCTION

"At the heart of every action for libel or defamation is the
threshold issue of whether the language used is reasonably sus-
ceptible of a defamatory meaning." It is well settled that this
question is one of law to be resolved by the court. "Likewise,
the critical issue of whether a spoken or written statement
amounts to a fact or an expression of opinion is a question of
law for the court."

The distinction between fact and opinion is important because
defamatory expressions of opinion are generally considered non-
actionable. Defamatory statements of false fact, however, do not
receive such deference. There is no social value in the inter-
change of false statements of fact. Moreover, since a statement
of fact can be evaluated only in terms of truth or falsity, there
is no infringement on freedom of expression by permitting a

2. Id.
4. Under the RESTATEMENT, a defamatory statement in the form of an opinion “is
actionable only if it implies the allegation of undisclosed defamatory facts as the basis
[There is no constitutional value in false statements of fact. Neither the intentional
lie nor the careless error materially advances society's interest in “uninhibited,
robust and wide-open” debate on public issues. They belong to that category of
utterances which “are no essential part of any exposition of ideas, and are of such
slight social value as a step to truth that any benefit that may be derived from
them is clearly outweighed by the social interest in order and morality.” Id.
(citations omitted).
6. Id.
judge or jury to determine the validity of such statements.

Due to the difference in treatment between statements of fact and expressions of opinion, it has become necessary to determine which types of statements should be privileged and which should not. However, the fact-opinion distinction does not lend itself to easy resolution. The difficulty arises because there is no easily discernable boundary between fact and opinion.\(^7\) Rather, most statements are said to lie somewhere on a continuum between pure opinion and pure fact.\(^8\) Unfortunately, most courts have had an exceedingly hard time determining where and how to mark the boundaries on this continuum.

This note will examine two approaches that have been used in an attempt to distinguish expressions of opinion from statements of fact. The first test examined will be the "totality of the circumstances test," which was outlined by Judge Starr in Ollman v. Evans.\(^9\) This four-prong test, which focuses on the underlying context in which the allegedly defamatory statement was made, was rejected by the Kentucky Supreme Court in Yancey v. Hamilton.\(^10\) (Note: This decision is not final; petition for rehearing pending). Instead, the Kentucky Supreme Court adopted the Restatement (Second) of Torts § 566 test, which focuses on whether the commentator has disclosed the underlying facts upon which he based his opinion.\(^11\)

This note will first review the common law foundations of this area, principally the qualified privilege of fair comment. Supreme Court cases affecting this area of the law will then be examined. Next, this note will briefly examine the Ollman "totality of the circumstances test."\(^12\) It will then attempt to show why the Kentucky Supreme Court made the proper choice in adopting the Restatement test, by comparing Yancey v. Hamilton, to Scott

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8. Id. at 1021.
12. Ollman, 750 F.2d 970.
FACT-OPINION DOCTRINE

v. News-Herald\textsuperscript{13} an Ohio case in which the \textit{Ollman} test was adopted. Lastly, this note argues that the Supreme Court should adopt the \textit{Restatement} test in the upcoming case to be heard before it, \textit{Milkovich v. News-Herald}.\textsuperscript{14}

II. BACKGROUND

A. The Common Law Defense of Fair Comment

Traditionally, one could be found liable for defamation if one published an opinion that harmed another’s reputation. Yet, expressions of opinion were privileged if they constituted “fair comment” on a matter of public concern.\textsuperscript{15} This privilege, however, was of limited availability. In order to qualify as fair comment, the criticism had to meet at least three requirements: (1) it had to relate to a matter of “public concern,”\textsuperscript{16} (2) it had to be based on facts truly stated\textsuperscript{17} or “otherwise known or available,”\textsuperscript{18} and (3) it could not be made maliciously, (\textit{i.e.}, it had to represent the critic’s actual opinion\textsuperscript{19}) and could not be made for the sole purpose of causing harm to another.\textsuperscript{20} In order to invoke the fair comment privilege, most jurisdictions required that the defendant establish initially that the allegedly libelous statement was merely protected opinion and did not constitute a factual assertion.\textsuperscript{21}

\begin{itemize}
  \item \textsuperscript{13} 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).
  \item \textsuperscript{14} 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984).
  \item \textsuperscript{15} See \textit{Restatement (Second) of Torts} § 566, comment a (1977).
  \item \textsuperscript{16} \textit{Restatement of Torts} § 606 (1938).
  \item \textsuperscript{17} Id. § 606(1)(a)(i).
  \item \textsuperscript{18} See id. § 606(1)(a)(ii).
  \item \textsuperscript{19} See id. § 606(1)(b).
  \item \textsuperscript{20} See id. § 606 (1)(c).
  \item \textsuperscript{21} Most courts refused to apply the fair-comment privilege to false statements of fact. Thus, the distinction between fact and opinion became crucially important; the defendant’s failure to convince the court that the statement constituted opinion would preclude jury consideration of the fair comment defense. Truth was the only remaining defense. See, \textit{e.g.}, \textit{Post Publishing Co. v. Hallam}, 59 F. 530 (6th Cir. 1893); Kirkland \textit{v. Constitution Publishing Co.}, 38 Ga. App. 632, 144 S.E. 821 (1928), \textit{aff’d}, 169 Ga. 284, 149 S.E. 869 (1929); \textit{Cook v. East Shore Newspapers, Inc.}, 327 Ill. App. 559, 64 N.E.2d 751 (1945); \textit{Smith v. Pure Oil Co.}, 278 Ky. 390, 128 S.W.2d 911 (1939); \textit{Bander v. Metropolitan Life Ins. Co.}, 313 Mass. 337, 313 S.E.2d 595 (1943); \textit{Eikhoff v. Gilbert}, 124 Mich. 353, 361, 83 N.W. 110, 113 (1900); \textit{Van Arsdale v. Time, Inc.}, 35 N.Y.S.2d 951 (Sup. Ct.), \textit{aff’d mem.}, 265 A.D. 919, 39 N.Y.S.2d 413 (1942).
\end{itemize}
Fair comment permitted a publisher to criticize only the conduct of another person that was a matter of public concern. The defendant was required to satisfy the court that the subject matter of his comment was of such interest to the public that he should be free to make it despite the injury to the plaintiff's reputation.

To qualify as fair comment, the criticism also had to represent the actual opinion of the publisher and could not be made solely for the purpose of causing harm to the plaintiff. Implicit in the term "fair comment" is the requirement that the opinion be fair. Therefore, in addition to requiring that the criticism be the critic's actual opinion it had to be published in part at least for the purpose of giving to the public the benefit of the opinion which they are entitled to know. If the criticism was published "solely from spite or ill will and for the purpose of causing harm to the person criticized," it was not privileged.

Finally, to qualify as fair comment, the facts supporting the criticism had to be disclosed or otherwise known to the recipient. Moreover, the facts upon which the criticism was based had to be true, or if they were not true, the critic must have been privileged to state them.

Disclosure was required so that the recipient of the communication could judge for himself the propriety of the author's
deductions from the facts.\textsuperscript{29} If the supporting facts were not disclosed, the comment carried with it the implication of supporting facts and was thus “more than the mere expression of an opinion.”\textsuperscript{30}

\textbf{B. Supreme Court Cases Affecting the Fair Comment Privilege}

The constitutional privilege for opinion, which was established in the landmark case of \textit{New York Times Co. v. Sullivan},\textsuperscript{31} has extinguished the media’s need for the fair comment defense in cases concerning public figures.\textsuperscript{32} Justice Brennan, writing for a unanimous court in \textit{Sullivan}, determined the applicable standard to be applied to defamation actions brought by public officials when there is “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open ……”\textsuperscript{33} In order to encourage unrestrained debate on matters of public importance, the Court held that under the First and Fourteenth Amendments, a qualified privilege must apply to both statements of fact and opinion.\textsuperscript{34}

The fact-opinion distinction arose again with new significance in \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{35} In dicta, Justice Powell, writing for the majority, elaborated on the fact-opinion distinction.

Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value in

\textsuperscript{30} \textit{Restatement of Torts} § 606 comment b (1938).
\textsuperscript{31} 376 U.S. 254 (1964).
\textsuperscript{32} \textit{Restatement of Torts} § 606 (1938).
\textsuperscript{34} \textit{Id.} at 279-80. \textit{Sullivan} essentially elevated the fair comment doctrine to a constitutional privilege: “Since the Fourteenth Amendment requires recognition of the conditional privilege of honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact.” \textit{Id.} at 292 n.30.
\textsuperscript{35} 418 U.S. 323 (1974). The case was indirectly related to the death of a Chicago youth. The boy’s family retained attorney Robert Gertz to initiate a civil suit against Richard Nuccio, a policeman later convicted for murdering the boy. \textit{American Opinion}, the John Birch Society’s monthly magazine, published an article accusing Gertz of framing the Chicago policeman of having a criminal record, and of maintaining communist sympathies. The United States District Court held that Gertz, a private citizen, must show actual malice as required by \textit{Sullivan}. The Seventh Circuit Court of Appeals affirmed the decision, and Gertz appealed to the Supreme Court. \textit{Id.} at 325-332.
false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in “uninhibited, robust and wide open” debate on public issues.\textsuperscript{36}

\textit{Gertz} permitted the states to impose any standard of care other than strict liability whenever private individuals are involved.\textsuperscript{37} Kentucky, for example, has adopted a standard of simple negligence in regard to a private citizen defamed by a media defendant, even where the publication was a matter of concern to the public.\textsuperscript{38}

Hence, no matter how unreasonable an expression of pure opinion may appear, it is not actionable. The expression of ideas, unlike false statements of facts, receives unqualified constitutional protection.\textsuperscript{39} Courts have interpreted this dictum as a “bright line demarcating when defamation law must give way to the mandates of the First Amendment.”\textsuperscript{40} The dichotomy, however, has not been easily distinguished.\textsuperscript{41} Thus, courts have turned to two different forms of analysis, or “tests,” to make the distinction.

\textbf{C. Fact-Opinion Tests After Gertz}

The demise of the qualified privilege of fair comment has, unfortunately, given new life to the struggle to distinguish fact from opinion. “The majority of federal circuits have accepted the \textit{Gertz} dicta as controlling law, and have thus conferred absolute

\begin{itemize}
\item \textsuperscript{36} Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); Presumably, Justice Powell was considering statements of “pure” opinion. These comments are accompanied by a statement of facts upon which they are based. On the other hand, a statement of “mixed” opinion implies a factual justification unknown to its receivers. “To say of a person that he is a thief, without explaining why, may, depending upon the circumstances, be found to imply the assertion that he has committed acts that come within the common connotation of theivery.” \textit{RESTATEMENT (SECOND) OF TORTS} § 566 comment b (1977).
\item \textsuperscript{37} 418 U.S. at 347.
\item \textsuperscript{38} McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky. 1981), \textit{cert. denied}, 466 U.S. 975 (1982).
\item \textsuperscript{39} “Unconditional” or “unqualified” First Amendment protection is reserved for statements of opinion. “Conditional” or “qualified” privilege is afforded to statements that are qualified as factual. Thus, expressions of fact concerning public officials are not protected when made with actual malice. See \textit{New York Times Co. v. Sullivan}, 376 U.S. 254 (1964).
\item \textsuperscript{40} See McCabe v. Rattiner, 814 F.2d 839, 841 (1st Cir. 1987).
\item \textsuperscript{41} See Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984), \textit{cert. denied}, 471 U.S. 1127 (1985).
\end{itemize}
immunity on the publication of clear statements of opinion."™
However, courts have desperately sought ways to distinguish
non-actionable expressions of opinion from actionable statements
of fact. Basiclly, two approaches have emerged to deal with
this problem: the "totality of the circumstances" approach and
the approach suggested in § 566 of the Restatement (Second) of
Torts. These two approaches will be considered in the context of
the recently decided Kentucky case of Yancey v. Hamilton.

III. YANCEY v. HAMILTON

A. Facts and Holding

Gregory Yancey sued Fred Hamilton and The Kentucky Post
and several of its employees in Boone County Circuit Court for
libel and invasion of privacy. The principal issue to be decided
in the case was whether the publishing of a remark that the
plaintiff was a "con artist" is absolutely privileged as a statement
of opinion under the First Amendment.

The action began with the plaintiff's arrest for double murder.
Justice Wintersheimer, dissenting, noted that Yancey was ar-
rested 13 days after the brutal double homicide and following
his false confession to a relative that he had committed the
murders. The Post ran a feature story about Yancey's back-
ground as a "sidebar" to the news article about his arrest. Among
those neighbors and acquaintances interviewed was Fred Ham-
ilton. The Post printed the following interview and statements
from the interview:

Fred Hamilton of Verona has known the family for years. "It was
really hard on Greg when his grandmother (Anna Yancey) died.

petition for rehearing pending.
43. For a good discussion of the various approaches courts have devised to distinguish
expressions of opinion from statements of fact, see Note, Fact and Opinion after Gertz v
petition for rehearing pending.
45. Id.
46. Id.
47. Id.
for rehearing pending. Justice Wintersheimer's dissent is available on Lexis (1989 Ky
LEXIS 67). It was not published as part of the opinion in K.L.S.
That was November, 1978. She thought the world of him. About the time his grandmother died, his parents separated and his world just seemed to fall apart."

"The family attended New Bethel Baptist Church in Verona," Hamilton said. "Greg sang in the choir. I remember four of [sic] five of them ... decided to go to Cumberland to take up the ministry. He could preach. He was a smooth talker. He was a con artist. I would never lend him money." 49

It was the last three statements that the plaintiff found defamatory. Yancey was later released on the murder charges because he was wrongfully suspected. 50

The trial court granted defendants' joint pretrial motion for summary judgment, holding as a matter of law that Hamilton's comments were clearly statements of opinion, which The Post had an absolute privilege under the First Amendment to publish. The Court of Appeals affirmed the Circuit Court judgment. 51

The Kentucky Supreme Court reversed the lower court, holding that under the Restatement test for distinguishing statements of fact from expression of opinion, the remark that plaintiff, Gregory Yancey, was a "con artist" was capable of bearing a defamatory meaning. 52 The court further held that upon remand, the jury must decide whether the communication in question actually conveyed a defamatory message to the reader. 53

IV. ANALYSIS

The Kentucky Supreme Court noted that the trial court in Yancey v. Hamilton relied heavily on Ollman v. Evans to determine whether Hamilton's statements about the plaintiff were actionable. 54 The court noted that under the four-part test set out in Ollman, an alleged defamatory statement has sufficient factual content to be defamatory if: (1) the common usage of the statement "has a precise core of meaning for which a consensus

50. Id.
53. Id.
54. Id. at 12 (citing Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985)).
of understanding exists," (2) the statement is objectively verifiable, (3) the full content of the statement would "influence the average reader's readiness to infer that a particular statement has factual context," and (4) the broader content in which the statement appears would signal the reader that the statement at issue has factual context.55 *Olman* held that the "distinction between fact and opinion is a matter of law."56 The trial judge had applied the *Olman* test and determined that the complained of statement was privileged opinion.57

Without stating its reason for so doing, the Kentucky Supreme Court rejected the *Olman* test, as well as the application of the test by the two lower courts.58 It is impossible to state exactly why the court rejected the *Olman* test. However, analysis of the four factors may give some insight into its decision.

In considering the first factor, the precision of the language used by a defendant, a court is required to determine whether the allegedly defamatory statement has a precise meaning, and thus, is likely to give rise to "clear factual implications."59 Whether a particular statement is capable of creating "clear factual implications" depends on "social normative systems."60 The example frequently given is the accusation of criminal conduct. Most accusations of criminal conduct are understood by the average person as implying extremely damaging facts.61

Some statements, however, are said to be so "loosely definable" or "variously interpretable"62 that they are generally incapable of giving rise to clear factual implications.63 Typical examples of

55. *Id.* at 13 (citing *Olman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985)).
56. *Id.*
57. *Id.*
58. *Id.*
60. *Id.*
62. *Olman*, 750 F.2d at 980.
63. *See Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1002 (1977). In Buckley, William F. Buckley, Jr. was accused of being a "fellow traveler" of "fascists." *Id.* at 884-85 n.1. Noting the wide disparity of meaning attached to the term "fascism," and that it was not clear from the context in which that term was used which meaning
such statements are derogatory epithets such as “bastard,” “scoundrel,” “bum,” “jerk,” and other remarks regularly tossed about in heated argument. This does not mean that such statements cannot be damaging. The point is that these types of remarks are usually so devoid of factual content that, in reality, they are little more than general expressions of dislike.

Perhaps the trial court in Yancey v. Hamilton found the phrase “con artist” to be such a derogatory epithet, for it found that the meaning was too indefinite. Had Mr. Hamilton accused the plaintiff of a specific crime, rather than of being a con artist in general, however, the trial court would have found it to be a statement of fact, capable of bearing a defamatory meaning.

The extent to which a statement is capable of being verified is another factor considered under the “totality of the circumstances” approach. This factor appears to be based largely on the dictum in Gertz that “there is no such thing as a false idea.” Accordingly, if a statement is incapable of being verified in terms of truth or falsity, it is likely to be deemed an opinion. The trial judge in Yancey v. Hamilton found the term “con artist” to be incapable of being verified as applied to Yancey. However, under the Restatement approach applied by the Kentucky Supreme Court, this factor will not preclude the plaintiff from recovering where the defendant does not reveal the facts upon which he bases his comment.

The third factor employed under the “totality of the circumstances” approach involves the literary context in which the assertion is made. This factor requires a court to review the entire article in which the statement is found to place it into context. Thus, the trial court in Yancey took into account the

was being asserted, the court declined to develop its own definition of the term. The court concluded that such remarks “cannot be regarded as having been proved to be statements of fact, among other reasons, because of the tremendous impression of the meaning and usage of these terms in the realm of political debate.” Id. at 893.

64. 36 K.L.S. No. 10, at 13.
66. Ollman, 750 F.2d at 981-82.
68. Ollman, 750 F.2d at 982.
70. Id.
71. Ollman, 750 F.2d at 982-83.
fact that the article was full of opinion about the plaintiff by those who knew him.73

The last factor that a court is required to take into account under the “totality of the circumstances” approach is the broader social context in which the statement is made.74 Thus, the trial court in Yancey v. Hamilton took into account the fact that the article was a background piece to the main article reporting the plaintiff’s arrest for murder.

No published opinion in Kentucky prior to this case had relied upon the Ollman “totality of the circumstances” test in deciding whether an allegedly defamatory statement was fact or opinion. Therefore, the Kentucky Supreme Court did not breach the principle of stare decisis by rejecting the Ollman test and instead applying the Restatement test.

As stated above, the Kentucky Supreme Court rejected the Ollman test.75 The decision implies that the court finds the “disclosure of underlying fact” requirement in the Restatement test of more importance than the factors in Ollman. It should be noted that even those courts which most adamantly support the “totality of the circumstances” approach recognize the importance of the disclosure requirement and tend to factor it into their analyses.76 Indeed, it seems that the third factor under the “totality of the circumstances” approach (the literary context in which the statement is made) implicitly incorporates the disclosure requirement.

Unfortunately, this has not cured the infirmities of the “totality of circumstances” approach. Commentators have found that the problem with this test is that the other three factors are essentially dead weight which tend to make its application more confusing and its outcome less predictable.77 Coupled with the fact that the Kentucky Supreme Court did not feel compelled to follow the “totality of the circumstances” analysis, this criticism offers a good impetus for adopting the Restatement test.

73. Ollman, 750 F.2d at 983.
74. 36 K.L.S. at 13.
75. Id. at 12.
76. See, e.g., Ollman, 750 F.2d at 987-89.
While there has not been a prior published Kentucky decision applying the totality of the circumstances test, there has been one decision applying the Restatement test.\(^{78}\) Haynes v. McConnell involved a statement by a county judge-executive that the plaintiff's debts of record presented "a real, or perceived, vulnerability" in his position as coordinator of a plea-negotiation program, together with a recommendation that he be terminated.\(^{79}\) The court properly concluded that the § 566 rule applied to this "absolutely privileged" "opinion based on disclosed true facts in such a matter of public concern."\(^{80}\) Thus, a precedent was set in which a Kentucky court used the Restatement test to decide a fact-opinion question. However, it is interesting to note that the Kentucky Supreme Court did not cite to Haynes in its decision in Yancey v. Hamilton.

After stating that it intended to follow the Restatement approach, the court in Yancey set out the test and the distinctions between pure and mixed opinion:

"A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion."\(^{81}\)

The Restatement distinguishes between "pure" opinion and "mixed" opinion. Pure opinion, which is absolutely privileged, occurs where the commentator states the facts on which the opinion is based, or where both parties to the communication know or assume the exclusive facts on which the comment is clearly based.\(^{82}\) In contrast, the mixed type is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication.\(^{83}\)

Thus, under the Restatement, the emphasis is placed on the purpose and policies underlying the opinion rather than on definitively labeling the statement as either fact or opinion. In this way, the often difficult determination as to whether a particular statement is one of fact or opinion is largely avoided. Statements

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79. Id. at 903.
82. Id. at comment b.
83. Id.
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are generally protected as opinion if enough supporting facts are disclosed to the reader so that he will recognize the statement as a comment on those facts and will not infer the existence of undisclosed defamatory facts. The critical issue under the Restatement, therefore, is whether the propriety of the statement is, in fact, capable of being scrutinized by readers or listeners. This usually depends on the degree of disclosure of supporting facts.84

The Kentucky Supreme Court noted in Yancey that the Restatement takes the position that the court “must determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts which may justify the expressed opinion about the undisclosed facts.”85 The court then noted that it had previously held that alleged defamatory statements should be “construed as a whole.”86 Thus, the court found that in the whole context of the publication, Hamilton's comments created a reasonable inference that they were justified by undisclosed defamatory facts.87

The Kentucky Supreme Court agreed with the trial court that the article was a background piece.88 However, the sequence of the last four sentences was critical to the court's finding that the appellation “con artist” was capable of bearing a defamatory meaning.89 The first statement, “He could preach,” was a harmless statement of fact. “He was a smooth talker” qualified the first observation. “He was a con artist,” could also be interpreted as a less flattering reflection on Yancey's preaching ability. However, the court found that coupled with the last statement, “I would never lend him money,” calling Yancey a “con artist” could be found to imply that the speaker had particular and articulable reasons for believing Yancey practiced the art of obtaining money or property from another by fraud, or was otherwise deceitful.90

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84. Cf. Restatement (Second) of Torts § 577 comments d and e (1977).
85. Restatement (Second) of Torts § 566 at comment c (1977).
88. Id.
89. Id.
90. Id.
The court then found that since the publication was capable of bearing a defamatory meaning, it was for the jury to decide whether such a defamatory meaning was attributed to it by those who received the communication. To sum up the decision in *Yancey v. Hamilton*, the court, using the *Restatement* test, found that the statement complained of was capable of bearing a defamatory meaning. "It is for the jury to determine, on the basis of competent evidence, whether a defamatory meaning was attributed to it by those who received the communication. . . . The terms should be construed in their most natural meaning and should be measured by the natural and probable effect on the mind of the average lay reader."  

The difficulties inherent in applying either the *Ollman* four-factor test or the *Restatement* test make litigation within one state very challenging for an attorney practicing in the area of libel law. However, the problems presented by litigation of the fact-opinion issue become even more complex in an area where a newspaper is published in more than one state. An attorney representing, for example, *The Cincinnati Post* or *The Cincinnati Enquirer* will be faced with two different standards depending on whether his client is sued for libel in Kentucky or Ohio. While Kentucky has adopted the *Restatement* test in *Yancey*, Ohio adopted a variation of the *Ollman* test in *Scott v. News-Herald*.  

The Ohio Supreme Court first addressed the issue of whether an allegedly defamatory article was an expression of fact or opinion in the companion case to *Scott*, *Milkovich v. News-Herald*. In *Milkovich*, a high school wrestling coach, Michael Milkovich, was accused in a sports column of committing perjury. First, the court held that Milkovich was not a public figure or public official as a matter of law. The court then examined the fact-opinion distinction. After considering several of the tests used to distinguish between fact and opinion, the court declined to establish a per se rule in determining what constitutes a protected opinion.

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91. *Id.* (citing *Deitchman v. Bowles*, 166 Ky. 285, 179 S.W. 249 (1915); *Beams v. Beams*, 138 Ky. 818, 129 S.W. 298 (1910)).
92. *Id.* (citing *McCall*, 623 S.W.2d at 884.)
95. *Id.* at 297, 473 N.E. 2d at 1196.
96. *Id.* at 298-99, 473 N.E.2d at 1196-97.
or a potentially actionable statement of fact. The court's somewhat cursory analysis considered the following two factors: (1) whether there were adequate precautions alerting the reader that the column was an assertion of opinion; and (2) whether the plain import of the author's assertions was that Milkovich committed the crime of perjury. The court concluded that the statements at issue were factual assertions as a matter of law and were not constitutionally protected as opinions of the writer.

The court also adopted the guidelines advocated by Judge Friendly in Cianci to analyze accusations of criminal conduct. This view looks to whether the statement can reasonably be understood in context to refer to criminal conduct: If the statement could reasonably be interpreted to infer specific criminal acts to the plaintiff, it is inherently factual and is redressable. Therefore, the Milkovich court afforded the allegations of criminal conduct only qualified constitutional protection because such statements are replete with factual connotations.

Only 20 months later, however, the Ohio Supreme Court, in Scott v. News-Herald, abandoned the rationale it used to distinguish fact and opinion in Milkovich. Although Scott concerned the same article that was considered in Milkovich, the court effectively overruled the fact-opinion portion of the case. Both suits involved a column written by J. Theodore Diadiun that was published in the sports section of the News-Herald in Willoughby, Ohio. The article recounted the circumstances surrounding an interscholastic wrestling match and the subsequent events related to the incident.

The article stated near the end: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or an impartial observer, knows in his heart that Milkovich and Scott lied at the [due process] hearing after each having given his solemn oath to tell the truth."

Both Scott and Milkovich filed separate libel suits naming the News-Herald and its parent company, the Lorain County Com-

97. Id. at 298, 473 N.E. 2d at 1196.
98. Id. at 299, 473 N.E.2d at 1197.
99. Id. at 298-99, 473 N.E.2d at 1196-97.
101. Milkovich, 15 Ohio St. 3d at 299, 473 N.E. 2d at 1197.
pany, as the defendants. Although the *News-Herald* prevailed in both defamation cases at trial, different results were reached by the Ohio Supreme Court. In *Milkovich*, the Ohio Supreme Court held that the article in question was too factually laden to be considered opinion.\(^{104}\) However, the court reversed itself in *Scott*, ruling that the statements were opinion deserving of unqualified First Amendment protection.\(^{105}\)

In *Scott*, Justice Locher, writing for a divided court, explicitly overruled *Milkovich* with respect to the application of the fact-opinion doctrine.\(^{106}\) He then adopted the four-factor totality-of-circumstances test outlined by Judge Starr in *Ollman v. Evans* to distinguish fact and opinion.\(^{107}\)

The inherent difficulties encountered in dealing with the fact-opinion distinction are made evident by the fact that *Scott v. News-Herald* engendered seven different opinions. Justices Holmes, Douglas, and Wright concurred with Justice Locher's opinion. Justice Holmes merely noted that *stare decisis* was not violated, stating that a decision which is "clearly wrong" should be overruled because there is "no valid public purpose to allow incorrect opinions to remain in the body of our law."\(^{108}\) Justice Douglas agreed that the statements in question were clearly opinion.\(^{109}\) Justice Wright agreed with the adoption of the totality of circumstances test, but he went on to advocate a "bright-line" rule to eliminate the uncertainty of characterizing statements as fact or opinion.\(^{110}\) This approach would afford complete constitutional protection to articles specifically labeled "opinion." However, statements made without the opinion label, not located in the editorial section, would be given only limited protection.\(^{111}\)

It is very possible that the U.S. Supreme Court will answer the call of Justice Wright, as well as that of many other commentators, for a bright-line rule regarding the fact-opinion issue. It recently granted certiorari to the *Milkovich* case.\(^{112}\) In his third

\(^{104}\) Id. at 299, 473 N.E.2d at 1196-97.

\(^{105}\) *Scott*, 25 Ohio St. 3d at 244, 254, 496 N.E.2d at 701, 709.

\(^{106}\) Id. at 248, 496 N.E.2d at 701.

\(^{107}\) Id. at 250, 496 N.E.2d at 706.

\(^{108}\) Id. (citing *Ollman*, 750 F.2d at 979; *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 649 (8th Cir. 1985), cert. denied, 479 U.S. 883 (1986)).

\(^{109}\) Id. at 254, 496 N.E.2d at 709 (Holmes, J., concurring).

\(^{110}\) Id. at 255, 496 N.E.2d at 709 (Douglas, J., concurring).

\(^{111}\) Id. at 262, 496 N.E.2d at 714-15 (Wright, J., concurring).

time before the Supreme Court, Milkovich asserts that the case "squarely raises a recurring and pivotal issue in the law of defamation." The question to be answered by the Supreme Court simply stated is: How should defamatory statements be analyzed to determine whether they are assertions of fact or expressions of opinion? Milkovich noted in his petition that "the highest court in Ohio has now reached an opposite conclusion interpreting the same statements in the course of just two years."

Obviously, the fact-opinion tests are very difficult to apply, as is evidenced by cases like Scott and Yancey. Therefore, it is even more difficult for an attorney to counsel a newspaper publishing the same article in two states that use different standards to determine whether a statement is fact or opinion. For the following reasons, the Supreme Court should adopt the Restatement approach as the one test to be used by all courts to make this distinction.

The problem with the "totality of the circumstances" test has already been stated. The three factors that do not deal with the disclosure requirement are essentially dead weight, and only serve to make the application of the test more confusing and its outcome less predictable.

The approach of the Restatement is superior for several reasons. First, it is much more simple and easier to apply than its four-factor counterpart. Under the Restatement, the difficult task of labeling a particular statement as either fact or opinion is largely avoided. Under the Restatement, it is necessary to determine only whether there has been proper disclosure of supporting facts. The emphasis is not so much on labeling a particular statement as fact or opinion as it is on determining whether a statement is worthy of protection. A statement is worthy of protection when the author has disclosed enough facts to enable the reader to judge the propriety of the expression without inferring the existence of further undisclosed defamatory factual support.

In addition, the approach suggested by § 566 is much more predictable, and consistent, than the "totality of circumstances"

114. Id.
115. Id.
approach. The problem that a journalist faces under the "totality of circumstances" approach has been described as follows:

The reader-oriented approach places the journalist in the precarious position of guessing how a contention will be regarded by the public. The truth or falsity test forces the journalist to predict how an allegation will be construed by a court. The textual approach and the broader context approach analysis also place the journalist in the difficult position of speculating as to where and when his or her works will be published, and further requires the journalist to guess which of the surrounding circumstances might be deemed relevant.117

Under the Restatement approach, on the other hand, the journalist is given a greater degree of control over his fate. To avoid defamation liability, he need only supply some factual support to his conclusions.118

Lastly, the emphasis under the Restatement is on the underlying purpose and policies behind the opinion privilege, rather than on the mechanics of distinguishing facts from opinion. Opinions, as recognized by the United States Supreme Court in Gertz, are privileged under defamation law because they have the capacity to be "corrected" by the "competition of other ideas."119 To allow opinion to be subjected to correction in a court of law would greatly compromise our system of free speech and press. However, in order for the marketplace of ideas to be an effective correction device for erroneous opinion, the opinion must have the capacity to be corrected. That is, recipients at least need to know the facts upon which the author has based his opinion. When such facts are not stated or otherwise known, a libelous statement should form the basis for liability.

V. Conclusion

The Kentucky Supreme Court chose the correct test to determine whether a defamatory statement is fact or opinion in Yancey. The Restatement approach is simpler to apply than the four-factor approach of Olmstead. If a court determines there are not enough facts in an article to support a statement as privileged opinion,

it would be up to the jury to decide whether the statement is defamatory. In addition, journalists will have a clear guideline that will be consistently applied from case to case. Other commentators will be better able to respond to a statement if they know the facts upon which an expression of opinion is based. For the foregoing reasons, the United States Supreme Court should adopt the Restatement (Second) of Torts § 566 test as the one standard to be used in the fact-opinion distinction.
WORTH V. HUNTINGTON BANCSHARES, INC.: OHIO'S FIRST REPORTED DECISION CONCERNING THE VALIDITY OF GOLDEN PARACHUTE AGREEMENTS

A.A. Brewer

I. INTRODUCTION

In June 1989, the Ohio Supreme Court directly addressed the issue of enforceability of corporate employment agreements commonly known as golden parachutes in Worth v. Huntington Bancshares, Inc. After affirming the findings of the lower court, which had applied the business judgment rule, the Ohio high court held that golden parachute agreements are not void as against public policy.

A golden parachute agreement is a contract between a corporation and an officer or other key employee that generally guarantees the individual continued employment without a decrease in status or benefits, or, if the individual's employment is terminated within a specific period after a change in corporate control, the individual is guaranteed certain and often substantial economic benefits. In this day of unprecedented numbers of corporate mergers and acquisitions, a great number of golden parachute agreements have been put in place, and a significant

2. Id. at 197, 540 N.E.2d at 255.
4. Worth, 43 Ohio St. 3d at 197, 540 N.E.2d at 255.
number of them may become ripe for dispute. New agreements undoubtedly are being prepared, and attorneys are looking for the legal bases for challenge or enforceability of such agreements.

The *Worth* decision has opened the door for analysis of a proper and effective judicial approach to dealing with the validity and enforceability of such agreements. Although the Ohio Supreme Court held that golden parachute agreements are not void as against public policy, its decision leaves unclear the appropriateness of invocation of the business judgment rule in disputes between parties to a golden parachute agreement. The business judgment rule has been discussed in conjunction with golden parachute agreements, yet judicial application of the rule has apparently been upheld only in shareholder suits brought in behalf of a corporation against individual directors. The decision in *Worth* mandates analysis of the novel and unprecedented use of the business judgment rule in disputes between parties to a contract.

The purpose of this note is to identify the recent trend in judicial law concerning the validity of golden parachute agreements in general in light of the recent Ohio decision of *Worth v. Huntington Bancshares, Inc.* This note will discuss the application of the business judgment rule in disputes concerning such agreements. It will also identify an effective and appropriate legal approach to suits between parties to an agreement, as well as identify where application of the business judgment rule is appropriate in conjunction with golden parachute agreements.

It should become apparent that a golden parachute agreement most probably will not be found invalid on the basis of being a golden parachute agreement alone. Application of the business judgment rule in disputes arising over breach of such a contract,

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8. *Worth*, 43 Ohio St. 3d. 192, 540 N.E.2d 249.
however, is not appropriate. The business judgment rule is appropriate in disputes brought by shareholders in behalf of the corporation against the directors (not a party to the contract) who authorized the agreement.

II. TREND: GOLDEN PARACHUTE AGREEMENTS ARE NOT INVALID PER SE

A. Cases that Consider Golden Parachute Agreements on the Merits.

Although the issue of per se validity of golden parachute agreements previously had been raised in commentary and in public reaction to the use of such agreements, no court directly addressed this issue on the merits until 1985. Since that time, the decisions in Koenings v. Joseph Schlitz Brewing Co., Royal Crown Cos. v. McMahon, and Worth v. Huntington Bancshares, Inc., have each contributed to a consistent legal position.


Koenings involved a dispute between Joseph Schlitz Brewing Co. and a former employee who had entered into an agreement when Schlitz was engaged in friendly merger negotiations with G. Heileman Brewing Company. Schlitz had drafted and extended employment contracts to 70 of its key employees, including Koenings, that “basically gave Schlitz the right to terminate an employee without cause and the employee the right to elect to be terminated if he felt his duties were substantially reduced by Schlitz. In either case, the employee would receive his salary

13. Worth, 43 Ohio St. 3d 192, 540 N.E.2d 249.
14. Koenings, 126 Wis. 2d at 352, 377 N.W.2d at 595.
and fringe benefits for the duration of the agreement." Schlitz subsequently merged with Stroh Brewing Company, and, after reorganization of the Stroh/Schlitz combination, Koenings terminated his employment due to a substantial reduction in his responsibilities as a result of the merger. When Schlitz failed to honor the terms of the agreement with Koenings, Koenings sued Schlitz for breach of contract.

The trial court ruled as a matter of law that the damages clause at issue in the employment contract was unreasonable. The appellate court affirmed. On appeal, the Wisconsin Supreme Court applied a totality of the circumstances test and held that the stipulated damages clause was reasonable. The court specifically did not pass judgment on the "legality of golden parachutes as a corporate tool to provide job security to key employees, or ... as a defensive measure to a corporate takeover." However, it did determine that the term "'golden parachute' is not by itself legally significant, nor is it legally conclusive. It is merely descriptive of a certain type of employment contract given to top corporate executives and triggered by a change in corporate control." The court went on to apply

15. Id. at 352, 377 N.W.2d at 595-96.
16. Id. at 353-54, 377 N.W.2d at 596.
17. Id. at 355, 377 N.W.2d at 597.
18. Id. at 351, 377 N.W.2d at 596. The court changed a jury award in favor of Koenings to zero by application of the doctrine of mitigation of damages.
19. Id. The appellate court also reversed the lower court's judgment which granted Koenings damages for loss of fringe benefits, and also held that golden parachute agreements must include mitigation clauses as a matter of public policy. Id. at 357, 377 N.W.2d at 598. The Wisconsin Supreme Court found the issue concerning mitigation of damages in error. Id. at 360, 377 N.W.2d at 599.
20. Id. at 361, 377 N.W.2d at 599. The controlling precedent was Wassenaar v. Panos, 111 Wis. 2d 518, 331 N.W.2d 357 (1983). The court in Koenings expanded the number of considerations for determination of reasonableness under Wassenaar to include consideration of "valid economic purpose[s]" to support the reasonableness of the agreement. Such valid economic purposes can include attempting to lower employee attrition during a period of company uncertainty, satisfying employee job status and salary uncertainty, allaying fears of job security or purchasing corporate loyalty. Koenings, 126 Wis. 2d at 370, 377 N.W.2d at 604.
21. Koenings, 126 Wis. 2d at 371, 377 N.W.2d at 604. The court reinstated the jury verdict for Koenings. (The amount of Koenings' damages had been reduced to zero through the trial court's application of mitigation-of-damages doctrine based on Koenings' new employment after termination of employment with Schlitz.)
22. Id. at 360, 377 N.W.2d at 599.
established contract law and treated Koenings' golden parachute agreement as it would treat other employment contracts.

In reaching its judgment and upholding the clause at issue, the court discussed traditional factors that should be considered in determining a contract's reasonableness under the totality of the circumstances, and it extended those factors to include consideration of certain consequential damages that relate specifically to corporate takeover situations, such as loss of job satisfaction, loss of career advancement opportunities, loss of a level of professional respect, and damage to personal marketability within one's profession. Consideration of policies supporting the reasonableness test were also discussed, including consideration of an appropriate balance between the parties' freedom to contract and the belief that a damages clause in excess of amount of injury would be objectionable. The use of such contract clauses to assure employees of their position within the company during a time of uncertainty or to gain employee loyalty and lower employee attrition during acquisition or merger were considered valid economic purposes that would support the reasonableness of the clause at issue.

One commentator has noted that "[a]lthough the [Koenings] opinion focused primarily on the ... termination benefits clause, the court's favorable discussion of golden parachutes ... may suggest future favorable treatment of properly drafted golden parachute contracts." Read broadly, Koenings indicates that where some valid economic purpose for entering a golden para-

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24. For example, the general rule regarding breach of contract damages where a stipulated damages clause exists was applied. Koenings, 126 Wis. 2d at 365, 377 N.W.2d at 601. The court utilized the general rule that absent ambiguity, the construction of a contract presents a question of law. Id. at 366, 377 N.W.2d at 602. And the court refused to apply the business judgment rule as inappropriate in this case. Id. at 360, 370 N.W.2d at 599.

25. Koenings, 126 Wis. 2d at 361, 377 N.W.2d at 599-600.

26. Id. at 367-68, 377 N.W.2d at 602-03. Proof of these consequential damages tipped the scale in favor of a finding of reasonableness under the totality of the circumstances.

27. Id. at 369, 377 N.W.2d at 603.

28. Id.

29. Id. at 370, 377 N.W.2d at 604.

30. Id. at 371, 377 N.W.2d at 604.

31. Id.

chute agreement can be demonstrated, the contract will be valid and enforceable.33

2. Royal Crown Cos. v. McMahon

Royal Crown Cos. v. McMahon34 dealt even more directly with the issue of whether a golden parachute contract is void as a matter of public policy.35 In Royal Crown, the plaintiff, McMahon, was employed as president of Arby's, Inc., a wholly owned subsidiary of defendant Royal Crown.36 Royal Crown offered a written agreement to McMahon, and other key employees, that contained a clause stipulating severance payment in the event of termination of employment or voluntary resignation after a change in corporate control. The agreement was offered by Royal Crown to allay fears and uncertainty among top management during the time when Royal Crown was a prime candidate for acquisition.37 Royal Crown did undergo a change in control, and shortly thereafter in accordance with the terms of the agreement, McMahon voluntarily resigned.38 Royal Crown refused to give McMahon the severance pay stipulated in the agreement, and McMahon sued.39

Regardless of the express ratification of all outstanding employment and severance agreements at the time of change of control,40 Royal Crown attempted to defeat this agreement by arguing that it was against public policy in that it was contingent on a change in corporate control, and because "golden parachute agreements, in general, bear the taint of conflict of interest in favor of the management beneficiaries and to the detriment of the shareholders."41 The court refused to defeat this otherwise enforceable agreement simply because it was contingent on a change in control and noted that Royal Crown's attempt to do so was largely without legal support.42 The court stated that a "golden parachute is simply a severance agreement triggered by

33. Id. at 848, and n.150.
35. Id. at 545, 359 S.E.2d at 381.
36. Id. at 543, 359 S.E.2d at 380.
37. Id.
38. Id. at 544, 359 S.E.2d at 381.
39. Id.
40. Id.
41. Id. at 545, 359 S.E.2d at 381.
42. Id.
a change in corporate control" and that a "severance contract by any other name would be just as enforceable." The case presented no issue against public policy in the nature of a conflict of interest in favor of the management because McMahon was not a member of the board of directors that had approved this agreement, and the agreement was offered for the express purpose of protecting the shareholders by encouraging McMahon's continued employment with the company.

The court also refused to apply a reasonableness test to the amount of severance compensation owed McMahon because Royal Crown had freely contracted with McMahon for that amount. A finding that this agreement was void as against public policy would, under the circumstances, interfere with the parties' freedom to contract. The court held that the golden parachute agreement at issue was not void as against public policy but was, rather, an enforceable severance pay agreement.


The third case concerning the validity of golden parachute agreements is Worth v. Huntington Bancshares, Inc. Plaintiff Worth was employed as an assistant vice president with the energy division of Union Commerce Bank, a wholly owned subsidiary of Union Commercial Corporation (UCC). In response to a takeover attempt by Huntington Bancshares, Inc., UCC extended golden parachute agreements to Worth and other key employees. Worth's agreement provided that it would be binding on the successors and assigns of both parties. It also stated that in the event of a change of control of UCC, Worth would receive certain benefits if his employment were terminated involuntarily or if he, in good faith, believed that his status or responsibilities had diminished following a takeover and he voluntarily terminated his employment. Huntington completed its

43. Id.
44. Id.
45. Id.
46. Id.
47. Id. at 545-46, 359 S.E.2d at 382.
49. Id. at 192, 540 N.E.2d at 251.
50. Id. at 193, 540 N.E.2d at 252.
51. Id. at 194, 195, 540 N.E.2d at 252-53.
hostile takeover of UCC, and Worth then voluntarily terminated his employment. When Huntington refused to pay Worth the benefits provided by the agreement, Worth sued to enforce the contract.\(^\text{52}\) The lower court ruled against Worth based on his failure to prove a basis for his good-faith belief that his status and responsibilities had diminished after the takeover.\(^\text{53}\)

On Worth's appeal of several evidentiary issues, Huntington challenged the validity of the contract as a whole. The Ohio Court of Appeals found the contract valid as a legitimate exercise of business judgment with which it would not interfere.\(^\text{54}\) It then affirmed the judgment on the basis of Worth's failure to prove good-faith belief that his status had diminished since the change in corporate control.\(^\text{55}\)

On appeal to the Ohio Supreme Court, the issue of relevance to this discussion was whether contractual obligations such as Worth's employment agreement are valid and enforceable.\(^\text{56}\) Although Huntington had not specifically appealed that issue, the court nevertheless considered resolution of the question an implicit threshold determination to resolving the other issues presented.\(^\text{57}\)

The supreme court recognized that a golden parachute agreement is simply a particular form of agreement\(^\text{58}\) entered into by a corporation and its "top officers which guarantee[s] those officers continued employment . . . or other benefits in the event of

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52. Id. at 193, 540 N.E.2d at 252.
53. Id. at 195, 540 N.E.2d at 254.
55. Worth, 43 Ohio St. 3d at 193, 540 N.E.2d at 252.
56. Id. at 196, 540 N.E.2d at 254. One main issue on appeal was whether Worth was entitled to the benefits provided in his employment agreement. Id. at 193, 540 N.E.2d at 252. The court affirmed the lower court's decision on that issue. Id. at 198, 540 N.E.2d at 256. Another issue was whether indemnification for legal expenses, as stipulated in the employment agreement, was contingent on the plaintiff's success in enforcing the agreement's other provisions. The court held that where a contract provides for indemnification of legal expenses incurred by a party in enforcing or defending a contract, but does not specifically make indemnification contingent on success in enforcing the contract's other provisions, the party is entitled to indemnification notwithstanding his lack of success, provided the party has not acted in bad faith or with no colorable claim of success. Id. at 198-99, 540 N.E.2d at 256-57.
57. Id. at 196, 540 N.E.2d at 254.
58. Id.
a change of corporate ownership."\textsuperscript{59} The court placed no legal significance on the term golden parachute,\textsuperscript{60} but rather identified this form of agreement as merely a type of employment contract.\textsuperscript{61}

After a brief review of the benefits and detriments of this type of agreement, the court noted that recent cases had upheld golden parachute agreements on the merits,\textsuperscript{62} and it stated that "a corporation's decision to enter into a golden parachute is, like all other matters dealing with compensation of corporate executives, within the sound discretion of the corporation's board of directors."\textsuperscript{63} It was held that golden parachute agreements are not void as against public policy and that the particular agreement at issue was valid and enforceable.\textsuperscript{64}

\textbf{B. The Trend}

A specific and consistent pattern concerning golden parachute agreements emerges from the three cases discussed above. Each case concerns a breach of contract where one party, the corporation, is charged with not fulfilling its contractual duties to the other party, the employee.\textsuperscript{65} Each contract at issue includes a provision for compensation to the employee if he should leave the corporation as a result of a change in corporate control.\textsuperscript{66} Each case determines that the form of agreement, or the term "golden parachute," is not legally significant in itself, and that such agreements are merely a certain type of employment or severance contract which is generally valid and enforceable.\textsuperscript{67}

There is a consensus that golden parachute agreements are simply a specialized form of contract triggered by a change in

\textsuperscript{59} Id. (citing Schreiber v. Burlington Northern Inc., 472 U.S. 1, 3 n.2 (1985)).
\textsuperscript{60} Worth, 43 Ohio St. 3d at 196, 540 N.E.2d at 254.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 197, 540 N.E.2d at 255, (citing Royal Crown Cos. v. McMahon, 183 Ga. App. 543, 359 S.E.2d 379 (1987); Koenings v. Joseph Schlitz Brewing Co., 126 Wis. 2d 349, 377 N.W.2d 593 (1985)).
\textsuperscript{63} Worth, 43 Ohio St. 3d at 197, 540 N.E.2d at 255.
\textsuperscript{64} Id.
\textsuperscript{66} Royal Crown, 183 Ga. App. 543, 544, 359 S.E.2d at 380; Worth, 43 Ohio St. 3d at 192, 540 N.E.2d at 251; Koenings, 126 Wis. 2d at 352, 377 N.W.2d at 599.
\textsuperscript{67} Royal Crown, 183 Ga. App. 543, 545, 359 S.E.2d at 381; Worth, 43 Ohio St. 3d at 196-97, 540 N.E.2d at 254-55; Koenings, 126 Wis. 2d at 380, 377 N.W.2d at 599.
corporate control, and that the triggering factor, like other conditions precedent, is of no significance in determining the validity of such contracts. There is also a clear consensus that an employment contract by any other name would still be an employment contract. That is, the label “golden parachute” is of no legal significance in determining the validity or enforceability of the contract. Therefore, the trend is, and the general rule most probably will be, that a golden parachute agreement will not be found invalid or unenforceable on the basis of its being a golden parachute agreement alone.

III. SHOULD THE BUSINESS JUDGMENT RULE BE ADOPTED TO RESOLVE CONFLICTS BETWEEN PARTIES TO A GOLDEN PARACHUTE AGREEMENT?

Each court, in the cases discussed above, refused to reject per se the general type of agreement commonly known as a golden parachute. However, after that express or implicit determination, each court proceeded to consider the validity of the specific agreement at issue on a case-by-case basis through application of diverse legal principles. The specific contract in Koenings was upheld on the basis of a reasonableness test, which was the controlling case law in Wisconsin for issues concerning excessive stipulated damages clauses in employment agreements. Royal Crown, on the other hand, rejected a reasonableness test and upheld the validity of the specific golden parachute at issue on the basis of lack of conflict of interest in the agreement and on the basis of the parties' freedom to contract. The court in Worth upheld the lower court's findings that the specific “agreement was neither excessive nor tainted by executive self-dealing or conflict of interest”68 and based validity of the contract on the sound discretion of the corporation's board of directors to determine compensation of corporate executives.69 State contract law was applied to resolve the disputes in Koenings and Royal Crown. This approach is consistent with the treatment of golden parachute agreements as a type of contract. Worth, however, appears to have applied a corporate law defense (the business judgment rule) to establish the validity of the contract at issue.

68. Worth, 43 Ohio St. 3d at 197, 540 N.E.2d at 255.
69. Id.
A. The Business Judgment Rule

The business judgment rule is the judicial doctrine that

[A] corporate transaction that involves no self-dealing by ... the directors who authorized the transaction will not be enjoined or set aside for the directors' failure to satisfy the standards that govern a director's performance of his or her duties, and directors who authorized the transaction will not be held personally liable for the resulting damages, unless:

(1) the directors did not exercise due care to ascertain the relevant and available facts before voting to authorize the transaction; or

(2) the directors voted to authorize the transaction even though they did not reasonably believe or could not have reasonably believed the transaction to be for the best interest of the corporation; or

(3) in some way the directors' authorization of the transaction was not in good faith.70

This rule reflects the concept that a corporate director stands in a fiduciary relationship with the corporation, and therefore must exercise a certain standard of care when transacting corporate business. In Ohio, this standard of care has been codified in Ohio Revised Code § 1701.59(B): A “director shall perform his duties as a director, ... in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances.” If a director breaches his fiduciary duties to the corporation, he can be held personally liable for his acts or omissions.71

The business judgment rule precludes judicial interference with the good-faith business judgment of a corporate director where the director diligently makes a reasonable effort to become informed about a business transaction before making a decision concerning that transaction, and where the director has not acted with gross negligence in making a business decision.72 Where a director has not been diligent or where he has acted with gross negligence, his conduct precludes his invocation of the business judgment rule as a defense, and courts have stepped in to enjoin

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or rescind the director's transactions or to award damages as appropriate.\textsuperscript{73} This doctrine has been applied in cases where the good-faith business judgment of corporate directors has been challenged due to the directors' alleged waste of corporate assets or due to other conduct that allegedly was not in the best interests of the corporation.\textsuperscript{74} The policy behind this doctrine is to protect directors from personal liability for mere mistakes in judgment.\textsuperscript{75}

Legal commentary has linked the business judgment rule to the analysis of golden parachute agreements.\textsuperscript{76} However, application of this doctrine has not been specifically suggested in such commentary for use in disputes between parties to a golden parachute contract. Legislation and, until very recently, case law have limited the application of this defense to shareholder suits in behalf of a corporation that were brought against individual directors in an attempt to enjoin or rescind certain transactions or to recover damages for corporate loss sustained as a result of alleged director misconduct. The Ohio Revised Code specifically states that the doctrine may apply "in any action brought against a director."\textsuperscript{77} The Code does not address the application of the business judgment rule to other situations such as disputes between parties to a contract where the corporation is one of the parties. Therefore, this issue is ripe for judicial resolution.

B. Cases that Apply the Business Judgment Rule in Disputes Between Parties to a Golden Parachute Agreement

Two appellate court cases have addressed the application of the business judgment rule in suits between parties to a golden

\textsuperscript{73} Id.
\textsuperscript{75} The problem of poor but good-faith business judgment on the part of directors is remedied outside the jurisdiction of the courts by, for instance, shareholders voting in new directors who, hopefully, will make more sound business decisions than their predecessors.
\textsuperscript{77} OHIO REV. CODE ANN. § 1701.59(C)(1) (Baldwin 1985) (emphasis added).
parachute contract. Those cases are Koenings v. Joseph Schlitz Brewing Co. and Worth v. Huntington Bancshares, Inc.


In Koenings, the plaintiff unsuccessfully attempted to invoke the business judgment rule to support the validity of his agreement. Koenings argued that the court should not interfere with his golden parachute agreement because it was enforceable as a valid, good-faith business judgment decision. The Wisconsin Appellate Court discussed the business judgment rule in terms of the directors' duty to act in the best interests of the corporation and in terms of the directors' fair treatment of the stockholders. Then the court held that "golden parachute contracts, as a matter of public policy, must have mitigation clauses" in order to be reasonable and enforceable and in order not to "bear the taint of conflict of interest in favor of the management-beneficiaries to the detriment of the stockholders' interest." It was not apparent from the decision why the issue of the directors' conduct should be considered in a dispute between parties to a contract where no individual directors had been joined as parties to the dispute, or why a conflict of interest between the management-beneficiaries and the shareholders, who were not a party to the contract, should impact on the validity of a contract between the corporation and its employee.

On appeal, the Wisconsin Supreme Court refused to adopt such an application of the business judgment rule. The court stated that the business judgment rule was inappropriate and unnecessary in this case.

2. Worth v. Huntington Bancshares, Inc.

Application of the business judgment rule in a dispute between parties to a contract received more favorable treatment by the
Ohio courts in *Worth v. Huntington Bancshares, Inc.* The defendant corporation argued that if the specific agreement at issue were a waste of corporate assets, then the agreement would not necessarily be void, but would be unenforceable against the corporation and its shareholders. The Ohio Court of Appeals found this argument "too simplistic" and indicated that it was necessary to inquire into the directors' fiduciary duty to the corporation. The court first found that since the defendant corporation failed to demonstrate any self-dealing or personal interest on the part of the directors in extending the agreement to the plaintiff-employee, the business judgment rule would apply. Then, relying heavily on a law review article concerning the business judgment rule and golden parachute agreements, the court held that the golden parachute agreement at issue was a "valid exercise of the Board's business judgment." The court applied the business judgment rule as an appropriate standard by which to evaluate the validity of a golden parachute agreement in the context of a dispute between parties to the contract.

On appeal, the Ohio Supreme Court appears, at first blush, to have impliedly authorized the application of the business judgment rule in disputes between the parties to contracts. It upheld the findings of the appellate court that the "agreement at issue was neither excessive nor tainted by executive self-dealing or conflict of interest," and stated it was "certainly not for this court to second-guess the business judgment of corporate executives." Both of these statements are consistent with the established application of the business judgment rule in appropriate

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85. *Worth*, No. 52861, , slip op. at n.10.

86. Id.


88. *Worth v. Huntington Bancshares Inc.*, No. 52861, slip op., (Ohio App. 8th Dist. Nov. 25, 1987) (LEXIS, States Library, Ohio File), aff'd in part, rev'd in part, 43 Ohio St. 3d 192, 540 N.E.2d 249 (1989). The court went on to assess whether the amount of compensation authorized by the contract at issue was a reasonable forecast of plaintiff's harm, and whether it was therefore enforceable against the corporation. The contract was upheld on this basis also.

89. Id.

90. *Worth*, 43 Ohio St. 3d 192, 197, 540 N.E.2d 249, 255.

91. Id.
cases. However, application of the business judgment rule in a dispute between parties to a contract was not specifically discussed by the Ohio court.

In light of this decision, some confusion may exist as to the appropriateness of the application of the business judgment rule in disputes between parties to a contract. Since application of the rule in this context was neither specifically overruled nor expressly adopted by the court, it can and should, for reasons discussed below, be argued that no such application of the rule has been established in Ohio.

The Ohio courts need to clarify the appropriate and judicially correct standard by which to evaluate the validity of individual golden parachute agreements. The following discussion suggests a correct and legally supportable position.

C. Implications of Adoption of the Business Judgment Rule in Disputes Between Parties to a Golden Parachute Agreement

A golden parachute contract may be at issue in a dispute between parties to the contract or in a dispute between the shareholders of a corporation (on behalf of the corporation) and the directors where the directors' business judgment is challenged concerning the golden parachute transaction. However, contract issues should not be confused with business judgment issues. These are two separate subjects, aimed at two separate goals and supported by two separate bodies of law.

The goal in a contract dispute is to determine whether the contract at issue is valid and enforceable between the parties to the contract. The goal where business judgment has been challenged is to determine whether the directors are entitled to assert the business judgment defense concerning their authorization of a particular business transaction. A contract dispute concerning enforceability of a golden parachute contract is between the corporation and its employee. Business judgment disputes concerning the legality of golden parachute contracts are between the corporation and its directors. The issues of business judgment surrounding golden parachute agreements, which have been so hotly debated in commentary and public opinion, can be best addressed in shareholder derivative actions. If the corporation believes it has been injured by the terms of a particular golden parachute agreement, it has legal recourse through a suit against the individual directors who approved the transaction on
behalf of the corporation. This is where the business judgment rule traditionally applies, and this is where the pros and cons of golden parachute agreements may legitimately be addressed.

However, if the business judgment rule were applied to a golden parachute contract dispute between the corporation and its employee, enforcement of the agreement could stand or fall based on whether individual directors had breached their duty to the corporation. The individual directors have no direct interest in this dispute. A directors's duty to a corporation is not material to the issue of whether a contract between an employee and the corporation is valid or enforceable. Such application of the rule would be clearly inappropriate in a dispute between parties to a contract.

Additionally, the policy behind the business judgment rule is not furthered by application of the rule in a contract dispute between parties to the contract. The policy behind the rule is to protect corporate directors from personal liability for mere mistakes in judgment. This policy is not material to the enforceability of an employee's contract. It is not appropriate to remedy wrongs against the corporation that resulted from director misconduct in a suit brought by an employee against the corporation where the employee merely accepted the terms of a contract offered him by the corporation, and attempted to secure his legal remedy against the corporation for its enforcement. The employee should not be accountable for director misconduct; rather, the responsible director should be reached through a shareholder derivative action in appropriate cases.

Individuals acting as employees should not be confused with individuals acting as directors. If an officer/employee who is also a director of a corporation benefits from a golden parachute agreement, then the individual as employee may try to enforce the terms of his agreement, but the individual as a director may be held accountable for any misconduct in which he engaged in authorizing the golden parachute agreement. In this manner, justice is served and the doctrine of stare decisis remains intact.

Application of the business judgment rule in a contract enforceability dispute could work unjustly against the "innocent" employee who merely accepted the terms of the agreement offered by the corporation and then acted in reliance on the agreement by remaining with the company during the period of
change in control. An employee would not know, at the time he entered into such an agreement with the corporation, whether the individual directors were in breach of their fiduciary duty to the corporation in extending the particular agreement to him, and whether, therefore, his contract could be found invalid or unenforceable in a later enforceability action. If the employee accepted the offer and the corporation later, under new leadership, refused to honor the agreement, the employee, who had acted in reliance on the agreement to his detriment, could be unjustly denied enforcement of his contractual expectations if the contract were rendered invalid on the basis of individual director misconduct. The employee should not have to prove the original director's good faith in the contract transaction in order to establish the enforceability of his contract.

If the business judgment rule were applied in contract disputes between parties to a contract, the presumption inherent in the business judgment rule that the directors have acted in the best interests of the corporation would appear to work to the benefit of the employee by substantiating the validity of his agreement with the corporation. However, invocation of the business judgment rule, which raises this presumption, also raises the opportunity to rebut that presumption. Such rebuttal would occur, in this instance, without the joinder of the individual directors who allegedly had breached their duty to the corporation. Additionally, such a rebuttal advanced by the corporate defendant is incongruous and, if successful, could allow the new management to set aside obligations to which the corporation would otherwise be bound. If the acquiring corporation has taken no steps to legally avoid the obligation or to invalidate such an agreement prior to an employee's enforceability suit, it would be manifestly unfair to the employee to allow the corporation to avoid the obligation by proving that its previous directors did not act in the corporation's best interests. Thus, the business judgment rule should not be utilized in disputes between parties to a golden parachute agreement.

92. See, e.g., Worth v. Huntington Bancshares, Inc., No. 52861, slip op., (Ohio App. 8th Dist. Nov. 25, 1987) (LEXIS, States Library, Ohio File), aff'd in part, rev'd in part, 43 Ohio St. 3d 192, 540 N.E.2d 249 (1989) (plaintiff claimed to have acted in reliance on the golden parachute agreement at issue in the dispute by refraining from considering other employment during the acquisition of the company for which he worked).
Since golden parachute agreements are merely a type of contract, the specific enforceability of an individual employee's golden parachute agreement should be judged on the basis of contract law. Contract law has developed over a long period of time around the specific issues of contract validity and enforceability. The well-developed policy that supports contract law resolution of those issues logically and legally support the application of contract law for resolution of disputes between parties to a contract.93

IV. CONCLUSION

In light of the Ohio Supreme Court decision in Worth v. Huntington Bancshares, Inc., a consistent and legally supportable trend has been established concerning the general validity of golden parachute agreements. The trend is, and the rule will most probably will be, that a golden parachute agreement will not be found invalid and unenforceable solely on the basis of its being a golden parachute agreement. A golden parachute agreement is merely a type of employment contract that is triggered by a change in corporate control, and this triggering event is of no consequence to the determination of the general validity of such agreements.

Also, in light of the recent Worth decision, it has become necessary to clarify the correct and legally supportable approach to the evaluation of specific golden parachute agreements in disputes between parties to the contract. Contract law has been

93. It is not the purpose of this discussion to address golden parachute agreements in light of traditional contract law. However, for a general overview of traditional contract issues, see J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS (1981). Traditionally, a contract will be found valid where there has been an intent to enter into an agreement, a valid offer, a valid acceptance, and where valid consideration exists to support the agreement. Intent to contract, offer and acceptance would rarely be at issue in a dispute between parties to a golden parachute agreement. Lack of valid consideration, however, is an issue that has been raised as a basis for invalidating such agreements, although it has been found that continued performance under a terminable-at-will contract was sufficient consideration to support a golden parachute agreement. See, e.g., Royal Crown, 183 Ga. App. 543, 545-46, 369 S.E.2d 379, 381 (1987).

Enforceability of contract terms turns on whether the contract was illegal, unconscionable, impossible, impracticable, and the like. Creative counsel will have to scrutinize such contract issues and the policies behind them in order to attempt to argue analogous reasoning to defeat the enforceability of a particular golden parachute in a dispute between parties to the agreement.
developed to specifically and justly address the issues of an agreement's validity and enforceability that are relevant to breach-of-contract disputes. Application of contract law to disputes between parties to a golden parachute agreement — that is, to this type of employment contract — is appropriate and legally supportable.

The business judgment rule, however, should not be applied in disputes between the parties to a golden parachute agreement. Breach of duty by one not a party to the contract — that is, breach of a director's duty to the corporation — should not be the basis for invalidating an employee's contract in an enforcement suit brought by the employee. Additionally, it is not appropriate to remedy the corporation's wrongs in a suit brought by an employee where the employee merely accepted the terms of a contract offered him by the corporation and attempted to secure his legal remedy against the corporation for its enforcement.

If the corporation believes it has been injured by the terms of a particular golden parachute agreement, it has legal recourse through a suit against the individual directors who approved the transaction on behalf of the corporation. In this context, the business judgment rule can legitimately be invoked by the directors as a defense where director misconduct has been alleged in extending such contracts to key employees. Application of the rule in this context is consistent with the policy behind the rule.
BOOK REVIEW


Reviewed by Sheila A. Kelley

The basic premise of crime—that there are certain actions which will not be tolerated—has been a constant in the ever-changing story of humanity. The types of actions characterized as criminal and a society's response to such actions have been totally inconsistent and have changed with frightening rapidity. Dozens of books have promoted and criticized the numerous theories defining crime and describing what should be done to deal with it. Therefore I approached Criminological Theory: Context and Consequences, with some trepidation. Much to my delight, I found that it is worth reading, worth studying, and worth buying.

The self-proclaimed theme of the book is "the interconnection among social context, criminological theory, and criminal justice policy-making." The authors, all well-known, university professors, attempt to provide "a primer in criminological theory—a basic introduction to the social history of attempts, largely by academic scholars, to explain crime." They succeed on both points.


2. Professor Lilly is a Professor of Criminology and Adjunct Professor of Law at Northern Kentucky University. He is recognized as one of the leading authorities on home incarceration and has written extensively about juvenile law and criminological theory. Professor Cullen is a Professor in the Department of Criminal Justice at the University of Cincinnati, where he holds a joint appointment in Sociology. He has written extensively and is a well-known authority in the area of white-collar and corporate crime. Professor Ball is Professor of Sociology at West Virginia University. He has written extensively and is a well-known authority in the area of juvenile delinquency and home incarceration.

3. Criminological Theory at 15.
The authors believe that: 1) all theories about crime are heavily influenced by the state of social order within which the originator of the theory exists; 2) the social order itself is influenced by the most current fad in criminological theory; and 3) societal policymakers are heavily influenced by both the social order and the current popular criminological theory. Because society is an ever-changing easel on which man paints his existence, the authors believe that criminological theories will continue to change and evolve. Therefore, the conclusion of the book is that there may never be definitive answers on how to deal with crime.

Nevertheless, the authors offer hope. They believe we must: 1) accept the fact that society changes; 2) change the way we think about crime; and 3) initiate effective controls flexibly designed to fit whatever social order exists.

The book demonstrates that various theories on crime, including ancient, no-longer-accepted theories, still influence our lives. One example is the theory that crime was committed by people possessed by evil spirits—"The devil made me do it." The book cites as an example, the claim of TV preacher and former PTL leader, Jim Bakker that his adulterous conduct was the result of the devil's work. Another example is the theory that certain mental and physical characteristics are indicative of behavior. The female beauty contest is a perfect example. As the authors state it, "A beautiful woman is expected to do good things."

The book also demonstrates how each theory builds on previous theories, with each proponent of a new theory borrowing what he believes is good about the old theory and adding to it his new ideas. However, the authors also demonstrate how criminological theories have taken quantum leaps from time to time because of revolutions in science and sociology. Discoveries in modern physical medicine and a greater understanding of the physiology of the human body led to the demise of many earlier theories such as those discussed above. Additionally, the social upheaval that

4. Id. at 20-21.
5. Id.
6. Id. at 27-45. Traits such as a sloping forehead, a receding chin, and a twisted nose were supposedly indicators of criminal tendencies. The same was true of diseases such as epilepsy.
7. Id. at 26.
8. Id.
9. Id. at 27.
occurred during the 1960s in the United States led to protests over discrimination, the development of a youth counter-culture, and reaction to Vietnam. These events inspired experiments that attempted to show how changes in an individual's socio-economic environment could have a positive effect on crime.

The authors do not limit themselves to traditional criminological theories. They explore the various theorists who believed that crime was not the problem, but that society itself was the problem. An example of this is the discussion of the theories proposed by Karl Marx and Friedrick Engels which set forth the basic proposition that: 1) in a capitalistic system the conflict of interest between different economic groups would be increased by inequality in the distribution of scarce resources (food, clothing, shelter); 2) those receiving less would question the legitimacy of the arrangement; 3) these groups would be more likely to organize and bring the conflict out in the open; 4) there would then be violence (crime) as a result. The solution, according to Marx and Engels, was their socio-economic theory known as communism.

Finally, what really makes this book worth reading, is the study of State Intervention in chapter 5. There, the authors discuss their belief that researchers, academicians, and policymakers invent or promote certain criminological categories in order to further their own personal, sometimes completely unrelated agendas. The authors are quick to point out, however, that society benefits from the work of these people. For example, Stephen Pfohl, who investigated the "discovery of child abuse," showed how pediatric radiologists were instrumental in bringing child abuse to the public's attention in an effort to demonstrate the importance of their specialty, pediatric radiology. It is not clear whether they were successful in gaining any additional respect for this profession. Yet their work most certainly advanced a category of crime that had previously escaped sanctioning, but which most people would agree is intolerable.

A college professor would enjoy teaching from this book. It is written at a level that is challenging but not overwhelming.

10. Id. at 103-104.
11. Although this theory was written in the middle 1800s, it was alarmingly accurate at predicting the events in Russia during the early 1900s.
12. Id. at 117-18.
Students may occasionally need to look up the definition of a word, but the book is very readable. Each chapter progresses chronologically as much as possible and discusses the theory, major theorists, and the social order in which each theorist worked. At the end of each chapter, the authors summarize the chapter and relate it to the previous chapters.

My only criticism of the book is that on a few occasions the authors' personal views are made apparent. Examples include phrases such as "capitalistic-militaristic imperialism" and descriptions of penological policies from the first half of the 20th century as the forerunner of Nazi Germany. If the book is to be used as a textbook, perhaps the student should be allowed to draw his own conclusions from the facts presented. However, the authors' personal views are so infrequent that they are easily counterbalanced by numerous instances of straightforward factual offerings. A criminology professor should easily be able to overlook this minor criticism and give the proper admonition to a class.

Criminological Theory: Context and Consequences, by Lilly, Cullen, and Ball, makes an excellent textbook and a good "nutshell" reference work. It is also good reading for those interested in or working in the field of criminology.

13. Id. at 183.
14. Id. at 43.