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W. JACK GROSSE: NOTES ON HIS RETIREMENT

Stanley E. Harper, Jr.*

He was one of that generation born in the early twenties who grew up on nickels and dimes in the Great Depression and who reached early adulthood in time to be drafted "for the duration" in that devastating conflict, World War II. But that war was fifty years ago, more or less, and that generation — including Professor Grosse — is passing from the scene. It is time to reminisce and to speak of senior citizenship and of retirement too.

Law professors: The Kingsfield-Paper Chase view has it that law professors (and law deans too — Jack has been both) are remote, Ivy League educated, sometimes autocratic figures immersed in academia and twice removed from the real world. Mine is another view: to know the professor, one ought first to know the boy, the young man and the man himself.

Jack was reared in Cincinnati (Madisonville, to be exact) in sometimes not affluent circumstances. From the beginning he was a good student; indeed, in grade school he learned his math very well under the eagle eye of one J. B. Britton, he of the then extant knuckle-whacking school of education. But Jack's real interests lay in the out-of-doors — sometimes the woods or the river, but more likely competitive sports of any kind. Golf: He developed his long ball skills with discarded clubs and nicked balls during his years as a caddy; in short, he learned as he earned. Basketball: With his height it is obvious that he was a good player. His real passion, though, was baseball, from sand lots to what might be defined as semi-pro ball. As a pitcher his fast ball was very fast but erratic, the kind of pitch that cautioned a hitter to hang loose and not dig in. If Jack had secret ambitions about professional ball, the duties of life and the war ended all that.

Jack's preoccupation with sports was not his only interest. While dutifully completing high school, he supplemented his keep

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with part-time employment in photography, not as the critical or artistic eye behind the lens, but as a lab assistant in the malodorous developing room at Fas-Foto, Inc. Photography as the eye behind the lens is now his continuing avocation. Friends call him Hollywood Jack.

Shortly after high school Jack was drafted. He was young, had a high army test score and had the temporary luck of the draw; he was assigned to a program that would lead to a college degree at army expense. Jack earned a few college credits, but the program was soon terminated in light of manpower needs. Jack was shipped off to Europe and assigned to the combat military police whose duties, among other things, included setting up road blocks, rounding up prisoners of war and engaging in random combat as the frequent occasion demanded. And so he foot-slogged across Europe as a GI, cold, wet, mud caked, obviously in need of a bath and more in need of a hot meal. A good night was a farmhouse or a bombed-out cellar. Euphoria was a scrounged up bottle of cognac. To this day Jack has war stories that are almost worth retelling.

In due time after the war, Jack returned to the states aboard a rust-bucket Liberty ship for his mustering out. The GI Bill was available. His interest in the out-of-doors came to the fore: he applied (and was accepted) for a degree in forestry and wildlife management at a Colorado university. His entry would be delayed for a semester or so in light of the great GI surge into college. In need of a job, Jack returned to Cincinnati and was employed by Dunn and Bradstreet. Hence, the Colorado program was abandoned although, even today, Jack will tell you on occasion that he should have been a forest ranger.

With the Bradstreet job Jack was on the road most of the time checking out the credit bona fides of merchants in small towns in the region. One day when back in Cincinnati he phoned for a date with Norma Kirby, a girl whom he knew — or perhaps knew of — in high school. That first date was obviously a Reds' game at old Crosley Field. One date was another and another until marriage and eventually children — Doug, now an environmental engineer, and Lisa, now a lawyer.

Because of travel Jack quit Dunn and Bradstreet. Next came his employment on the car financing desk of a local bank. Here he balanced the interests of car dealers, new and used, with purchasers' ability to meet mortgage payments and in the course
of doing so learned more about floor-planning auto sales than he
needed to know. The job was hectic with little chance of pro-
motion. With an eye to the future and having a few college
credits, Jack enrolled with advanced standing in the evening
degree program of the then Chase College of Commerce. He
continued on the loan desk at the bank while he earned his
degree in business administration.

After graduation Jack remained at the bank for about a year
and then was invited by the Chase College of Commerce to be a
professor and assistant dean. Thus he began his academic career.

Jack remained as a professor and administrator in the College
of Commerce from 1954 to 1962. In addition to his regular duties,
he first earned a master's degree in business administration at
Xavier University and then his law degree at Chase. These were
extremely busy times, and yet they were good times. With their
young children Jack and Norma found time for long weekend
camp-outs and additional time for trips to the Smokies. There
were woods, camp fires, remote streams, mountains to climb and
occasional waterfalls for kids to slide down.

In the spring of 1962 the Chase College of Commerce degree
program was terminated. Jack became assistant dean and pro-
fessor in the law school, a position he held for two years.

In 1964, however, he accepted the opportunity for a professor-
ship in business administration at Clarkson University in upstate
New York. The family moved to Potsdam. Jack's career at Clark-
son was quite successful, but in 1966 the law dean at Chase was
on the telephone to lure Jack to Cincinnati. After some debate,
loyalty to Chase prevailed. The family returned, Jack to be
professor of law without administrative duties.

In 1968, however, Jack was invited to teach in the graduate
business administration program at Xavier University and, in
light of conditions at Chase, he accepted. But yet again he was
persuaded by Chase to return, this time as dean. Incidentally,
during these uncertain years Jack found time during summer
months to earn his master's degree in law at Case Western
Reserve University.

But why in the 1960s this seeming ambivalence between teach-
ing law and business administration? In light of his background
and education, Jack is well prepared to teach in either field.
Furthermore, his opportunities to teach at Clarkson and Xavier
afforded him security with well-established universities. In con-
trast, by 1970 the facilities at Chase were inadequate — limited library space, small classrooms, inadequate faculty space, no room for expansion. In addition, there had been a turnover of deans. Finally, Chase, even though accredited by the American Bar Association, was one of the few free-standing law schools unaffiliated with a university; its future was uncertain.

For some time the American Bar Association and the legal profession have exerted pressure to force free-standing law schools to affiliate with a university — this, on the theory that the law school will enjoy greater support within the security of the university environment. At Chase in the 1960s Jack had experienced a decade of failed attempted mergers. In 1961 the merger of Chase and the University of Cincinnati College of Law failed at the last minute. In 1965 a merger of Chase with Miami University seemed likely, but it also failed. Merger discussions ensued with Wright State University in Dayton but without result. And throughout the decade there were merger talks with Xavier University that never came to fruition. In 1970 when Jack left his secure position at Xavier University to accept the Chase deanship, his move in mid-career was indeed chancy; the prospects for merger were almost nil. Certainly, then, in the early 1970s the merger of Chase and Northern Kentucky University came as a complete surprise to Chase alumni and the general community as well.

At the time Northern Kentucky University was expanding rapidly, adding programs and contemplating the move from its Dixie Heights location to the Highland Heights campus. Dr. Frank Steely, then president of the University, contacted Dean Grosse and certain Chase alumni, and merger discussions ensued. Discussions led to negotiations with Dean Grosse accepting a major role. The negotiations were extended, sometimes difficult, requiring at times some hard bargaining and just as often acceptable compromises and friendly persuasion. The merger was effected, and the law school (without interruption to classes) undertook the difficult move from its time-worn downtown Cincinnati quarters to the more inviting location in Dixie Heights.

That was the beginning. In the years following in his tenure as dean, faculty and library staff positions were added, and the library collection was expanded, catalogued and properly housed. Classrooms, faculty offices and student facilities were improved
to meet proper standards. The *Northern Kentucky Law Review* was founded. More importantly, after much effort, the Day Division was established, making Chase a multi-division law school. Later in his tenure, plans were made for the move from Dixie Heights to Nunn Hall on the Highland Heights campus, and much attention was given to ultimate membership in the American Association of Law Schools. Certainly this era of progress required the dean to engage in public relations, fund-raising and continuing negotiations with the university administrators for adequate financial support.

Toward the end of his demanding nine-year tenure as dean (a very long tenure in those times of short-lived deanships), Jack fell ill and was hospitalized for a short time. Not long after he resigned the deanship and returned to full-time teaching.

In his teaching career Professor Grosse's interests have been catholic. His long-time teaching of the law of contracts, his seminar in Law and Economics and his course in Commerical Law reflect his business background and education. The course in Sports Law, although far removed from the sandlot, represents his abiding interest in competitive sports, professional and amateur. One need not probe deeply to discover why he, who might have been a professional environmentalist, now teaches Environmental and Animal Rights and Habitat Law. Finally, his seminars in Legal History and Jurisprudence attest to his belief that even the practical courtroom lawyer should have some knowledge of the evolving principles of law as rooted in history or in the philosophy of a particular society.

In the classroom, Professor Grosse is certainly not Kingsfield although he does expect his students to be prepared. He can break the tension of the classroom with humor. He has a very good reputation for fairness. He is available for student consultation. That he is respected and liked by students is reflected by the full enrollment in his elective courses.

Of course a professor should also be a scholar; Jack has more than met the standard. In addition to law review articles, prepared speeches and papers given at professional meetings, he has published three books and is in the course of publishing two more. His authorship reflects his diverse interests: *The Underwriters List of Trial Counsel* (1962), *Government Contract Law* (1969), and *Handbook on School Law* (1980). In 1991, a casebook
and a companion text on management of natural resources and wildlife and habitat law will be ready for classroom and general professional use.

A final note on a service Jack has performed for legal education. For more than ten years he has served with the Section of Legal Education of the American Bar Association. His main duty has been to be the "finance man" on inspection teams that report on whether law schools continue to meet accreditation standards. With his experience, and in short order, he can check the books to determine underfunding, if any. No college president can bamboozle Jack with grandiose promises of future funding. If the books say otherwise, Jack's report will get to the truth. Many professors owe Jack a debt of gratitude for a salary boost now and then, and librarians can thank him for more adequate funding.

But as stated before, a generation is passing from the scene and Jack in retirement is not an exception. Retirement? Well, not quite. He will return in the fall for his course in Habitat Law "just to see how the new casebook and text work in the classroom." And then he might go out "on just one more inspection trip for the American Bar Association." Or even sit for a contract arbitration now and then in the business world. One hopes that he will have more time, camera in hand and grandchildren in tow, for a trip to a remote stream and a waterfall for the kids to slide down. Of course, if his entry to forestry school had not been delayed a semester, he might now be facing retirement as a forest ranger or as a habitat manager with one last climb (in the proverbial sunset) up the old fire tower for a final survey, horizon to horizon, of the immense design of things, saying to himself, I should have gone to law school....
PROFESSOR W. JACK GROSSE

W. Frank Steely*

Rare is the faculty member at any institution whose service to college, university and larger community equals that of Professor Jack Grosse. I have always admired people who do great deeds for their fellows and for the entities they serve. No individual has contributed more to Chase College of Law than Jack Grosse and, in so doing, he has served Northern Kentucky University and the entire Commonwealth of Kentucky.

As first president of Northern, I joined Dean Grosse as he led Chase in its merger with Northern Kentucky University in 1972. In so doing, he placed the law school on solid financial ground while preserving the precious opportunity for evening legal education in the immediate Cincinnati area.

Think for a moment of the added recognition for Northern Kentucky University in the greater Cincinnati area to which Professor Grosse has contributed as a result of the Chase merger. Northern has acquired a body of alumni serving this entire region in prestigious positions, including judgeships. The contributions of alumni to the University through their leadership, dedication and hard work have been enormous in very material ways. For example, at the time of the merger there were over one hundred Chase graduates practicing law in the three Northern Kentucky counties (including several state senators and state representatives). In addition, the merger of Chase College of Law with Northern Kentucky University gave and continues to give to the entire University a broad base of recognition and support. These distinguished alumni, from Paducah to Pikeville, provide a voice for the University commensurate with that of the Universities of Kentucky and Louisville as they continue to find their way into state government not just in this region but throughout the Commonwealth.

After the merger Jack Grosse continued to teach during his entire administrative tenure at Chase. He and many law faculty

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colleagues he brought to Northern have served well their adopted Commonwealth through their efforts on the variety of assignments of the state bar association. Professor Grosse is also respected by the American Bar Association and has served on its accreditation teams to colleges as distant as Puerto Rico.

I admire Jack Grosse enormously. Not the least of the many reasons for my admiration is that he and I (and his assistant dean, Martin Huelsmann) used to argue long and hard over decisions we had to make. Each time we separated we parted with the complete confidence and faith that each of us had said openly everything he would ever say covertly. I choose to think that of such toughness and integrity, good institutions are built.

If I may be forthright, I believe I am well acquainted with Professor Grosse's academic contributions, his scholarly writing and especially his classroom teaching. He demonstrated his desire to make Chase an integral part of Northern Kentucky University when he originated the interdisciplinary class that he invited me to team teach with him in Anglo-American Legal History. This was the very type of creative and innovative development often recommended for Northern. Thus, I have shared a classroom with Jack Grosse each year for over a decade. His appeal for and popularity with students across the spectrum — law, graduate and undergraduate — is phenomenal. Beyond the student evaluations which document this, I have seen the tremendous respect shown by a multitude of bright men and women who recognize excellent instruction.

One further quality in my own view which any outstanding leader should possess is a humane and decent, yes, even compassionate, attitude toward his fellows: students, faculty, and staff. Those who know Jack Grosse know he meets this standard par excellence.
DEDICATION TO W. JACK GROSSE

Jack Sherman, Jr.*

Chase Law School gave me the opportunity to become a lawyer. With a young family and a full-time job teaching in the Cincinnati Public Schools, evening law school was my only hope for entering the profession of law. When my acceptance letter came from Chase I was so happy, I literally hit the ceiling. Now, whenever I muse about the wonderful opportunity I have been given, and how thoroughly rewarding and enjoyable the legal profession has been, I think of Chase Law School, and when I think of Chase, I think of Jack Grosse.

My first recollection of Jack Grosse was as a student in his Contracts class. Jack was an excellent teacher. He knew his subject and was always well-prepared. Using the Socratic method, he encouraged class participation, which was often quite lively and invariably interesting. When a student was called upon to orally brief a case in class, he gave encouragement and support. He never embarrassed a student who faltered or was unprepared; that was simply not his style. One felt comfortable in his class. Jack was a down-to-earth scholar. He taught law in a way that was consistent with logic and common sense, in a way that was clear and comprehensible. The purpose of law was to simplify life, not complicate it. He always took us from the complex and confusing to the simple and understandable, not the other way around. I think Jack loved teaching, loved being in that classroom. His quick smile, engaging attitude, and outright friendliness certainly suggested it. In his class, you not only learned law, but you learned to enjoy and appreciate law. These important lessons have stayed with me throughout my career, and I thank him for it.

Several years after graduating from Chase, Jack Grosse, now dean of the Law School, called me. After some friendly hellos, he told me to “hold onto your seat,” then invited me to join the

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Chase faculty and teach Constitutional Law. I said I wanted to think about it, but it did not take long to decide. I returned to Chase Law School, with Jack no longer my professor, but my colleague and the highly respected leader of the law school. Many of the traits that made him an excellent teacher also made him an excellent dean; friendliness, openness, humility, scholarship, thorough preparation. He also had a keen sense of what was good for Chase Law School.

Jack and I share a number of things; names, high schools, and even neighborhoods. We also share the legal profession and a cherished friendship. Jack Grosse has given a lot to Chase Law School, a lot to hundreds of lawyers who are now practicing in our profession, and he certainly has given a lot to me. In the years to come I will continue to think often about Chase Law School and about Jack Grosse, my professor, my colleague, my friend.

1. Jack
2. Withrow High School
3. Madisonville, Cincinnati, Ohio. He grew up in Madisonville, a modest northeastern neighborhood in Cincinnati, as did his lovely wife, Norma, a commercial artist whom he married in 1947. I lived in Madisonville for a number of years with my family.
TRIBUTE TO W. JACK GROSSE

Edward P. Goggin*

W. Jack Grosse, then dean of the Salmon P. Chase College of Law, had just rescued the school from oblivion when I joined the faculty in 1972. Professor Grosse had arranged the merger of Chase with Northern Kentucky State College, which was later to become Northern Kentucky University. Due to the merger and expansion of Chase, Professor Grosse hired six new teachers which doubled the size of the full-time faculty. In the fall of 1972 Chase moved from the Cincinnati YMCA to the Covington Campus of Northern Kentucky State College.

During those years in the 1970s Professor Grosse worked closely with Dr. W. Frank Steely, then president of Northern Kentucky State College, and the legal communities of Northern Kentucky and Cincinnati to enhance the reputations of both schools. Nineteen years later, as Professor Grosse retires, it is clear that the merger of the two schools has been of great benefit to the University, to Chase, and to the people of Kentucky.

In those early days Professor Grosse, as dean, was in charge of student recruitment, faculty development, teaching assignments, student placement, and fund-raising. When I started teaching at Chase there was not a formal mentor system. Professor Grosse just handed me a class roster and told me to go teach, but he was always available to give advice and guidance. He also, due to his love of teaching, took time each semester to teach Contracts.

The name W. Jack Grosse became synonymous with Chase College of Law. Under his guidance, Chase expanded its student population and instituted its first full-time program in 1975. During the scholastic year 1975-76 there were over 200 students in the first-year day and evening classes. Professor Grosse also encouraged the expansion of the Alumni Association, worked with the Chase Foundation to develop new programs, including

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funds for faculty travel, and worked closely with University administrators to assure that the interests of the students at Chase were considered.

In the fall of 1978, Professor Grosse returned to the faculty and full-time teaching. In addition, from 1979 to 1981 he took on the duties of serving as part-time university counsel. Professor Grosse, who at one time was a minor league pitcher, also planned and co-taught a new course entitled Sports Law. The course was well received and provided an opportunity to bring well-known sports personalities to Chase. In addition to the Sports Law course, Professor Grosse has introduced several other courses into the curriculum. He developed courses in Jurisprudence, Economic Foundations, and Environmental, Habitat and Wildlife Law. For each of these, he prepared his own course materials.

Beginning in 1981, students could not graduate from Chase without taking a Breadth and Perspective Course and fulfilling an Upper Level Writing Requirement. Of the six courses in the curriculum which could be taken to satisfy the Breadth and Perspective requirement, three were taught by Professor Grosse. Many of the students used the research paper prepared for the Breath and Perspective Course to also satisfy the Upper Level Writing Requirement. Because of Professor Grosse's interest in the development of the students, he always accepted the additional academic burden of supervising and grading these research papers without complaint.

Over the years, Professor Grosse and I have cooperated as the Contracts teachers. At least once each semester we traded classes in order to give the students the experience of different teaching philosophies and techniques. We also gave the same final examination to our day and evening classes to demonstrate that the same high quality performance was expected of all students.

From 1980 to 1991 Professor Grosse offered interdisciplinary courses with members of the undergraduate faculty. He regularly taught a course in Anglo-American Legal History with Dr. W. Frank Steely and, on several occasions, taught a course on Education Law with Dr. Nick Melnick.

Professor Grosse is also a prolific writer and has published many articles and books. Although he has officially retired after almost four decades, he is still writing and teaching. His most recent publication, a casebook entitled Environmental Law: The Protection and Management of Our Natural Resources, Wildlife
and Habitat, was written at the request of Oceana Publications. Oceana published the book in the summer of 1991, in time for Professor Grosse’s fall course in Environmental Law. A textbook on the same subject has also been accepted for publication by Oceana Publications and will be available later this year.


Professor Grosse has always been willing to help his colleagues. I have had the sense that everything he did was to enhance the academic program and the reputation of Chase. For nineteen years I have watched Chase grow and have always felt that it would not have been so successful if Professor Grosse had not been here as a leader and guide. It has truly been one of the great pleasures of my life to work closely with him during these years. W. Jack Grosse clearly has had a most distinguished career as a lawyer, administrator, scholar, friend, and, most of all, teacher. He has been an outstanding example of what Salmon P. Chase College of Law gives to the community.
THE HAROLD J. SIEBENTHALER LECTURE SERIES

The annual Harold J. Siebenthaler Lecture Series was established by the Chase College Foundation in 1978. The purpose of the Lecture Series is to enrich the curriculum of the College of Law by affording it the benefit of the wisdom, scholarship, and learning of eminent persons in various fields of law.

The Lecture Series was named in honor of Harold J. Siebenthaler, a 1914 graduate of the McDonald Institute (the predecessor institution to Salmon P. Chase College of Law). Mr. Siebenthaler was a native Cincinnatian who both garnered and provided support and leadership for the College of Law. Mr. Siebenthaler was a founding partner in the Cincinnati law firm of Frost and Jacobs with whom he was associated throughout his professional career. His leadership of the College of Law included many years of service on the College’s Board of Trustees and, until his death in 1988, Mr. Siebenthaler held the position of president emeritus of the Chase College Foundation.

This year’s lecture was delivered on February 22, 1991, by Professor Charles Donahue, Jr., Harvard University School of Law. Professor Donahue earned his artium baccalaureus degree with honors from Harvard College in 1962 and his legum baccalaureus degree with honors from Yale Law School in 1965. After graduation he was employed in private practice. He also served as attorney-advisor to the Office of the General Counsel, Office of the Secretary of the Air Force, Washington, D.C. and as assistant general counsel for The President’s Commission on Postal Organization. Professor Donahue has been Professor of Law at Harvard University School of Law since 1980, teaching many courses and seminars, including Property, Advanced Property, Introduction to Roman Law, English Legal History, and Continental Legal History.

Professor Donahue has authored numerous articles as well as either authored or contributed to several books. He is versed in many languages. He is a former Articles and Book Review Editor of the *Yale Law Journal*. He has served on the law faculty of the University of Michigan School of Law and has been visiting professor at Vrije Universiteit Brussel, Columbia University School of Law, University of California School of Law at Berkeley, and Boston College School of Law.
My title may be a bit misleading. It could mean that I am going to talk about the history of the case method as a technique of instruction in law schools. That would be an interesting exercise. One might even learn something about why the case method today is somewhat in disarray. That is not, however, my purpose this afternoon. My purpose this afternoon is at once more immediate to the case method itself and more remote from the writing of the history of the method.

I begin not as an historian looking at the case method from the outside but rather as a law teacher who employs the method. But I am also a legal historian. The question, then, is how does the fact that I am a legal historian affect the way that I use the case method when I am teaching courses in contemporary law? To put the question another way, how do I put the two halves of my life together?

People frequently ask me this question, and they are usually surprised at the answer. Since I teach first-year property, the answer that my inquisitors expect is that I spend a lot of time teaching the history of estates and future interests. In fact, I spend relatively little time in first-year property on estates and

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* This is the text, largely unrevised, of the Siebenthaler Lecture given at the Chase Law School on February 22, 1991. The author would like to thank the dean, the faculty, and the student body of the Chase Law School for a delightful weekend and a reception far more generous than the lecture deserved.

1. One might start with Christopher Columbus Langdell, the dean of the Harvard Law School in the late nineteenth century, who is said to have invented what we now know as the case method, or one could go back to the remoter origins of the method, in the *casus, quaeationes* and *disputationes* in the medieval law schools. See generally, Coing, *Die juristische Fakultät und ihr Lehrprogramm*, in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*. I: Mittelalter (1100-1500) 69-80 (H. Coing ed., München 1973).
future interests, and practically no time on the history of the system.  

"No," I say, "I think the principal effect of the fact that I am a legal historian on the way that I teach modern courses is in the use I make of the case method." That answer frequently puzzles my inquirers, and if I do not go on quickly I sometimes leave them with the impression that I teach a lot of old cases. I do teach a number of old cases, though currently I teach none older than the nineteenth century. I think that it sometimes helps students' understanding of a topic to get back to see how it all began. For this reason, for example, I still teach Village of Euclid v. Ambler Realty Co. I do it because I think the students need to know more than the fact that in 1926 the Supreme Court declared zoning constitutional. They need to know how zoning got past the constitutional objections that were raised to it, because the institution of zoning today bears, it seems to me, the unmistakable traces of what it had to do in order to pass constitutional muster in the 1920s.

I also make more use of cases in teaching legal history than would a teacher who did not regularly teach contemporary American law school courses. My European colleagues, for example, find it odd that I teach the basics about the medieval law of marriage by having the students read decisions about marriage that were rendered by the popes in the late twelfth and early thirteenth centuries. I think it works as a teaching method, at least with American law students, and I have been able to make some contributions to the literature on the topic because of the insights that my classes have developed as we pored over the material.

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2. I tell my students that when we speak of the common-law system of estates and future interests we are not speaking of an historical reality but of an intellectual construct that was put together in the nineteenth century in order to reform the system. I suggest that they ought to learn the construct because the system was never fully reformed; reform was made piecemeal, and so the only structure that the modern system has is the presumed historical structure with odds and ends of changes.


But the principal point of intersection between my interests as an historian and my interests as a law teacher is not in the fact that I use cases in both endeavors or in the fact that I sometimes use older cases in teaching modern courses, but in what I do with the cases. I pay more attention to the facts of cases than do many of my colleagues and all of my students, at least when they start.

That is going to be my principal point this afternoon. My work as an historian has led me to look at the facts of contemporary cases more carefully and also to use them somewhat differently from the way in which many other practitioners of the case method use them. I would like to illustrate this point first by looking at a fifteenth-century marriage case that is part of my current history project, and then by showing how the same methods that I used to analyze this historical case can be used with a contemporary, or near contemporary case, one that I use in my first-year property course. I would like to close by suggesting that one does not have to be trained as an historian in order to use this method and to urge both teachers and students of contemporary cases to apply the method to other cases and in other areas.

In order to understand my historical example, we need to know just a bit about the medieval canon law of marriage. In the Middle Ages cases about marriage were under the jurisdiction of the church courts. There were three basic rules that the church courts used in deciding marriage cases:

First, present consent ("I take thee as wife [or] husband"), freely given between parties capable of marriage, made a valid marriage, and that marriage was indissoluble so long as the parties lived, except in the most unusual of circumstances.

Second, future consent ("I promise to take thee as wife [or] husband"), freely given between parties capable of marriage, made an indissoluble marriage, if that consent was followed by sexual intercourse between the parties.

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6. See Select Cases from the Ecclesiastical Courts of the Province of Canterbury, c. 1200-1301 81 (N. Adams & C. Donahue, eds., Selden Soc'y Publications No. 95, 1981). (I hope I may be excused for referring to my own work for the basic propositions about the medieval canon law of marriage. The works cited in this and the following notes contain further bibliographical references.)

7. See Donahue, The Canon Law on the Formation of Marriage and Social Practice in the Later Middle Ages, J. FAMILY HIST. 144 (Summer, 1983).

8. Id.
Third, with minor exceptions, any Christian man was capable of marrying any Christian woman provided that both were over the age of puberty, that they were not too closely related to each other, that neither had taken a solemn vow of chastity and that the man was not a priest or deacon. The rules about relationship were complicated, extending as they did to blood relatives, affines and spiritual relatives, but recent research, as we shall see shortly, would suggest that they were not so important socially as had once been thought.\(^9\)

The striking thing about these rules is how little they require. Despite extensive legislative effort encouraging couples to have their marriages solemnized, no solemnity or ceremony was necessary for the validity of marriage at any time between the late twelfth and the mid-sixteenth centuries.\(^10\)

Finally, a procedural rule of some relevance: In a contested case, with some exceptions not relevant here, two unimpeachable eyewitnesses were required to prove each element essential to making out the case.\(^11\)

Currently I am looking at as many examples of actual medieval marriage cases as I can find in order to find out how this law was applied. Is it true, for example, as F. W. Maitland thought, that the rules about consanguinity and affinity were so complicated and so extensive that all medieval marriages were, as a practical matter, dissoluble?\(^12\) That does not seem to have been the case. Although the documentation, particularly for England, is quite extensive, relatively few cases raise issues of consanguinity or affinity. The largest group of cases involves a factual dispute over whether Robert and Joan actually exchanged words of present consent. The next most common type of case involves a dispute over whether Robert and Joan exchanged words of

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9. Id. at 144-45.
10. In an age characterized by arranged marriages and by requirements in the secular law that lords consent to the marriages of their vassals and serfs, canon law required the consent of no one other than the parties themselves for the validity of a marriage. Finally, in an age of class-consciousness, canon law imposed no barrier of status of any sort to marriages across classes.
present consent before Robert exchanged words of present consent with Ellen. This issue can arise either in the situation in which both Joan and Ellen sue Robert, what the records call "competitor" cases, or in the situation in which Joan sues Robert and Ellen seeking that their marriage be dissolved and that Joan be declared Robert's wife. The case I am about to describe is of this last type, what the records call a "marriage-and-divorce" case, with, as we shall see, some interesting variations.

The case, Joan Ingoly c. John Middleton and c. Robert Easingwold and his wife Ellen Wright, was decided in the Consistory Court of the Archbishop of York in 1430. The surviving documentation is quite simple. In March of 1430, Joan Ingoly of Bishopthorpe, wife of John Middleton, sued three people—her husband John, Robert Easingwold of Poppleton, and Robert's wife Ellen Wright—alleging that neither her marriage to John nor Robert's to Ellen could stand because she and Robert had exchanged words of present consent before either her marriage to John or Robert's to Ellen. Witnesses for Joan's articles were heard in April of 1430. At the beginning of July, the presiding judge, the commissary general, rendered sentence declaring both de facto marriages null and that Robert and Joan were husband and wife. The case then disappears from view.

The depositions in the case have survived, and they are of some interest. Two witnesses testify solely to the marriage of John and Joan, which took place in the presence of a priest in the parish of St. Margaret, Walmgate, York, on 25 November 1414, sixteen years previously. Three witnesses testify to the

13. On all of this with numbers to support it see Donahue, Women Plaintiffs in Marriage Cases in the Court of York in the Later Middle Ages, in WIFE AND WIDOW: THE EXPERIENCES OF WOMEN IN MEDIEVAL ENGLAND (forthcoming).

14. York, England, Borthwick Institute of Historical Research, CP.F. 201. I have arbitrarily assigned numbers to the five documents in this file for ease of reference: 201/4 (Joan's libel (complaint) dated 20 Mar. 1430); 201/3 (Joan's positions and articles (basically, questions to be put to the witnesses) dated 5 Apr. 1430); 201/5 (depositions of seven witnesses; date of examination of first five seems to be missing, final two examined 7 Apr. 1430); 201/1 (definitive sentence (judgment) dated 4 July 1430); 201/2 (refutatory apostoli (see infra note 30) dated 11 July 1430).

15. CP.F. 201/4.
16. CP.F. 201/5.
17. CP.F. 201/1.
18. See infra note 30.
19. CP.F. 201/5.
marriage of Robert and Ellen, which took place in the presence of a priest in Poppleton chapel, on 25 May 1410, twenty years previously. The two witnesses to Robert and Joan's informal marriage, Robert and Alice Dalton, were husband and wife; Alice was Joan's sister. They testify that on 22 July 1408, twenty-two years previously, Robert and Joan had contracted marriage in the high street of Upper Poppleton, at the end of the garden of one Thomas del Leys. Robert testifies that they both used the same form of words: "I will have you as wife [or] husband and to this I give you my troth." Alice has a slightly different version of Robert's words, "I will have thee and take (conducere) thee as wife and to this I pledge thee my troth." Both agree that Robert held Joan by the right hand while the words were being spoken and that after the words were exchanged the couple joined hands and kissed. Both Robert Dalton and Alice Dalton deny that they knew anything about the marriage of Robert Easingwold and Ellen Wright until after it happened. Although Alice was present at Joan and John Middleton's wedding in St. Margaret's Walmgate, she says that she said nothing against the marriage because she believed that Robert's earlier marriage to Ellen had been authorized by letters from the archbishop. Robert Dalton alleges the same belief.

Unlike many of the marriage cases that survive from the Middle Ages, there is no necessary reason why any of the witnesses in this case needs be lying. The two solemnized marriages almost certainly happened much as described, and the informal marriage could have happened as well. Certainly there is no reason to doubt the main outlines of the witnesses' stories of their lives. Both say that they were working as servants in York when the key events took place, and their employers are identifiable people. 21 The story of their lives, and of that of Joan and Robert, is typical of the middle class in this period and well beyond. Young people in service, required by the custom of their society to postpone marriage, frequently slept together, and

20. Or perhaps it was 1409; the unclarity is in the clerk's dating system and not in the witnesses' testimony.

21. Robert Ketill of York, tailor, with whom Robert Dalton was serving at the time of the informal marriage, was recorded as having been admitted to the freedom of city in 1402-1403. REGISTER OF THE FREEMEN OF THE CITY OF YORK, 1, 1272-1558 107 (Francis Collins ed., Surtees Society No. 96, Durham 1897) [hereinafter YORK FREEMEN]. The John Lymyng with whom Alice served may be the mariner recorded in 1391. Id. at 89.
sometimes — often enough to produce a number of surviving cases — exchanged words importing some form of marital consent.\textsuperscript{22} It is even possible that Robert and Joan had some sort of relationship during their period of service, a relationship that led them to exchange words that might be regarded as words of marital consent.

What I find hard to believe, however, is that this story was anything like as straightforward as the record makes it out to be. In the first place, Robert and Alice Daltons' alibis for failing to come forward when Robert Easingwold and Ellen Wright were married look highly suspicious.\textsuperscript{23} Robert Dalton says that he spent the six or seven weeks preceding and following the marriage on his master's service in Lincoln diocese.\textsuperscript{24} Alice simply alleges that she was in service in York and so knew nothing about a marriage in Poppleton. Poppleton is only three miles northwest of York, and Alice came from there. It is hard to believe that she did not hear of the impending marriage, and if she really thought that Robert Easingwold had married her sister, one wonders why she did not do anything about it when he married someone else. One possible explanation is that Joan Ingoly may have decided that she was well enough rid of Robert Easingwold, but then one wonders why she changed her mind twenty-two years later. It seems more likely that nothing had occurred between Robert and Joan, or that what had occurred was not nearly so clear as the witnesses make it out to be. The story of the rumors about letters from the archbishop is also hard to believe. Not that rumors like this could not have circulated, but once it was clear that the letters did not exist, the failure of Robert and Alice to take any action calls for more of an explanation than the examiner demanded of them.

Indeed, the examiner's questioning is remarkably lax.\textsuperscript{25} Other than asking why Robert and Alice had allowed the other two marriages to go ahead, he does little cross-examining. He does not inquire into the circumstances of the events in Upper Pop-

\addcontentsline{toc}{section}{Notes}
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\item[22.] See Goldberg, \textit{Marriage, Migration, Servanthood and Life-cycle in Yorkshire Towns of the Later Middle Ages}, 1 \textit{Continuity and Change} 141-69 (1986).
\item[23.] Both depositions are in CP.F. 201/5.
\item[24.] What makes this suspicious is that it corresponds exactly to what the decretal on the topic (X 4.18.6) says will constitute a good excuse for failure to object to banns.
\item[25.] CP.F. 201/5.
\end{itemize}
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pleton, the clothes the parties wore, the weather, why the witnesses are sure about the dates — all standard questions that examiners ask. Nor does he ask what the two witnesses did when they finally did find out about the conflicting marriages. He fails to ask the most obvious question: Granted that you did not know about Robert and Ellen's marriage at the time it took place, why have you remained silent for twenty years?

But if this case raises so many doubts, why does it leave such a simple record? Even taking the record on its face, there are difficulties. As Professor Richard Helmholz has pointed out, Alice's version of the words that Robert spoke goes right to the edge of what the canonists and the courts would take as words of the present tense, and no one testifies to sexual intercourse. Yet the judge does not interrogate the parties; no exceptions are filed to the witnesses; the case goes forward without a hitch.

Perhaps a different explanation fits the evidence better: If we assume that this was not a contested case, much of what seems to be incomprehensible becomes comprehensible. Three defendants, represented by the best proctors of the day in the York court, present no defense to a weak case. Could it be that they presented no defense because this was the result that all of them wanted? This is certainly the case with Robert Easingwold, because the docket book in the case indicates that he admitted the facts in Joan's libel from the very beginning.

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26. See Donahue, Proof By Witnesses, supra note 11, at 127-58.
27. R. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 36-40 (Cambridge, Eng. 1974) (our case is cited at 38 n.48) [hereinafter MARRIAGE LITIGATION]. The case is also discussed with some interpretations that do not seem to me to be fully supported in the record in id. at 64-65.
28. It is so straightforward that the routine stay pending appeal is denied. See infra note 30.
29. A type of lawyer roughly equivalent to a modern English solicitor.
30. York, England, Borthwick Institute of Historical Research, Cons.AB 3, fol. 60v. Only one item in the record requires explanation if we are to view this case as an uncontested. After the commissary general rendered sentence for Joan, John Middleton's proctor appealed to the pope, but a week later the chief judge of the court, the official, refused to issue apostoli, the medieval canonic equivalent of a stay pending appeal, and the case disappears from view. CP.F. 201/2. If John consented to the judgment, why does his proctor appeal to the Holy See? The probable explanation lies deep in the practice of the York court in the late middle ages. Appeals to the Holy See were common, not only in contested cases but in ones that were hardly contested. Denials of apostoli were also common. In the contested cases, we may suspect that in many cases the appeal was intended to produce a delay, for rarely do we find evidence that the appeal was ever
But what of the personnel of the court? If the parties to the case were in some sense abusing the process of the court in order to obtain a consent judgment, why did the proctors and the judge allow this to happen, particularly when it involved dissolving two marriages of long-standing? Surely the personnel of the court knew, or suspected, that the defendants were not pursuing the case very vigorously. Even if all the parties to the case had consented to the judgment, the court personnel should have been concerned about the bond of the sacrament of marriage and about the potential scandal that the case might cause. My explanation for why the court allowed this to happen so easily is simple, if somewhat shocking: One of the defendants in the case, you will recall, was named Robert Easingwold; his proctor was also named Robert Easingwold, and the judge in the case was named Roger Easingwold. My suggestion, then, is that the court personnel were in on the deal.

The name Easingwold derives from the small town of the same name twelve miles northwest of York. At least thirteen men named Easingwold appear in the court and city records of York in the first decades of the fifteenth century. The cluster of men

pursued. In the uncontested cases, particularly marriage cases, the purpose of the appeal was somewhat different. As is well known, a truly final judgment in a marriage case is difficult, perhaps impossible, to achieve in canon law. See Donahue, Roman Canon Law in the Medieval English Church: Stubbs v. Maitland Re-Examined after Seventy-Five Years in the Light of Some Records from the Church Courts, 72 MICH. L. REV. 647, 657 n.207 (1974). But one could come close to a final judgment; one could appeal and have the apostoli denied. This would make the judgment as final as it could be. If this is right, then John's purpose in taking the appeal was not that he wanted another hearing (which he could have gotten much more easily by appealing from the commissary general to the official), nor even because he wanted delay, but rather in order to make the consent judgment as final as it possibly could be, granted the state of the law.

31. In 1401, four men of that name were enrolled as freemen of the city. YORK FREEMEN, supra note 21, at 104. There were two mercers, John and William. (John is perhaps to be identified with the chamberlain of the city of the same name in 1423. Id. at 131. He was sheriff of York in 1432, and his will was proven in 1459. TESTAMENTA EBORACENSIA: PART II 90n (James Raine, Jr. ed., Surtees Soc'y No. 30, Durham 1855) [hereinafter TESTAMENTA EBORACENSIA]: FRANCIS COLLINS, INDEX OF WILLS IN THE YORK REGISTRY, 1389 to 1514 59 (Yorkshire Archeological Soc'y Record Series No. 6, York 1889) [hereinafter REGISTRY WILLS]; R. B. Cook, Some Early Civic Wills of York, 33 ASSOCIATED ARCHITECTURAL SOCIETIES REPORTS AND PAPERS 164 (1915) [hereinafter York Civic Wills]. The John, styled "gentleman," who was enrolled in the right of his father in 1461 may be this John's son. YORK FREEMEN, supra note 21, at 182.) There was a moneymaker also named John (whose will was probated in 1431, TESTAMENTA EBORACENSIA, supra, at 16), and a sherman, also named William. In 1402, a William de Easingwold, butcher, was
with this name in the York records in this period, coupled with their relative absence from earlier and later periods, suggests that many or most of our Easingwolds were connected. Blood relationship is demonstrable or probable in a number of cases. In other cases the connection is more likely to be geographical. Not that all of them came directly from Easingwold (Robert, the defendant in our case, may well have been born in Poppleton), but the fact that they bore the same toponym suggests relatively recent origins in Easingwold.

The records show that older and more established men named Easingwold patronized younger and less established men that shared their origin. It is not by chance that the commissary general and one of the proctors in our case both bore the same name. Nicholas Easingwold, proctor in the late fourteenth cen-
turly, almost certainly passed on his practice to Robert Easingwold, although he does not seem to have been his father, and he may have been the father of Roger Easingwold, the commissary general. 32 John Easingwold, a moneymaker at the archbishop's mint, benefited from the patronage of Roger Easingwold, the commissary general. 33 Similarly, it is probably not by chance that Robert Easingwold the tailor, and perhaps the defendant in our case, was enrolled as a freeman of the city of York in the same year that Thomas Easingwold was the mayor. Granted the way that patronage worked, it is also probably not pure chance that Robert Easingwold, the putative tailor, was able to discard his wife of twenty years and marry a woman who had been another man's wife for sixteen years in a case in which another Robert Easingwold served as his proctor and a Roger Easingwold was the judge. That something like this could have happened is made more plausible when we learn that the archbishop (John Kempe, who had been in office for only four years) was the lord chancellor of England and was probably not paying much attention to what was going on in his court at York. We might even speculate that there is a connection between this case, and the scandal that it may have caused, and the fact that shortly after this time Easingwolds disappear not only from positions of prominence in the court of York but also from positions of prominence in the city.

One swallow does not a summer make, nor does one case, even a dramatic one, make a good historical argument. What this one case suggests, however, is that Maitland was looking in the wrong place. Medieval marriages were more dissoluble than the rules would suggest, but not because everyone could dream up a violation of the rules of consanguinity or affinity but because everyone, or at least many people, could come up with a pre-contract.

It is well to sound a note of caution here. The *Ingoly* case is extreme. I have been over the 213 marriage cases that survive in the York records quite carefully, and this is the only one in which two solemnized marriages were dissolved on the basis of a single informal pre-contract. There are, however, enough cases

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32. See *supra* note 31.
in which one solemnized marriage was so dissolved, cases in which the testimony about the pre-contract looks suspicious, that we may suggest that Ingoly was not an isolated instance.

My concern this afternoon, however, is not with the medieval law of marriage nor with the practice of the medieval ecclesiastical courts; my concern is with method. There is something about the way in which I analyzed the Ingoly case that is different from the way in which law teachers normally analyze the appellate cases that appear in our casebooks. I would like to focus on those differences, on how it was that I did what I did, and then suggest that the same methods may be applied to modern appellate cases.

If one were doing a typical law school analysis of the Ingoly case one would have to note in the first place that the nature of the record in the case is different from that in a modern appellate case. Medieval judges were not required to, and normally did not, render reasoned opinions. We have the judgment in the case, but it is simply a formal declaration that Joan has proven her case, that she is Robert Easingwold's wife, and that the other two marriages are dissolved.34 In order to find out what the legal issues were in the case we have to look at the pleadings and the depositions. In this case the basic issue is relatively clear: Will a prior informal exchange of present consent suffice to upset two subsequent solemnized marriages of long-standing? Here the absence of a reasoned opinion does not do us much harm. It was well established in medieval canon law that such a marriage could upset one or even two subsequent solemnized marriages, so long as the prior marriage was proven by two unimpeachable witnesses.35

These propositions lead to a second cluster of issues: First, was the exchange that took place between Joan and Robert an exchange of present consent sufficient to count as a marriage? Second, was that exchange proven by two unimpeachable witnesses? In the case of both these issues, the absence of a reasoned opinion is unfortunate. We would certainly like to know what the judge made of the conflicting authorities on the topic of whether an exchange as ambiguous as the one that the witnesses

34. CP.F. 201/1.
35. See supra notes 7, 11 and accompanying text.
reported was sufficient to make a present consent marriage. As it is, all that we can say is that an argument in favor of it can be constructed from the authorities, and we will give the judge the benefit of the doubt that he did so.  

We would also like to know more about what the judge made of the witnesses to the informal present consent marriage. We know that the medieval handbooks of procedure authorized, perhaps even required, a judge to ignore the testimony of relatives of one of the parties. (The Daltons were, after all, Joan's sister and her brother-in-law.) We also know that witnesses who did not object when banns were promulgated were, at the very least, to be questioned as to why they did not object, and some authorities suggested that if they could not produce a good excuse for not having objected, their testimony should be discarded entirely.  

The case, then, stands for the following propositions:

1. A prior informal exchange of present consent suffices to upset two subsequent solemnized marriages of long-standing.
2. An exchange of consent in the form "I will have thee" as wife or husband or "I will have thee and take thee" as wife is present consent not future consent.
3. Witnesses will not be automatically excluded from testifying, even if they are the sister and brother-in-law of the party who produced them.
4. Witnesses who did not object when the banns were promulgated at a solemnized marriage will nonetheless be allowed to testify against that marriage if they come up with some sort of excuse for not having objected when the banns were promulgated.

Now that is the kind of thing that my students' class notes are full of. Probably the first proposition would be in yellow highlight. The good students will puzzle over and argue about the distinction between present and future consent, may hint at

36. See authorities cited in Marriage Litigation, supra note 27, at 34-40. That "I will have thee" constitutes words of present consent is supported by the weight of the authorities. "I will take thee" was usually considered words of the future tense. But the authorities did allow for varying interpretations on the basis of the common understanding of the area. See id. at 38.

37. See Donahue, Proof by Witnesses, supra note 11.

38. See X 4.18.6; Marriage Litigation, supra note 27, at 108 (citing our case in n.123). The legal problem is more complicated than the text suggests because the decretal refers to the "accuser" of the marriage (the person in Joan's position) and not, expressly, to the witnesses.
the distinction between a legal act and a contract, and may ask whether anything so important as an indissoluble marriage should be made to depend on whether witnesses to an oral transaction remember whether someone said “I will have” as opposed to “I shall have” or “I will take.” The very best students will realize that the procedural propositions, what witnesses are acceptable and how they must excuse their failure to object to the banns, are at least as important, perhaps more important, than the propositions of substantive law. The not-so-good students will not get much beyond the list of propositions, will try to memorize them for the exam, and will probably get one or more of them mixed up.

Now I hope you will agree with me that if what I have suggested about the context of this case is even half right, all of the students from the very best to the very worst will have missed the point of the case if they stop with a group of propositions about the substantive or adjective law. The point of this case is that the result was a foregone conclusion, granted that the case was uncontested and that the judge was in on the deal. The interesting thing about the case is that the court and the parties did not put together a record that concealed more artfully than this one does the fundamentally fraudulent nature of what was going on. That to me suggests that medieval people testifying on oath were willing to shade the truth to get the result that they wanted but that their consciences frequently would not allow them to tell outright lies. Another possibility, not inconsistent with the preceding one, is that John Middleton, Joan Ingoly’s husband, was wavering. Ultimately, I think, he consented to the judgment, but I am not sure that he was in on the deal from the beginning. The same may be true of Ellen Wright, Robert Easingwold’s wife, but the record tells us less about her.

But how do we know what was going on? I suppose one has to start off with a strain of cynicism, a notion that particularly with legal records things are not always what they seem to be. I cannot remember what first provoked my suspicion that there was more to this case than meets the eye. I knew that the judge’s name was Easingwold and that one of the parties’ names was Easingwold, but I’m not sure that that would have been enough to trigger suspicion. Maybe it was the fact that most contested marriage cases have some sort of defense, and this one did not.
All I know is that when I wrote up my notes after I returned from the archive I added the comment: "This is the most corrupt case that I have seen in this material."

Having decided that there might be something more to the case than just a straightforward application of the law, the rest was relatively easy. A search through the docket book produced the information that Robert Easingwold had not contested the case. The names of the lawyers on both sides, including Easingwold for Easingwold, are contained in the sentence. Identifying the Easingwolds in early fifteen-century York proved relatively easy, because the surviving wills from the period can be looked up in a printed calendar and there is a surviving register, also in print, of the freemen of the city of York in this period. The place names can all be found on a modern map of Yorkshire.

Of course, we do not know what drove these seemingly respectable people to engage in this piece of chicanery. Had both formal marriages broken down, or were the parties engaged in a shameless piece of spouse-swapping? We do not know whether any children were involved or what happened to them if there were. We do not know what happened to the marital property. We are not even sure whether Robert Easingwold married Joan Ingoly after it was all over, much less whether John Middleton married Ellen Wright. Finally, our speculations that the community found the whole affair to be scandalous must remain just that, speculations.

Despite the considerable gaps in our knowledge, we have been able to tell a story. The story at least suggests a social context within which a piece of medieval marriage litigation took place. The story also suggests that some people were able to use the rules of medieval canon law to achieve results that were quite different from what those who promulgated the rules had in mind, and that, at least in this instance, the court and a group of respectable lawyers were willing to go along with it.

Not every case presents a situation in which the context fits with the law as badly as does this one, but cases like this remind us that the fit between what we call the facts and the social situation is never perfect. Jerome Frank, after a lifetime of work as an appellate judge, came to the conclusion that in most cases that he decided the facts as they appeared on the record were so far from the real situation of the parties to the case as to
render most, if not all, of his decisions irrelevant to the parties. That may be a little too pessimistic. We might suggest that in the *Ingoly* case the decision was quite relevant to the parties; it was just that the facts as presented to the court were probably quite far from what actually happened, and so a law designed for one set of facts came to be applied to another set, quite different from the set that the promulgators of the law had in mind.

How the law, the legal facts and the real facts are fitted together is a fundamental problem in any legal system. Most lawyers manage to learn about this problem fairly early in their careers. I think all good lawyers know how to deal with it, though they frequently do it instinctively. I would suggest, however, that very few lawyers learn about this problem, or how to deal with it, in law school. As law teachers we tell ourselves that outside of a clinical setting we cannot teach much about facts—how to find them, how to deal with them once they are found, how they affect judges. I do not think that that is right. I think that we can begin by using the materials that are in our case-books. All it takes is some simple techniques known to every historian and which anyone can master. The results, I might add, are explosive and in many ways profoundly disturbing to the students. I would suggest that the disturbance is healthy and that they will be better lawyers because of it.

Let me illustrate these points with an appellate decision that appears in a number of first-year property books: *Geragosian v. Union Realty Co.* The case was decided by the Supreme Judicial Court of Massachusetts in 1935 and is normally taught to illustrate the proposition that an injunction will lie to remove an encroaching structure, even if the encroachment does the plaintiff no harm and even if the encroachment was unintentional.


40. 289 Mass. 104, 193 N.E. 726 (1935). Since I delivered the lecture, I have examined the record and briefs in the case, which are available in a microfiche publication of the Social Law Library in Boston: *Massachusetts Records and Briefs of the Supreme Judicial Court* (microfiche, 1977). The briefs are not of great interest, but the record contains the master's report (at 8-24) and two diagrams of the location (un paginated) that confirm in many ways our suspicions as to what was going on in the case. References will be given in the notes to allow the reader to see both how close one can get by guessing and also why it helps to look at all the available evidence.
The facts of the case as reported by the court were these: In 1927, one Vartigian built a theater in Somerville, Massachusetts. Although he was not aware of it at the time, the fire escape in the rear of the theater overhung, to a slight extent and at the third level, the land of one Aaronian who owned a small parcel next door where Aaronian maintained thirteen one-story garages for hire. Perhaps more serious, but also unbeknownst to Vartigian at the time, a drain pipe from the theater ran underground at some eight or nine feet in depth and a couple of feet over Aaronian's property line for fifty-three feet until it joined a common sewer in the back of both their properties.

Nineteen twenty-seven was not a good year to be building a theater. The property was heavily mortgaged, the first mortgage being held by the Charlestown Five Cent Savings Bank, the second by the Union Realty Company, both of which were named defendants in the case. In 1928, Union acquired three-fourths of Vartigian's equity of redemption. In 1930, Union prevented Vartigian and his wife from continuing to maintain a candy stand in the theater. In 1931, Union foreclosed on the second mortgage and bought in at the foreclosure sale.
Sometime during this period, Vartigian found out about the encroachments. In January of 1930, two days after Union had forced him to abandon the candy stand in the theater, Vartigian persuaded his brother-in-law Geragosian to buy the Aaronian land for $6,500. Vartigian did this, the trial court found, in order to make trouble for Union Realty Company. In 1932, Geragosian sued for an injunction. The trial court found that Geragosian had not shared Vartigian's purpose and that he was not under Vartigian's control. The trial court also found that the Aaronian-Geragosian land was worth $2,800, that the theater was worth $250,000, and that the cost of removing the encroachments was $4,300. The trial court then entered an injunction, and, with modifications not relevant here, the appellate court upheld the injunction.

The appellate court's opinion is quite short and is designed to give one the impression that the case was open-and-shut. It was

relations between Vartigian and Stoneman and Rosenberg, the principals of the Union Realty Co. Id. at 16-18. In light of the ethnic speculations in which we indulge, infra text accompanying notes 59-67, we must add another: anti-Semitism.


47. Id. "Stoneman and Rosenberg testified in substance that they refused to allow Vartigian to continue to occupy the candy stand, and Stoneman further said that a conversation about restoring the candy stand took place in 1930 or 1931 at his office, and that Rosenberg was present; that there was then a general conference about the passageway, Sewell Court, and the substance was that Vartigian said if Union Realty Company would restore him to possession of the candy stand, Vartigian would arrange that Union Realty Company would not be harassed on account of the fire escapes and a certain sewer or drain; that Stoneman asked him how he could guarantee that Union Realty company would have no trouble, and testified that Vartigian said that he controlled the situation, that he arranged for the purchase of this piece of property and the piece in the rear of the theater with the garages, immediately adjoining defendant's land; that Vartigian said he either took title in the name of Geragosian or that he got Geragosian to buy it; that Vartigian had known all along that there was a slight encroachment; that neither Rosenberg nor Stoneman ever saw or spoke with Geragosian." Record at 17.

48. Geragosian, 289 Mass. at 107, 193 N.E. at 727. "Vartigian denies the substance of the above conversations, as testified to by Stoneman and Rosenberg, but I find that they took place about as outlined, but I am not able to infer that Vartigian was authorized by Geragosian to enter into these conversations concerning the candy stand, in which there was no evidence that Geragosian was interested, nor do I find that the claims therein made by Vartigian as to his control of the plaintiff's premises are true or made with the plaintiff's knowledge." Record at 18. "I do not feel justified in finding that the plaintiff purchased his land with the purpose in mind of making trouble for the defendant because of the encroachments. I do find that the plaintiff has been aided in the prosecution of this suit by Vartigian." Id. at 21.


50. Id. at 110, 193 N.E. at 728.
not, and I start by trying to get my students to see that. In the first place, the court's argument that fee ownership in land cannot be compensated for by money is by no means self-evident. If this is not to be taken as a postulate or as an axiom of the legal system, we must ask how compensation might be calculated. The actual financial loss to Geragosian is minimal. His non-financial loss is hard to calculate. Its extent depends on the strength of his feelings, but we can get some kind of feel for what is involved if we remember that he paid $6,500 for a piece of land that is now worth $2,800. If we look at possible compensation on the basis of what the theater gained by its wrong, we note that at the time the encroachments were built, the theater probably gained nothing from the wrong. It was a mistake. If the theater has to remove the encroachments now, it will cost $4,300. The effect of granting the injunction, then, is to allow Geragosian (with Vartigian behind him) to make the theater pay him up to $4,300 from its profits in order to satisfy Geragosian's non-monetary interest in having the land not encroached upon. The end result will be that Geragosian will be able to get from the theater more than his land is worth to compensate for a loss that cannot be measured, or to put it another way, to get $4,300 from the theater to compensate him for the fact that he paid $3,700 more for this piece of land than it was worth to anyone else.

While the extreme potential of an injunction has been forcibly brought home to us by the practitioners of the school of law and economics, the courts have always been cautious about granting injunctions. Courts have traditionally hedged the granting of the injunction with doctrines that give them the opportunity to back out. The appellate court in our case mentions three such doctrines: laches, estoppel, and relative hardship. Application of

51. Id. at 108, 193 N.E. at 727.
52. This, of course, assumes that the land was worth the same when Geragosian bought it as it was when the master evaluated it. This is unlikely considering what was happening to land values in this period, but it seems likely that Geragosian paid more for the land than its market price even when he bought it. This last speculation is confirmed by the record. There was uncontradicted expert testimony that land values in Somerville had declined only 20 to 30% from 1930, when Geragosian bought the land, to early 1934, when the master made his report. Record at 23-24.
53. Geragosian, 289 Mass. at 109-10, 193 N.E. at 728. Not specifically mentioned but lurking in the background are two more possibilities that the plaintiff had "unclean
the doctrines of laches or estoppel, though not foreclosed, was made difficult by the finding below that Geragosian did not "share in the purpose" of Vartigian. The court nowhere says what the grounds for this finding were and in the light of the dates, the relationship between the two, and the price that Geragosian paid for the land, it strikes me as inherently implausible. Be that as it may be, application of either doctrine or of the broader doctrine of "unclean hands" would probably have involved upsetting the trial court's findings of fact.

Application of the doctrine of relative hardship, on the other hand, would not have required upsetting any of the findings of fact. The court could simply have said that where the encroachments are unintentional, where they do not interfere with any present or contemplated use of the land, where they are, for all practical purposes, invisible, and where their removal would cost substantially more than the entire value of the parcel encroached upon, a court of equity should not order their removal.

So far we have said nothing that would not be said in a traditional law school class, although we have, perhaps, spent more time with facts than would be usual. The problem is that we end up with a puzzle that we have not solved. Granted that the court had discretion to affirm or quash the decree, granted that a perfectly plausible opinion could have been written coming out the other way, why did the court come out the way it did? The answer that my students usually come up with is that people in 1935 were very conservative, that was a long time ago. But to describe the first term of the Roosevelt administration, when

54. Id. at 107, 193 N.E. at 727.
55. The master's report simply confirms the impression that he was deliberately not seeing something that must have been obvious to everyone: "Paul Vartigian testified that he had no occupation now, but was in the real estate business as a builder and operator, and has been in many other businesses. From his testimony it is apparent to me that he is quite familiar with business transactions, more particularly with real estate matters. He and the plaintiff are related by marriage, Vartigian being the plaintiff's stepsister's husband. I find that they are friendly and sometimes visit together, and have known each other for from 15 to 18 years; that the plaintiff's mother lives a part of the time with Vartigian and part of the time with the plaintiff. I find that Vartigian is much more experienced in business matters than is the plaintiff." Record at 16. The only countervailing evidence is that it seems clear that Geragosian paid for the land with his own money. Record at 9, 16.
legal realism had been preached, at least in some quarters, for almost twenty years, as a conservative time is, to say the least, to overgeneralize. Now there is no doubt that the Massachusetts Supreme Judicial Court had a somewhat conservative bias at the time, but the same court that decided this case had also decided three relative hardship cases that came out the other way. The court at least had the honesty to cite them and to try to distinguish them.

So the next question is: Was there something about the facts of the case that made the distinctions that the court drew between this case and the other relative hardship cases seem more plausible to the court than it does to us from the somewhat muddy description that they give of the physical facts? There are a couple of ways that one might go about finding that out. One could obtain the briefs and record of the case and get a fuller description of the facts. What I did was perhaps less reliable but more fun. The site of Vartigian's theater is about three miles from the Harvard Law School. I drove over to Somerville and checked it out. The theater is gone, and the site is now a supermarket parking lot. But the Aaronian-Geragosian land is still there, and the fact that the theater site is now a parking lot makes it quite easy to figure out what was where in 1935. It is even more obvious from the site than it is from the court's opinion that the two encroachments could not have interfered in any conceivable way with the use of the Aaronian-Geragosian parcel.

But there is something in the facts of the case that gives us a clue as to why the court came out the way it did, and it does not require amateur urban archaeology to figure it out. All one has to do is look at the names. Geragosian, Vartigian, and Aa-


57. Id.

58. Amateur urban archeology is dangerous stuff. The plans filed with the record (e.g., record between pp. 10 and 11) make clear that my reconstruction of the physical situation in 1935 from the site as it exists now was inaccurate in a number of respects. Fortunately, the "bottom line" is the same: There is no way that the two encroachments could have interfered with the use of the Aaronian-Geragosian parcel.
ronian were all Armenian immigrants. In 1935 the Armenians were the most recent immigrant group to have come into the great Boston-area melting pot. There was considerable sympathy for the Armenians as a group because they had fled from a particularly brutal repression that was going on in their native land.

Vartigian is also a character for whom one can have considerable sympathy despite his machinations to make trouble for the Union Realty Company. Starting off as an immigrant, he had succeeded to the point where he had been the owner of a theater which, despite the collapse of real estate values in the Depression, was still worth $250,000. But his success was short-lived. He lost his theater in a depression, the worst that the nation had ever experienced, one that was affecting the lives of everybody and the fortunes of almost everybody. All Vartigian had left was the candy stand that he and his wife maintained in the theater. Then the Union Realty Company, the same people who foreclosed on his mortgage, used their ownership interest in the theater to expel Vartigian and his wife from their candy stand.

All this is on the face of the opinion. One more element is not. My wife’s uncle was a young lawyer in Boston during this period, and I asked him if he remembered anything about the parties to the case. Only one rang a bell, the Charlestown Five Cent Savings Bank, the defendant first mortgagee. The bank had behaved, he told me, in a singularly unpleasant fashion during the Depression. At a time when many banks were not foreclosing mortgages but leaving the mortgagors in possession because there was no hope of recovering the amount loaned in a depressed real estate market, the Charlestown Five was foreclosing mortgages left and right, putting widows and orphans out on the street and then forcing them into bankruptcy by suing for the deficiencies.

In order to avoid a potential libel action, I must say that I do not know whether this is true or not. Nor do I think it particularly important whether this is true. What is important is that members of the legal community thought that it was true, and that

59. In fact, Geragosian did not speak English. He testified through an interpreter, and all of the real estate dealings in which he was involved were conducted by Vartigian. Record at 15, 18-21.

60. At the time of the trial both Vartigian and Geragosian were out of work. Record at 15-16.
impression could well have been shared by the members of the supreme judicial court. The Boston legal community, even today, is a close-knit group, and it was even more so in the 1930s.

Now who were the members of the Massachusetts Supreme Judicial Court? I know this is going to sound like a bad ethnic joke, but of the seven members of the court that decided this case, six (Rugg, Crosby, Pierce, Field, Lummus, and Qua) had Yankee names and one (Donahue—no relation) Irish. This was, of course, the Brahmin establishment with the token participation of a member of the oldest immigrant group.61

Now I am not saying that anyone on the court ever said what I am now going to say, or even that it was anyone’s conscious train of thought, but here is another way of framing the issue in this case: “How should we decide this case? We have an opportunity to exercise discretion. This case could come out either way. On one side is an immigrant. The American dream seemed to be within his grasp, but his hopes of achieving it have been dashed by this Depression that neither Mr. Hoover nor Mr. Roosevelt seems able to control. On the other side we have an establishment bank that has behaved badly, and a real estate investment company that has behaved worse, taking away from this immigrant his last shred of respectability by throwing him and his candy stand out of the theater that he struggled to build and now has lost. If we decide this case in favor of the defendants, everyone will think that we are protecting our own class. If we decide this case in favor of the plaintiff, Mr. Vartigian will have a bargaining chip to use to get his candy stand back, the Union Realty Company will lose nothing if it behaves humanely, and it will lose a small amount compared to the value of the theater if it behaves irrationally. Further, if we decide this case in favor of the plaintiff we will still be able to render an opinion that resoundingly confirms the institution of private property.”

I leave it to you to decide whether this imaginary conversation provides a better explanation for why the case came out the way it did than does our analysis of the authorities and the doctrine. I can report that most of my students find this explanation of the case convincing, but it makes them angry. They think that I

61. To this group we should also add Arnold Leonard, the master in the case. Record at 24. His quite remarkable refusal to find a conspiracy between Geragosian and Vartigian made the appellate court’s job possible. See supra note 55.
am playing the game with a stacked deck, that I have somehow pulled a fast one on them.

There are, I admit, some pieces in the puzzle that require a knowledge that is not on the face of the record of the case. I think it is asking too much to expect first-year law students to visit the site of the cases that they read, even if the site is only three miles from where they are sitting, and my information about the attitudes of Boston lawyers to the Charlestown Five Cent Savings Bank was acquired serendipitously and decidedly outside the record. On the other hand, those pieces of information simply confirm what is already on the record. The court is quite clear that the encroachments did no harm to the Aaronian-Geragosian land. All that the visit to the site did is confirm that what they said is true and clarify the physical description that they give of the premises. Further, though the Charlestown Five Cent Savings Bank does not figure prominently in the printed opinion, the Union Realty Company does, and anyone who reads the opinion and does not get the impression that the Union Realty Company behaved just as badly if not worse than Vartigian did is, I would suggest, lacking in both moral sensitivity and in sensitivity to style. The court here constructs a powerful piece of advocacy simply by reciting the facts of a case deadpan.

I do not think that what makes my students angry is the fact that I bring to bear on the case the kind of information that any lawyer worth his or her salt would find out if the case were an important one. I think what makes my students angry is that I set the case in a context that is perfectly easy to derive from the opinion but which is never stated expressly. Any case that is captioned "Geragosian v. Union Realty Co." and begins "In 1927 one Vartigian built a theater in Somerville on land the rear of which adjoined the rear of land of one Aaronian" is a case about Armenians. In Boston of the 1930s, and I might add, today, it would be superfluous to say that; it is perfectly obvious from

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62. Any lawyer handling a case like this would certainly be remiss if he or she did not visit the site, and I would suggest that any lawyer relying on this case in a subsequent case should look at the record and briefs to get a better picture than the court gives of what the physical site looked like.
63. The Charlestown Five Cent Savings Bank does not figure prominently in the record either, and it seems to have let Union represent its interests in the case. On the other hand, the behavior of Union is a key part of the record. See supra notes 44-45, 47.
the names. My students are angry at that for three reasons, all
of which deserve some thought. The first one is that many of
them do not know that these are Armenian names. This is the
product of the fact that in some places in the United States and
in some social and political circles we have tried to achieve non-
discrimination by ignoring ethnicity. Boston is not one of those
areas, at least in most circles, and whatever one's views about
how an ideal world ought to be structured, a person who tries
to practice law in Boston today and who is not conscious of the
ethnic identity of people's names will miss a considerable amount
of what is going on. So I make no apologies for expecting my
students to pick up on ethnicity. Like so many things that we
try to teach in law school, some students are further ahead than
others in this department, and they ought to try to learn from
each other.

Having identified the names as Armenian, I make even less
apology for the two pieces of historical context that I brought
to bear on the case: the fact that Armenian immigrants came to
the United States in order to escape genocide and the fact that
in 1935 we were in the depths of a depression. If a peculiar
sensitivity to ethnicity is a characteristic of the Boston area not
shared by all regions of the country, the basic facts of American
history are part of our common culture. I cannot imagine how
anyone could participate in sophisticated legal, political or social
discourse in the United States without knowing at least this
much American history.

The second reason that my references to ethnicity anger my
students is related to, but somewhat different from, the first.
Justice is supposed to be blind. However much difference ethni-
city makes in social or political discourse, it should, in their view,
make no difference in the decision of cases. I have considerable
sympathy with this as an ideal, but I like to suggest that its
implementation is far more complicated than it might seem.
Lawsuits involve people, and people have a lot of characteristics,
some of which, like their behavior, they have some control over,
and some of which, like their ethnicity, they have little or no
control over. To decide a case for someone or against someone
because he or she is an Armenian is, of course, rank discrimi-
nation, but however the case comes out, an Armenian is going
to win or lose, and the Massachusetts Supreme Judicial Court
had no more control over that fact than Geragosian, Vartigian,
and Aaronian had over the fact that they were Armenians. If Armenians were a disadvantaged group in Massachusetts in the 1930s both because they were the most recent immigrant group and because of what they had suffered before they came to Massachusetts, a decision against one member of the group is going to add to that disadvantage and a decision in favor of one of them is going to go some small way to ameliorate it.

Further, in the social and political world of Boston of the 1930s any decision that pits the Armenians against the establishment is going to be viewed very carefully for possible evidence of bias. If the court wishes to avoid criticism it must play this one very straight, and the way to play something very straight is to tilt slightly against one's own group. A judge who is aware of the fact that these people are Armenians is also going to be aware of what the effects of the decision are going to be, however much he or she may try not to take that into account in rendering the decision.

The same can be said of the facts more specific to the case, facts that were quite legitimate ones for a court to take into account in rendering a decision. Vartigian sought to make trouble for the Union Realty Company. The trial court so found, and the appellate opinion repeats the finding.65 But the Union Realty Company had not behaved well either. It had thrown Vartigian out of his theater.66 A decision in favor of Geragosian would give his brother-in-law a weapon to use against the Company; a decision in favor of the Company would vindicate the Company's bad behavior. There is no way out of this. Any decision will achieve one or the other result. Although neither side had the equities fully in its favor, the balance of the equities seemed to favor Geragosian. This may even be relevant in a technical sense, since this is an equity case.

Now one might have to do injustice in a particular case in order to support a generally just rule of law. But there is no such necessity here. The authorities are balanced; the case could go either way. Further, a decision in favor of Geragosian has a perfectly respectable policy going for it, protection of private property. Viewed in this light the decision, which looks problem-

65. Id. at 107, 193 N.E. at 727.
66. Id.
atical on the basis of the authorities, becomes a foregone conclusion.

That leads me to what I think is the third reason for my students' anger. If I am not playing with a stacked deck, surely the court is. If appellate judges in our system are supposed to render reasoned opinions, surely they should have told us more than they did about what was going on in their minds and not leave us in the dark until Donahue pulled the Armenians out of his copious hat. I have already suggested some partial answers to this objection. Legal writing is complicated and terse, and no one has the time to state the obvious. For a court in 1935 to say that they write in the middle of a depression would be decidedly to state the obvious. For it to say that Geragosian, Vartigian and Aaronian were Armenians would also be to state the obvious and would raise the issue of possible bias that the court wanted to avoid. As to the court's perception of the balance of the equities, that is, to some extent, a matter of style. The story of Vartigian, his financial difficulties and his candy stand, is not relevant to the decision of the case, unless it affects the balance of equities. The fact that the court included these facts in what is otherwise quite a brief statement of facts is surely a clue to what it is thinking. The fact that it chose not to color these facts with strong language is, I suggested, a style of advocacy.

That leaves the part of the opinion that deals with the law, an opinion that we suggested above was less than candid about how close the case was on the authorities. Perhaps a contemporary court would have been more forthcoming, although advocacy is inbred in lawyers and most of them do not abandon it when they become judges. As lawyers, however, and not as judges, we deal with judges as they are and not as they ought to or might be. If I have convinced you that my story about Armenians, the Depression and the Charlestown Five Cent Savings Bank has given you information that will allow you to predict better what the result will be in this case, surely I have given you something that you can use to be a better lawyer.

Thus, my main point is that any lawyer who did not know that the result in this case was easy to predict was doing his or her client a disservice. If a lawyer told the Union Realty Company
after they had lost the case at the trial level to take an appeal because the authorities were evenly divided, that lawyer would have been giving fundamentally bad advice. If a lawyer was not conscious of the fact that a court might bend over backwards so as not to seem unfair to a disadvantaged group, he or she was not fully doing the job. If a lawyer was not conscious of the fact that the candy stand episode made his or her client look bad and that the client might be better off settling the case by restoring Vartigian to the candy stand, that lawyer was living in some world other than the one in which the court and the parties were living.

How do we teach our students these things? Well, one way is to point them out when they come up in the cases, to force them to think about the human situations that give rise to litigation, to ask them to put the situations in a social context. Sometimes our guesses will be wrong, just like sometimes the historian's guesses are wrong, but it is a rare court that does not give us a slant on the facts that it recites, a slant that lets us know how the court perceived the facts, and it is a rare case in which the legal issue is so technical or so momentous that it obscures the concern with doing justice between the parties.

How do we confirm our speculations about what is going on in the cases? The United States court system, many law libraries, and government and private archives maintain at great expense massive amounts of material that tell us a lot more about the cases that adorn our books than most of us ever use. Time does not allow us to pursue every one of the cases, but there are always cases that particularly catch a teacher's or a student's fancy, and most authors of casebooks are more than willing to add background material to their notes or teachers' manuals when they find out about it. More dangerous, because more unreliable, but more interesting are the occasions when we come across information about our cases by chance. Over the course of twenty years teaching property I have been amazed at how many cases in my book involve people or fact situations that my students know something about. Sometimes it's just a matter of interest. "Good Lord, this is Aunt Jane," a student of mine once said when he realized in the middle of class that he knew the defendant in the case we were discussing. Frequently, it is a matter of some relevance to the context of the case and perhaps to the decision. A student from Hawaii, confirmed later by other
students from the same state, told me that any open house on a
beach in Hawaii is going to have rats on the roof and occasionally
in the house. You cannot escape rats in a subtropical area. The
celebrated Hawaiian case of *Lemle v. Breeden,*8 in which the court
purports to be shocked at the notion that anyone could rent an
expensive house on the beach that had rats, is being less than
candid.

America is a big country. Despite the dreary uniformity of our
mass culture, there are considerable differences among our areas
and peoples and local knowledge tends to remain local. Particu-
larly in the area of private law the facts of any case are embedded
in a social context that is likely to be recoverable most easily by
those in the area. I feel quite comfortable telling the students
about *Geragosian* because I have lived in the Boston area for
many years, and my in-laws have lived there since the nineteenth
century. I feel less confident that I've got *Lemle* right, because
I do not come from Hawaii and Hawaiian local knowledge is hard
to come by in Boston. Yet despite the fact that *Lemle* is one of
the leading cases on the warranty of habitability in leaseholds,
no one from Hawaii that I know of has ever written about the
facts of the case. That the supreme court of the state would be
engaged in protecting the tourist trade seems to me to be
plausible, but surely someone in Hawaii should be willing to "fess
up."

Students write dozens and dozens of case notes every year,
many of them concerning cases from their states, cases that
involve people and fact situations about which there is easily
available local knowledge. Few of these case notes show any
indication that the writer of the note made use of the briefs and
records, and practically none show any indication that the writer
had done any of the obvious things that one can do to fill in the
context: consult files of local newspapers, call the lawyers who
dealt with the case to ask about the facts, look up the parties
and the companies involved in local directories.

Let me close with an example of the kind of thing that could
be done right here. Some of you may be familiar with the 1839
decision of the Kentucky Court of Appeals called *Lexington &
Ohio Railroad v. Applegate.*69 I do not know whether the case is

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69. 38 Ky. (6 Dana) 289 (1839).
in any casebook, although it certainly could be. It is important because it is the first American case that attempts to adapt nuisance law to the demands of economic development. The case reversed an equity decision that had enjoined the maintenance of a steam railroad down the middle of Main Street in Louisville.

I have a student working right now on a paper trying to set the case in its context.70 The material is extraordinarily rich. The Louisville Historical Society has newspapers from the period, records from the city council, maps that show the location of all the properties involved, and business directories from which all of the parties can be identified. The Kentucky State Archives in Frankfort has the record of the case, including the original depositions.71 The case seems to have arisen out an effort by one group of Louisville businessmen to foster the economic development of the city at the expense of another group of Louisville businessmen whose businesses had been harmed by the presence of a railroad train outside their doors. Despite the first group's victory in the court of appeals, they seem to have conceded a large part of what the plaintiffs wanted. The locomotive was replaced by a horse-drawn car, and the whole operation was stopped outside the city. When the railroad went bankrupt, Elisha Applegate, the plaintiff in the case, became the architect of a plan that saw to it that the operations of the railroad were taken over and the profits from them applied to benefit the Louisville schools. That at least suggests that his motives for bringing the suit were not exclusively the financial loss that the railroad was causing him.

The newspapers tell us more. There was apparently agreement among the citizens of Louisville that some sort of rail line ought to be built from Louisville to Portland, which was a separate town at the time. The question was who should build the rail line. The Lexington & Ohio benefited from the fact — to put it delicately — that one of its directors, James Guthrie, was also...


71. So far we have not been able to locate the "very copious and learned opinion" (Applegate, 38 Ky. (8 Dana) at 292) that the chancellor rendered. I would like to thank both Professor Caryl Yzenbaard of the Chase Law School and the staff of the Kentucky State Archives in Frankfort for extraordinary efforts to find this document, efforts which unfortunately proved to be in vain.
a member of the city council. Guthrie was a Democrat; his opponents seem to have been Clay Whigs.

Clearly, these facts are of some relevance for understanding the case. Whether we can draw any firm conclusions about the effect that these facts had on the way the court decided the case is another matter. If I had to guess right now, I would suggest that the court’s perception of the controversy was that it should have been decided in the city council, that those who lost the battle before the council should take their case to the electorate, that the case involved an attempt to turn a political battle into a legal battle. My concern with this analysis of the case is whether I am overly influenced by modern conceptions of where the line lies between the political and the legal. My student, moreover, is unconvinced that this is the lesson of the case. He finds in the depositions a contrast between the narrow view of the world espoused by the plaintiffs’ witnesses and the broader one espoused by the defendants’. He suggests that these two views reflect a fundamental conflict in Kentucky society in this period, a conflict that the court of appeals had to resolve.

My point in closing, however, is not what may have been going on in the Applegate case, but that it is odd that a student of mine should be doing this. The material is a lot closer to you than it is to him, and there is nothing about what he is doing that requires historical training. All it requires is patience, persistence, and a little lawyer’s ingenuity. I urge all of you to try your hands at it.
ARTICLES

THE REGULATION, CONTROL, AND PROTECTION OF ATHLETE AGENTS

W. Jack Grosse* and Eric Warren**

I. INTRODUCTION

Sports and money have enjoyed an almost sibling relationship from the earliest days of athletic competition in the Greek civilization. From the days of rewarding those who excelled in athletics, to today's high stakes and revenues for those associated with professional sports, billions of dollars have been spent and wagered on the outcome of a stolen base, a completed pass, or a three-point basket. With such amounts available, some form of regulation has been needed to control the activities of those able to affect the future of athletes and therefore athletic competition. The possibility of signing a "world-class" athlete to a multi-million dollar contract is a compelling reason for agents to become highly competitive within the agency industry to recruit prospective clients as soon as practicably possible.

A sports agent is a relatively recent phenomenon on the American sports scene. However, the historical roots go back to

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1. The winner of a running event received financial rewards equal to several years of wages, D. Young, THE OLYMPIC MYTH OF GRECk AMATEUR ATHLETICS 127 (1988).

2. For example, total revenues from the 1990 NCAA Division I men's basketball tournament were $76,178,792. NCAA Division I Men's Basketball Championship General Information, NCAA Basketball Program (1990).

3. Penn State University's Coach Joe Paterno discussed the paradoxical treatment of compensation to college athletes where track and field athletes can have endorsement funds entered into a trust fund, whereas, football and basketball players can receive no more than incidental compensation. See PATERO & ASBEEL, PATERO BY THE BOOK 184 (1989).

1925 when Red Grange, "the Galloping Ghost," signed a $100,000 contract to play eight games with the Chicago Bears. This relatively astronomical salary was negotiated by his "manager" C. C. "Cash and Carry" Pyle.\(^5\)

During the 1970s professional sports agents became common when players gained a more equal footing in bargaining with management due to the end of the reserve system, increased union influence, and interleague competition for players.\(^6\) These events are only several of the many factors which caused professional sports to become much more complicated than it had ever been for the individual athlete. So there does not seem to be any question that professional athletes need business agents since the athlete entering professional sports is usually unsophisticated in business affairs.

Formalities and customs along with professional courtesies and ethical considerations have established certain parameters within the professional athlete agent ranks. However, the lure of big financial payoffs and having as a client an athlete of star quality often entice the most ethical agents to bend or circumvent the written and unwritten "laws" of recruiting amateur athletes with remaining college eligibility. These recruitment efforts by the agent may be outside the allowable tolerance of permitted contact with regard to permissible acceptance of gratuities.\(^7\)

As a result, the collegiate, and to some extent even high school, athletes are submitted to external pressures of overzealous agents who can persuasively manipulate athletes into signing premature contractual agreements to "protect" the athlete's future well-being. In many cases, the contractual agreement between the athlete and the agent is kept in secrecy by both parties. This is ostensibly for the benefit of the athlete so as to continue the athlete's eligibility status to compete on an intercollegiate level.\(^8\)

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7. See NCAA Operating Bylaws § 12.1.2, reprinted in 1991-92 NCAA MANUAL 68-69, prohibiting:
   (a) Educational expenses not permitted by the governing legislation of this Association;
   (b) Any direct or indirect salary, gratuity or comparable compensation;
   (c) Any division or split or surplus (bonuses, game receipts, etc.);
   (d) Excessive or improper expenses, awards and benefits. (Emphasis supplied)
The policies of the National Collegiate Athletic Association ("NCAA") mandate that in most intercollegiate sporting events, with a few marked exceptions, receiving compensation from any professional contractual agreement terminates the eligibility of the athlete. In response to the NCAA mandate and for the protection of their own university athletic programs, a growing number of states have enacted statutory provisions to qualify procedures and, to a large degree, limit contact between athletes and professional agents. In some cases, statutes address registration, fees, bonding requirements, permitted contact, and penalties for violations of the statutes. Other statutes address the problem of a student athlete who does sign with an agent including the notification requirements and the rights of the athlete to rescind.

Unfortunately, the maze of differing statutory provisions among states enacting such legislation has led to uncertain results depending on the jurisdiction of the agent. As a result, many agents have been reluctant to become involved deeply with collegiate athletes prior to their termination of eligibility. Athlete agent Brian Goldberg stated, "Fortunately, I am involved primarily in baseball where very few athletes are signed while playing college...

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10. See NCAA Operating Bylaws § 14.01.4.1 "Amateurism" and § 14.01.4.2 "Awards, Benefits and Expenses," reprinted in 1991-92 NCAA MANUAL 117. Section 14.01.4.1 specifically provides:

A student-athlete shall not be eligible for participation in an intercollegiate sport if the individual takes or has taken pay, or has accepted the promise of pay in any form, for participation in that sport, or if the individual has violated any of the other regulations related to amateurism set forth in Bylaw 12.

legiate baseball. Most of my contacts are already placed in the professional ranks at the minor league level. I really do not have to contend with intricate provisions of the NCAA and the state regulations.\textsuperscript{12}

This sentiment reflects the feelings of many agents.\textsuperscript{13} The different provisions of the various state statutes, along with the absence of judicial decisions and the stiff penalties for violations, have led to the distinct conclusion that uniform statutory treatment would simplify an agent's task in complying with the legislative intent. There would also be a more predictable outcome of any litigable issues.

In addition to state statutes which attempt to regulate sports agents' contact with athletes, either amateur or professional, there are other legal means by which this athlete/agent relationship can either be controlled or adjusted. The common legal concept of agent/principal has application to these sports agents/athlete relationships in much the same way that it has application to the general principal/agent relationship in ordinary business affairs.\textsuperscript{14} In addition to state statutory control of agents and the general law of agent/principal, there are some federal controls on the agent relationship with the athlete.\textsuperscript{15}

This article will examine and discuss general agency principles as they apply to the athlete/agent relationship and the statutory provisions of the approximately twenty states which have enacted athlete/agent contacts and contracts statutes. Federal cases involving general controls, primarily through the imposition of criminal penalties, are also discussed. Finally, the authors will present a recommendation for a uniform act which in their opinion would result in some measure of control of the athlete/agent relationship and which would also provide a format for obtaining uniform results throughout the states in which these activities take place.

\textsuperscript{12} Interview with Attorney and Sports Agent Brian Goldberg in Cincinnati, Ohio (April 9, 1991).

\textsuperscript{13} See supra note 12 and infra notes 158 and 161.

\textsuperscript{14} The agency relationship between the athlete (here the principal) and the sport agent (here the agent) is created by an agreement for contract between the two. 3 AM. JUR. 2D Agency § 17 (1986).

II. THE PROBLEM: ATHLETES, AGENTS, AND ABUSE

An agent can be defined as "one who acts for or in place of another by authority from him."\(^6\) Agency law does not require one to have any particular set of skills to be an agent but, generally speaking, the agent performs a myriad of functions in representing the professional athlete. While a single representative/agent rarely performs all tasks, in general the services provided by the professional agent for athletes include the following:

1. Employment contract negotiations
2. Legal counseling
3. Obtaining and negotiation of endorsement contracts and other income opportunities
4. Financial management and planning advice
5. Career planning and counseling
6. Marketing of the athlete through public relations and other means
7. Resolution of disputes under an employment contract.\(^7\)

While many of these functions can be performed by an individual's sports agent, sports lawyers who represent client athletes often participate as principals in these sports management firms. Since the typical sport agent does not necessarily have all of the skills necessary to perform all of these functions, he either hires out the particular skills that he does not have or joins with other sports agents (usually attorneys) in combining skills to offer the athlete complete representation.

With this combination, the firm performs the legal tasks needed for the client, including contract negotiation, preparation of tax returns, counseling, and dispute resolution. Frequently the firm involved may also perform other tasks such as financial management, marketing, or investment advice. But often, the firm will farm out these functions to others while retaining oversight so as to protect the client athlete's interests.\(^8\)

\(^6\) Restatement (Second) of Agency § 1 (1958).
\(^8\) Berry, Representation of the Professional Athlete, ABA Form Comm. on Entertainment in the Sports Industry (Nov. 1, 1988).
Sports agents can be either attorneys or non-attorneys, and there are no regulations or requirements which require the agent to adhere to any professional responsibilities. But there are rules of professional responsibility which are applicable to attorneys. These rules apply to attorneys in any capacity and certainly carry over into their activities in the sports field when they are acting as attorneys.

One of the requirements of the Model Rules of Professional Conduct is that a lawyer shall provide competent representation to a client. The rule provides that competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation of the client. The obvious aim of this rule is to dissuade lawyers from fumbling through matters with which they are not reasonably familiar.

Another model rule relates to fees. The rule requires that a lawyer's fee shall be reasonable and provides a series of factors to be considered in determining the reasonableness of a fee.

The non-lawyer agent, while not subject to the rules that apply to the lawyer agent, must nevertheless adhere to the general rules applicable to the agent/principal relationship in general law. The fundamental requirement in the agent/principal relationship

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20. Attorneys are bound by the requirements of professional ethics which are imposed upon them by various state Supreme Courts. The American Bar Association has promulgated the Model Rules of Professional Conduct which many states have adopted and which address the attorney's responsibility in his relationship with his client. A sports agent who is an attorney therefore is bound by these rules of professional responsibility and the indirect result of these professional requirements accrue to the benefit of the client athletes, although this application was not specifically intended by the American Bar Association or the state supreme courts. Model Rules of Professional Conduct (1983).
22. Id.
24. Id. The matters to be considered under this rule include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing services; and (8) whether the fee is fixed or a contingent.
applicable to attorneys and non-attorneys alike is the concept of the fiduciary duty owed by all agents. 25

"Most agents are reputable, but a shocking percentage are not." 26 In all probability, a relatively small percentage of sports agents are responsible for most abuses that have tarnished their profession's image. Unfortunately, agents do not always act in their clients' best interests, 27 and examples of abuse by agents are plentiful. Bad agents continue to operate in the field and are not deterred from doing so even though legal methodology provides a way to recompense clients for their abuses. In fact, many agents continue to gain additional clients long after they begin their pattern of abuse.

Some case examples are illustrative of the point. In People v. Sorkin, 28 Sorkin was an ex-sports writer who became an agent and told his clients that he would advise them on investment matters even though he had no previous legal or contract negotiation experience. Sorkin required that all client paychecks be sent to his office, supposedly for investment purposes. When the investments did not pan out, Sorkin used his clients' money for his gambling habit, leading to the clients' eventual loss of over $626,000. 29

In another case, Brown v. Woolf, 30 a professional hockey player retained an agent and negotiated a contract. 31 The agent, Woolf, recommended that the player reject an offer from a National Hockey League team and instead accept an offer from a World Hockey Association ("WHA") franchise. 32 The WHA contract had to be renegotiated for significantly less compensation due to the

25. This legal rule provides controls for the benefit of clients over activities of both lawyer and non-lawyer agents which might breach the fiduciary duty requirements incumbent upon all agents. See 3 Am. Jur. 2d Agency § 210 (1966).


31. Id. at 1207.

32. Id.
new league's precarious financial condition, but Woolf maintained that his compensation should be based on the value of the contract before renegotiation. The court denied Woolf's motion for summary judgment due to the agent's failure to investigate the team's financial stability, failure to obtain guarantees or collateral, and negotiation of reductions of player's compensation without similar reductions in the agent's fee.

Agents often have conflicts of interest which may cause harm to a client's representation. In *Detroit Lions v. Argovitz* a football player, Billy Sims, was encouraged by his agent, Argovitz, to break his contract with the Lions and to become a player for the new United States Football League's Houston Gamblers. Although Argovitz was then a co-owner/president of the Gambler's franchise, he still attempted to act as Sim's agent in negotiating the deal. Interestingly, the court noted that even though Sims knew Argovitz had a interest in the Gamblers, it was not enough for the agent to "merely inform the principal that he has an interest that conflicts." He must also "inform the principal 'of all facts that come to his knowledge that are or may be material or which might affect his principal's rights or interests or influence the action he takes.'" The court rescinded the player's contract with the Gamblers and upheld the agreement with the Lions.

While not specifically applicable to the sports agent/athlete relationship, general agency law does offer some measure of control over the sports agents/athlete relationship.

**III. STATE REGULATION OF PLAYER AGENTS**

Due to the high fiscal compensation considerations and the extremely competitive nature of agents vying for a share of the athlete market pie, a minority of jurisdictions have responded with regulatory provisions which identify and provide controls

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33. *Id.*
34. *Id.* at 1209.
37. *Id.* at 545.
38. *Id.* at 545.
40. *Id.* at 549.
over those acting in an agency capacity. Currently, there are twenty\textsuperscript{41} states with some form of statutory provisions regarding the activity of agents. The scope of these statutes varies widely. The statutes include provisions such as where to register, the imposition of civil and criminal penalties, and fee or bonding requirements.

The registration of athlete agents varies among the state statutes. Typical language reads, "No person shall engage in or carry on the occupation of an athlete agent either within the state or with a resident of the state without first registering with the commission."\textsuperscript{42} Athlete agents must register with the Secretary of State in Arkansas,\textsuperscript{43} Iowa,\textsuperscript{44} Louisiana,\textsuperscript{45} Mississippi,\textsuperscript{46} Maryland,\textsuperscript{47} North Carolina,\textsuperscript{48} and Texas.\textsuperscript{49} In Alabama and Georgia registration is effective in the office of the Commission.\textsuperscript{50}

The selection of the Commission in Alabama and Georgia differs. The formula for the composition of Alabama's Commission has some foundation that is related to sports. Selection of the Commission, as taken from the Alabama Athlete Agents Regulatory Act, is accomplished as follows:

1. The Governor shall appoint one commission member;
2. The Lieutenant Governor shall appoint one commission member;
3. The speaker of the house shall appoint one commission member;
4. The athletic director at Alabama institutions of higher education participating in the following conferences:
   a. Southeastern conference
   b. Sunbelt conference
   c. Southern intercollegiate conference
   d. Gulf south conference
   e. Southwestern athletic conference

\textsuperscript{41}See supra note 11.
\textsuperscript{42}ALA. CODE § 8-26-4 (Supp. 1990).
\textsuperscript{43}ARK. STAT. ANN. § 17-48-201 (Supp. 1989).
\textsuperscript{44}IOWA CODE ANN. § 9A.3 (West 1989).
\textsuperscript{45}LA. REV. STAT. ANN. § 4:422(A) (West 1987).
\textsuperscript{46}MISS. CODE ANN. § 73-41-3 (1989).
\textsuperscript{47}MD. ANN. CODE art. 56, § 633(b) (Supp. 1989).
\textsuperscript{48}N.C. GEN. STAT. § 78C-72(a) (1990).
\textsuperscript{49}TEX. REV. CIV. STAT. ANN. art. 8871, § 2(a) (Vernon Supp. 1991).
\textsuperscript{50}ALA. CODE § 8-26-5 (Supp. 1990) and GA. CODE ANN. § 43-4A-4 (1988).
5. The Alabama high school athletic association shall collectively appoint one commission member. 51

In contrast, the Georgia Commission is composed of six members, none of which need any rational relationship with athletics in the State of Georgia:

1. The Governor shall appoint two commission members;
2. The President of the Senate shall appoint two commission members;
3. The Speaker of the House of Representatives shall appoint two commission members. 52

Athlete agents registering in the State of Florida must do so with the Department of Professional Registration. 53 California requires registration with the Labor Commission. 54 Virginia registrants must file with the Director of the Department of Commerce. 55 In the jurisdictions of Indiana, Kentucky, Michigan, Minnesota, Ohio, Tennessee, and Pennsylvania there are no formal registration requirements. In several states, licensed attorneys are exempt from the formal requirements of registration. 56 In those states that require registration, the information required, fortunately, is fairly standardized. The California statute is typical of the type of information most states require. The California statute requests:

(a) The name of the applicant and address of the applicant's residence;
(b) The street and number of the building or place where the business of the athlete agent is to be completed;
(c) The business or occupation engaged in by the applicant for at least two years immediately preceding the date of application;
(d) The application for registration shall be accompanied by affidavits or certificates of completion of any and all formal training or practical experience . . . 57

54. CAL. LAB. CODE § 1511 (West 1989).
56. See, e.g., CAL. LAB. CODE § 1500 (West 1989); MISS. CODE ANN. § 73-41-21 (1989); N.C. GEN. STAT. § 78C-72 (1990); and OKLA. STAT. ANN. tit. 70-821.62 (West 1989).
57. CAL. LAB. CODE § 1511(a)-(d) (West 1989). See also ALA. CODE § 8-26-5(1)-(5) (Supp. 1990) for an additional example of the type of information commonly sought under state statutes.
Annual registration fees vary widely as well. Set fees range from fifty dollars ($50) in Mississippi,58 to one hundred dollars ($100) in Arkansas59 and Louisiana,60 to a maximum of one thousand dollars ($1,000) in Oklahoma.61 If not specified by statute, a state may be given authority to set its fee “in the amount necessary to generate sufficient revenue to cover the costs of administration and enforcement” of its statutes governing licensing and/or regulation of athlete agents.62 Regardless of the jurisdiction, registration fees appear not to be excessive and are clearly within the financial means of all athlete agents.

In contrast, the requirements imposed upon an athlete agent to post security for the performance of duties and for the recovery of the costs of any violations they make could be the most prohibitive of statutory regulations. Such statutes may also impose an unfairly excessive burden on most agents not part of a large corporate type of organization. Security deposits can be met by posting a bond for the proper amount or by posting cash in the form of a certificate of deposit with the registration official. No form of security is required in the states of Florida, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Nevada, Ohio, Tennessee, and Pennsylvania. However, California63 and Iowa64 require a security deposit of twenty-five thousand dollars ($25,000). Alabama65 has a requirement of fifty thousand dollars ($50,000). Arkansas,66 Georgia,67 Mississippi,68 North Carolina,69 Oklahoma,70 Texas,71 and Virginia72 require a bond or cash deposit of one hundred thousand dollars ($100,000). While it is inconceivable that any agent could effectively post the full amount in cash, the bonding option payable to the appropriate representative of each

60. LA. REV. STAT. ANN. § 4:422(E) (West 1987).
61. OKLA. STAT. tit. 70, § 821.62(E) (West 1989).
63. CAL. LAB. CODE § 1519 (West 1989).
64. IOWA CODE ANN. § 9A.6 (West 1989).
68. MISS. CODE ANN. § 73-41.9 (1989).
69. N.C. GEN. STAT. § 75C-72(h) (1990).
70. OKLA. STAT. ANN. tit. 70, § 821.62(G) (West 1989).
state is a viable alternative. Or is it? After contacting several insurance agents, the average premium on a $100,000 bond is about $500.\footnote{Telephone interviews with Lonnie P. Hudson, CPCU, Northern Kentucky Insurance Agency, Ft. Wright, Kentucky, and Carolyn Allphin, Bond Underwriter, Old Republic Surety Company, Independence, Kentucky.} Therefore, to post bonds in the ten states requiring deposits would require about $5,000. While this is still not excessive in this high stakes game, if all fifty states required similar deposits the ante could go as high as $25,000 cash to post the necessary security.

Most jurisdictions enacting athlete agent statutes require a filing of the fee schedule charged the athlete by the party acting as an agent. The agent is responsible for filing the schedule with the registration official.\footnote{See, e.g., LA. REV. STAT. ANN. § 4:423 (West Supp. 1991); OKLA STAT. ANN. tit. 70, § 821.63 (West 1989).}

Additionally, several states impose mandatory limits on the amount an agent can negotiate. Alabama\footnote{ALA. CODE § 8-26-24(b) (Supp. 1990).} and California\footnote{CAL. LAB. CODE § 1531(b) (West 1989).} set a maximum limit of “10 percent of the total compensation, direct and indirect, and no matter from whom received, the athlete is receiving in that calendar year under the contract.”\footnote{ALA. CODE § 8-26-24(b) (Supp. 1990); CAL. LAB. CODE § 1531(b) (West 1989).} In contrast, Texas,\footnote{TEX. REV. CIV. STAT. ANN. art. 8871, § 635(b) (Vernon Supp. 1991).} Oklahoma,\footnote{OKLA. STAT. ANN. tit. 70, § 821.63(D) (West 1989).} and Virginia\footnote{VA. CODE ANN. § 54.1-520(d) (Supp. 1990).} provide that an athlete agent who negotiates a \textit{multiyear} contract for an athlete cannot collect in any twelve-month period a fee for negotiating the contract that exceeds what the athlete will receive under the contract for that same twelve-month period. The Maryland statute is very similar to that of Texas, Oklahoma, and Virginia. It provides: “If a sports agent negotiates a contract for an athlete’s professional sports services, the sports agent may not collect in a 12-month period a fee for the sports agent’s services that exceeds the amount that the athlete will receive in the same 12-month period.”\footnote{MD. CODE ANN. art. 56 § 635(b) (Supp. 1989).} But the Maryland statute also has a very unusual provision in that unlike Texas, Oklahoma, or Virginia, it does not direct the provisions specifically to multiyear contracts. This could be the result of an error or sloppy drafting. Strictly interpreted, an agent could take the entire amount of the contract as a fee.
An issue of paramount importance in all statutory provisions is what contact should be permitted with amateur athletes after signing an affiliation agreement with an athlete agent prior to the natural termination of the athlete's eligibility. Most jurisdictions which address permitted contact allow a period for on-campus interviews before the termination of the athlete's eligibility in a structured environment within a specified number of consecutive days. Both Virginia and Oklahoma allow for ten days, whereas Texas provides for a thirty day period. Some states, such as North Carolina and Iowa, provide that the school may set its own time frame and that such time period must be strictly adhered to. Other states prohibit contact prior to the athlete's last competitive event.

In all jurisdictions which allow contact or even contractual agreements between athletes and agents, there is a requirement to place a warning or waiver in ten point type on the face of the contract. The language of the warning generally reads similar to the Florida statute which states:

"WARNING: IF YOU AS A STUDENT ATHLETE SIGN THIS CONTRACT, YOU MAY LOSE YOUR ELIGIBILITY TO COMPETE IN INTERCOLLEGIATE ATHLETICS. PURSUANT TO [STATE] LAW, YOU MUST NOTIFY THE ATHLETIC DIRECTOR OR PRESIDENT OF YOUR COLLEGE OR UNIVERSITY IN WRITING PRIOR TO PRACTICING FOR OR PARTICIPATING IN ANY ATHLETIC EVENT ON BEHALF OF ANY COLLEGE OR UNIVERSITY OR WITHIN 72 HOURS AFTER ENTERING INTO THIS CONTRACT, WHICHEVER OCCURS FIRST. FAILURE TO PROVIDE THIS NOTICE IS A CRIMINAL OFFENSE."  

The exact period of notification varies from state to state. For instance, the Florida statute could be compared to the Georgia provision, which requires an agent to notify the commission. The commission then has three days to notify the athletic director of the university. The agent shall not be permitted to sign the

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83. OKLA. STAT. ANN. tit. 70, § 821.65 (West 1989).
84. TEX. REV. CIV. STAT. ANN. art. 8871, § 7(c) (Vernon Supp. 1991).
86. IOWA CODE ANN. § 9A.9 (West 1989).
athlete to a contract for thirty days after the agent notifies the commission. 89

A contract entered into by a student athlete is statutorily deemed void or voidable in those jurisdictions which prohibit contact prior to the natural termination of an athlete's eligibility. 90 Those states which allow athletes to contract also provide a window to rescind the contract which ranges from ten days in Florida 91 to fifteen days in Maryland. 92

The majority of the jurisdictions which have enacted statutes closely scrutinize prohibited activities of agents. A laundry list of prohibitions varies slightly from state to state, but the general scope and intent of such legislation is embodied in the Oklahoma version, which reads:

"A registered athlete agent may not:
1. Sell, transfer or give away any interest in or the right to participate in the profits of the athlete agent without the prior written consent of the Secretary of State;
2. Publish or cause to be published any false, fraudulent or misleading information, representation, notice or advertisement;
3. Advertise by means of cards, circulars or signs, or in newspapers and other publications, or use letterheads, receipts or blanks unless the advertisement, letterhead, receipt or blank is printed and contains the registered name and address of the athlete agent;
4. Give any false information or make any false promises or representations concerning any employment to any person;
5. Divide fees with or receive compensation from a professional sports league or franchise, or its representative or employee;
6. Enter into any agreement, written or oral, by which the athlete agent offers anything of value, including the rendition of free or reduced-price legal services, to any employee of an institution of higher education located in this state in return for the referral of any clients by that employee; . . . " 93

89. Id.
92. MD. CODE ANN. art. 56.1 § 635(d)(1) (Supp. 1989).
93. OKLA. STAT. ANN. tit. 70, § 821.64(1)-(6) (West 1989).
 While statutes of other jurisdictions may contain different provisions, they all attempt to regulate unpermitted direct and indirect contact between athletes and agents, including intermediaries, such as coaches and trainers.

Athlete agents who engage in unethical or illegal activities in violation of the statutes in these twenty jurisdictions face the possibility of civil damages in the form of fines and/or injuries suffered by the student athlete's institution from loss of the student's services. These damages can include repayment of scholarship costs, loss of revenues from decreased attendance, loss of television/radio revenues, and attorney's fees and costs.94

Also available to the states are criminal sanctions which include fines and incarceration. Arkansas, Georgia, and North Carolina have no specific penalty provisions but do have a $100,000 security instrument which a perpetrator is likely to forfeit.95 As to criminal penalties, California,96 Iowa,97 Kentucky,98 Ohio,99 Oklahoma,100 Pennsylvania,101 Texas,102 and Virginia103 impose misdemeanor or felony charges that carry fines from $1,000 to $10,000 and jail terms ranging from a maximum of up to ninety days to not more than two years. Alabama,104 Florida,105 and Indiana106 impose felony sanctions of Class C, Class D, and Class 1 respectively, with fines of $5,000 and jail terms from one to ten years.

Civil penalties can be quite shocking as well. Michigan,107 Minnesota,108 and Tennessee109 provide for antitrust-like sanctions of proven treble damages. In the case of the Minnesota statute, the

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damages are calculated at $100,000 or treble damages, whichever is greater.\textsuperscript{110}

By this point, it may be evident that the statutory provisions have been a valiant but perhaps ineffective attempt to regulate an abused activity using a band-aid approach that is at best a temporary fix. In reviewing the twenty different statutory provisions, there is enough consistency to infer that these sections were adopted in whole or in part from some general provisions of a governing body like the NCAA. In some cases, such as Maryland’s fee limitation statute,\textsuperscript{111} even the adoption appears to be a quick fix afterthought to a current problem. Added to these considerations is the fact that available case law for precedential guidance is virtually nonexistent. In addition, despite these legislative efforts, major recruiting violations still occur and athlete-agent contracts are still signed. The statutory scheme is not fulfilling the required need.

\textbf{IV. THE FEDERAL APPROACH}

There have been some federal rumblings in the area of Sports Law which have been designed or intended to bring the sports business within federal purview. Most of these federal legislative attempts have concerned themselves with two antitrust issues. One relates to the control of the athletes by the clubs and leagues. The other relates to the relationship between the location of sports teams and the various communities which either house them or would like to house them.\textsuperscript{112}

Foremost in the array of federal legislation that currently could be used to control the activities of sports agents are the Mail Fraud Act and the Racketeer Influence Corrupt Organizations Act (“RICO”). The Mail Fraud Act\textsuperscript{113} makes it a crime to use the mails to defraud or obtain money or property by means of false or fraudulent pretenses, representations, or promises. RICO\textsuperscript{114} makes it a crime to use the income from racketeering

\begin{footnotesize}
\begin{enumerate}
\item[111.] Md. Code Ann. art. 56 § 636(b) (Supp. 1989).
\item[112.] See Professional Sports Community Protection Act, S. 259, 99th Congress, 1st Sess. (1986). This was a congressional attempt to protect communities where sports franchises bargain for, and negotiate relocation contracts.
\item[113.] 18 U.S.C.A. § 1341 (West 1984).
\end{enumerate}
\end{footnotesize}
activity or an unlawful debt to invest in any enterprise engaged
in interstate or foreign commerce.

An interesting recent case involving both of these prohibited
criminal activities is United States v. Walters. In this case
Norbie Walters and Lloyd Bloom were sports agents who spe-
cialized in representing college football players. Walters and
Bloom would recruit young players still in college and secretly
sign them to exclusive representation contracts. They formed
an organization named World Sports & Entertainment
("WS&E"). Walters and Bloom would entice talented college
football players to sign exclusive representation contracts by
providing signing bonuses and cash, no-interest loans, sport cars,
and other incentives. As it was in the interest of both the
agents and their clients for the players to retain their college
eligibility, the contracts were postdated and the agreements were
kept secret by both sides.

Walters and Bloom were not very successful in keeping the
athletes after the athletes graduated from college. Out of fifty-
eight college football players recruited and signed by Walters
and Bloom, only two players continued the relationship after
graduation from college. Apparently the vast majority of these
college athletes felt cheated by Walters and Bloom and signed
with other agents prior to the National Football League draft.

Walters and Bloom lost their anticipated representation fees
because the athletes signed with other agents. In addition, the
loan proceeds they had advanced to the players were not repaid.

115. 913 F.2d 388 (7th Cir. 1990).
116. Id. at 390.
117. Id. at 389.
118. Id. at 390.
119. Id. at 390. As the court explained:
The National Collegiate Athletic Association (NCAA) forbids players from signing
with an agent or receiving compensation for athletics before the expiration
of collegiate athletic eligibility. An athlete who violates these rules is considered to
have waived his eligibility in return for payment and can no longer compete in
college athletics. Schools who are members of the NCAA require their players to
submit forms testifying to the lack of such restrictions and their eligibility. The
forms are then filed with the NCAA. Thus the players who have signed agreements
with Walters and Bloom would lie to their colleges on these eligibility forms in
order to continue to receive scholarships and to play for their school teams.
120. Id.
121. Id. at 390.
122. Id.
The RICO citations against Walters and Bloom stemmed from Walters' and Bloom's efforts to enforce the contracts. 123 "The government allege[d], and several former clients testified, that Walters and Bloom personally threatened them [the college athletes] in an attempt to enforce these contracts." 124 The court noted that one player was told that if he did not repay his loan to Walters and Bloom, his legs would be broken before the National Football League draft. 125

The acts of Walters and Bloom, including attempted extortion, mail fraud, wire fraud, collection of credit by extortionist means, and the use of interstate facilities in the furtherance of unlawful activity, were the basis of criminal charges by the government for violations of RICO. 126 In addition, Walters and Bloom were also charged by the government with mail fraud against the University of Michigan, Michigan State, the University of Iowa, and Purdue University. 127

The jury deliberated for a week. 128 Walters and Bloom were found guilty of all counts with the exception of two counts of mail fraud against two of the universities. 129 The judge sentenced Walters to five years in custody to be followed by five years probation and sentenced Bloom to three years in custody to be followed by five years probation. 130

On appeal the court found prejudicial error and reversed the convictions of both Walters and Bloom and ordered a new trial. 131 The particular reason why the court of appeals reversed the trial court revolved around an attempted defense by Walters called "advice-of-counsel." 132 The linchpin of Walters' defense was that his actions were taken in good faith based on the advice of his attorneys. 133 It seems that Walters and Bloom consulted with a law firm concerning the possible legal ramifications of these

123. Id.
124. Id.
125. Id.
126. Id.
127. Id.
128. Id.
129. Id. at 391.
130. Id.
131. Id. at 393.
132. Id. at 391.
133. Id.
agreements that they had reached with the college athletes. Walters asked the trial court judge for an instruction to the jury on this advice-of-counsel defense, and the trial court refused to give the jury such an instruction. The court of appeals felt that this was a question for the jury to decide, overturned the conviction of Walters and Bloom, and remanded the case to the trial court for a new trial.

While both the mail fraud and the RICO statutes are not designed to reach sports agents, they nevertheless can be applied to the kinds of activities in which sports agents engage. Any future activities similar to the kind carried on by Walters and Bloom could result in severe restriction of an agent's activities under criminal statutes.

Congressional attempts to provide control mechanisms for professional sports have met with failure. Previous reference has been made to the Professional Sports Community Protection Act which was introduced and became Senate Bill No. 259. Another attempt to involve Congress and the federal government in the sports industry was instigated by the National Sports Lawyers Association ("NSLA"). Between 1982 and 1985 the NSLA drafted and proposed the Professional Sports Agency Act of 1985 ("PSAA"). The NSLA plan introduced its proposal to the United States Senate Committee on Commerce, Science, and Transportation. Several sponsors were lined up, but all of them had to forego prospective sponsorship because they had become too involved in other congressional activities and matters. The result of this absence of sponsorship was a non-introduction of the NSLA proposal.

As it was drafted, the PSAA pointed out the rationale for federal legislation, including the role sports play in interstate commerce and the interstate character of the athlete/agent relationship. The PSAA further reflected on agent susceptibility

134. Id. at 390.
135. Id. at 392.
136. Id. at 391.
139. Id.
140. Id.
141. Id.
142. Id. at 1070.
to impropriety and misconduct, and noted that federal legislation is the best way to control such agent behavior.\textsuperscript{143}

The PSAA scheme as drafted in 1985 required that all sports agents would have to become members of a "national sports agency association"\textsuperscript{144} which would be registered with the Secretary of Commerce.\textsuperscript{145} If an agent neglected to become registered with one of these associations, it would be unlawful for him or her to be involved with a sports contract or athlete/agent contract.\textsuperscript{146}

The Act as drafted in 1985 also required the agent and any of his associates to meet standards or qualifications including competency in the field which would be established by the Secretary of Commerce and the national sports agency association to which the agent applied.\textsuperscript{147} The national sports agency association would be able to grant registration or suggest denial to the Secretary of Commerce based on criteria including competency, financial or operation responsibility, commission of acts inconsistent with the association's rules and statutory disqualification.\textsuperscript{148} The Secretary of Commerce thereafter would make a decision based on a specifically set procedure within a set period of time.\textsuperscript{149} A registered association could bar an associate of the agent who did not meet the association's competency requirements.\textsuperscript{150}

The proposed 1985 Act also addressed inspection of the applying agent's premises. It would have required the national sports agency association to inspect the premises before granting registration, and to again inspect the premises six months after granting registration. The inspections would be done to ascertain whether or not the agent was conducting business within the purview of the PSAA.\textsuperscript{151}

If it had been established, the national sports association would have also had the authority to suspend a registered agent upon

\textsuperscript{143.} Id.
\textsuperscript{144.} Id. (quoting Professional Sports Agency Act of 1985 at § 3(5)).
\textsuperscript{145.} Id.
\textsuperscript{146.} Id.
\textsuperscript{147.} Id. at 1070-71.
\textsuperscript{148.} Id.
\textsuperscript{149.} Id.
\textsuperscript{150.} Id.
\textsuperscript{151.} Id. at 1071.
findings that he or she did not comply with the PSAA. 152 This authority to suspend, censor, or to stay suspension or limit the activities of an athlete or agent was to be vested in the Secretary of Commerce. 153

The PSAA would have represented a distinct improvement over the regulations which currently exist. The most significant advantage would have been that it would not have been limited by state boundaries or player association memberships. It would have reached all agents, provided that they operated within the United States or its territories or possessions. 154

One of the limitations of the PSAA as proposed was that it failed to impose any criminal or civil penalties. Neither did it provide any financial remedy for the damaged athlete. The only sanction it did provide for was the suspension or revocation of the registered agent’s status. 155 In addition, the PSAA did not set forth any criteria relating to such things as training, experience, or competence, and required no express provision for an examination.156 Another perceived defect in the proposed PSAA was that it did not contain provisions for excessive fees. 157

V. A PROPOSAL

The current system of athletic agency continues to be under attack by outside forces. In addition to the inconsistent statutory sword wielded by twenty jurisdictions, there are nongovernment groups such as the NCAA; players’ associations in major league baseball, football, and basketball; club owners; schools; and universities that all attempt some form of regulation of an agent’s activities. Unethical conduct by agents and general public mistrust of agents as “snake-oil salesmen” put the field of sports agents in a highly envied and highly targeted industry. By the same token, agents generally act as lone wolves in a dog-eat-dog environment. Perhaps this is by choice.

152. Id.
153. Id.
154. In actions pursuant to federal statutes, due process requires only that a defendant in a federal suit have minimum contacts with the United States. FTC v. Jim Walter Corp., 651 F.2d 251 (5th Cir. 1981).
156. Id. at 1072-73.
157. Id. at 1073.
The existence of the sports agent is sure to change, and perhaps become extinct, given the strong union among major league baseball players, strict scrutiny by the NCAA regarding contact between athletes and agents, and the certain likelihood of more jurisdictions enacting athlete agent statutes. The Major League Baseball Players Association has a significant arm lock on whether an agent participates. Surely, football, basketball, hockey, and new players' associations will eventually possess the same powers. These organizations could conceivably have their own staffs of attorney agents which negotiate all contract/arbitration matters for the association. Exit the individual agent. Likewise, if all fifty states enact statutory provisions requiring the current maximum annual registration fee, as, for example, Oklahoma's one thousand dollar ($1,000) fee times fifty states would equal fifty thousand dollars ($50,000) in annual registration fees and a possible twenty-five thousand dollars ($25,000) annually in bonding fees, an agent will need to generate $75,000 per year to get past the states. If one were to add fees for such things as players' associations, malpractice insurance, and travel expenses to meet prospective clients, one would be talking about possibly exhorbitant startup costs for a prospective sports agent.

Agents need to be regulated. The availability of excessive sums of money, the likelihood of illegal contact with athletes, the potential for violation of regulations, the unethical diversion of funds, and the tortious interference with the contracts of other agents all provide economic pressures that mandate regulation. But agents need protection as well. It is strength in numbers that precipitated players' associations, the NCAA, and state regulations. Agents need "equal protection" to promote their interests.

At the risk of more bureaucracy, the authors propose a regulatory scheme; an association of agents involved in athletics. In a lighter moment, suppose we call the organization the American Association of Athletic Agents, or "AAAA." It would be made up of a seven member commission, composed of the chairman of

159. OKLA. STAT. ANN. tit. 70, § 821.62(E) (West 1989).
the AAAA; one member each from the NCAA, the major league players' associations, and the registration officials of all state jurisdictions; and three elected from the Association's athlete agent members. This way there would be representation and input by both amateur and professional sports along with the states and the agents themselves.

The Commission would prepare and adopt a Uniform Act to replace the inconsistent state statutes. This Uniform Act could then be adopted by the individual states much in the same manner as the process used in the installation of the Uniform Commercial Code.160 Once the Act was adopted by the states, it would replace the current inadequate statutes in those states where some legislative action has been taken, or provide new legislation for the current majority of states who have not addressed the problem.

Once installed, all athlete agents would register with the Commission, which would result in a uniform fee requirement. The Commission would send certifications of registration to all states, the NCAA, and the players' associations. The agents would agree to abide by the Uniform Act and subject themselves to the jurisdiction of the individual governing bodies in the event of violations. Agents would post one “umbrella” bond with the Commission which would be available to any jurisdiction upon a finding of misconduct.

With this uniform approach, agents could be heard, regulated, and even defended by the Commission in regard to their activities. The Association could be a clearinghouse of agent and athletic information. Reciprocally, the chairman would interface and/or sit with the NCAA, players' associations, and even with state registration officials to be the communication link between these groups and the agents.

It is a Utopian plan. Agents may prefer to act individually or as a team. But as athlete agent Richard Katz has commented, “[the current system] is confusing, dynamic, and expensive. The

160. In 1940 the idea of a Uniform Commercial Code was proposed to take the place of numerous disparate acts which had a direct bearing on commercial transactions. A national conference undertook the project and by 1952 it was completed. Numerous amendments were made thereafter and, as of 1990, forty-nine states have enacted it in substantially amended form.
need for a central organization for agents is long overdue."161 A sample act proposing provisions attempting to remedy current problems is appended.

APPENDIX
UNIFORM ATHLETE AGENT ACT*

* This Act was patterned after the Oklahoma revised statutes concerning the disposition and regulation of athlete agents in that state. The reason for choosing the Oklahoma statutory scheme is that it represented the most comprehensive regulation of athlete agents of all twenty states that have statutes regulating the same.

§ 100.01. Definitions.
1. "Person" means an individual, company, corporation, association, partnership or other legal entity;
2. "Athlete agent" means a person who, directly or indirectly, recruits or solicits an athlete to enter into an agent contract or professional sport services contract with that person, or who for a fee procures, offers, promises or attempts to obtain employment for an athlete with a professional sports team;
3. "Agent contract" means any contract or agreement under which an athlete authorizes an athlete agent to negotiate or solicit on behalf of the athlete with one or more professional sports teams for the employment of the athlete by one or more professional sports teams;
4. "[state] NCAA athlete" means any athlete who is eligible to participate in intercollegiate sports contests as a member of a sports team at an institution of higher education that is located in [state] and that is a member of the National Collegiate Athletic Association; and
5. "[state] non-NCAA athlete" means an athlete in a team sport who resides in [state] who is not a(n) [state] NCAA athlete.
6. For purposes of this Act, execution by an athlete of a personal service contract with the owner or prospective owner of a professional sports team for the purpose of future athletic services is equivalent to employment with a professional sports team.

§ 100.02. Registration of agents.
A. Except for attorneys licensed to practice law in [state], unless an athlete agent is registered with the Association as provided in subsection C of this section, an athlete agent may not:
1. Contact, directly or indirectly, a(n) [state] NCAA athlete while the athlete is located in [state]; or
2. Contact, directly or indirectly, a(n) [state] non-NCAA athlete who has never signed a contract of employment with a professional sports team while the athlete is located in [state].

B. A registered athlete agent may make those contacts only in accordance with § 100.01 et seq. of this Act.

C. A written application for registration or renewal must be made to the Association on a form prescribed by the Association and must state:
   1. The name of the applicant and the address of the applicant's principal place of business;
   2. The business or occupation engaged in by the applicant for the five (5) years immediately preceding the date of application;
   3. The applicant's formal training, practical experience and educational background in the subject of contracts, contract negotiation, complaint resolution, arbitration or civil resolution of contract disputes, federal income taxation and federal estate planning;
   4. The names and addresses of five (5) professional references;
   5. The names and addresses of all athletes for whom the athlete agent is currently performing professional services;
   6. The names and addresses of all athletes for whom the athlete agent has previously performed professional services, accompanied by a brief explanation of the reason the athlete agent is not currently performing professional services for the athletes; and
   7. The names and addresses of all persons, except bona fide employees on stated salaries, who are financially interested as partners, associates or profit sharers in the operation of the business of the athlete agent.

D. The registration is valid from July 1 of one year through June 30 of the following year. An initial registration is valid until the first June 30 following the date of registration. Renewal of the registration may be made by the filing of an application for renewal and a renewal bond as provided in subsection G of this section.

E. To produce sufficient revenue to offset the expenses incurred by the Association in administering § 100.01 et seq. of this Act,
an annual filing fee of two thousand dollars ($2,000) shall be paid by the athlete agent.

F. When an application for registration or renewal is made and the registration process has not been completed, the Association may issue a temporary or provisional registration certificate that is valid for a period not to exceed ninety (90) days and that is subject in appropriate circumstances to the automatic and summary revocation by the Association.

G. An athlete agent must deposit with the Association, before the issuance or renewal of a registration certificate, a surety bond in the sum of two million dollars ($2,000,000). Any applicant may provide to the Association proof of an equivalent amount of professional liability insurance in lieu of a surety bond, provided that such professional liability insurance shall be of such type as to provide coverage for the same types of conduct, acts, or activities as are covered by the bond otherwise provided for in this section. The surety bonds must be payable to the Association and must be conditioned that the person applying for the registration will comply with § 100.00 et seq. of this Act, will pay all amounts due any individual or group of individuals when the person or the person's representative or agent has received those amounts, and will pay all damages caused to any person by reason of the intentional misstatement, misrepresentation, fraud, deceit or any unlawful or negligent acts or omissions by the registered athlete agent or the agent's representative or employee while acting within the scope of his employment. This subsection shall not limit the recovery of damages to the amount of the surety bond or the professional liability insurance.

H. If a registrant fails to file a new bond or new proof of professional liability insurance with the Association before the expiration of the thirtieth day after the date of receipt of notice of cancellation by the surety of the bond or the issuer of the insurance, the registration issued to the athlete agent under the bond or insurance is suspended until the time that a new surety bond or proof of insurance is filed.

I. The Association may suspend or revoke a registration for a violation of § 100.01 et seq. of this Act or a rule adopted under § 100.01 et seq. of this Act.
J. Fees and other funds received under § 100.01 et seq. of this Act by the Association shall be deposited in the revolving fund of the Association and shall be used by the Association to administer the provisions of this Act. At the end of the fiscal year, any monies received from fees and other funds by the Association under this Act and not used to administer the provisions of this Act shall be deposited in the Association's treasury to credit the athlete agents in order to reduce their fees the following year.

§ 100.03. Agent's contract - schedule of fees - maximum fee.
A. Any agent contract to be used by a registered athlete agent with an [state] non-NCAA athlete who has never before signed a contract of employment with a professional sports team must be on a form approved by the Association and the [state registering authority]. This approval may not be withheld unless the proposed form of agent contracts is unfair, unjust and oppressive to the athlete.

B. The following provision must be printed on the face of the agent contract in prominent type: "THIS ATHLETE AGENT IS REGISTERED WITH THE ASSOCIATION AND THE [STATE REGISTERING AUTHORITY] REGISTRATION DOES NOT IMPLY APPROVAL OR ENDORSEMENT BY THE ASSOCIATION OR THE [STATE REGISTERING AUTHORITY] OF THE SPECIFIC TERMS AND CONDITIONS OF THIS CONTRACT OR THE COMPETENCE OF THE ATHLETE AGENT."

C. A registered athlete agent must file with the Association a schedule of the fees that the agent may charge to and collect from an [state] non-NCAA athlete who has never before signed a contract of employment with a professional sports team and must file a description of the various professional services to be rendered in return for each fee. The athlete agent may impose charges only in accordance with the fee schedule. Changes in the fee schedule may be made from time to time, but a change does not become effective until the seventh day after the change is filed with the [state registering authority].

D. If a multiyear professional sports services contract is negotiated by a registered athlete agent for an [state] non-NCAA
athlete who has never before signed a contract of employment with a professional sports team, the athlete agent may collect fees as registered on the schedule outlined in subsection C but in no instance more than ten percent (10%) of the said professional sports services contract.

E. A registered athlete agent shall file with the Association a copy of an agent contract made with a(n) [state] non-NCAA athlete who has never before signed a contract of employment with a professional sports team. If the [state] non-NCAA athlete is a student at an institution of higher education located in [state], the athlete agent also shall file the contract with the athletic director of the institution. The contract must be filed not later than the fifth day after the date the contract is signed by the athlete. An agent contract may be terminated by the athlete before the expiration of the tenth day after the date the contract has been filed as provided by this section.

§ 100.04. Prohibited activities.
A registered athlete agent may not:

1. Sell, transfer or give away any interest in or the right to participate in the profits of the athlete agent without the prior written consent of the Association;

2. Publish or cause to be published any false, fraudulent or misleading information, representation, notice or advertisement;

3. Advertise by means of cards, circulars or signs, or in newspapers or other publications, or use letterheads, receipts or blanks unless the advertisement, letterhead, receipt or blank is printed and contains the registered name and address of the athlete agent;

4. Give any false information or make any false promises or representations concerning any employment to any person;

5. Divide fees with or receive compensation from a professional sports league or franchise, or its representative or employee;

6. Enter into any agreement, written or oral, by which the athlete agent offers anything of value, including the rendition of free or reduced-price legal services, to any employee or any institution of higher education located in [state] in return for the referral of any clients by that employee;

7. Offer anything of value, excluding reasonable entertainment expenses and transportation expenses to and from the athlete
agent’s registered principal place of business, to include a(n) [state] non-NCAA athlete who has never before signed a contract of employment with a professional sports team, to enter into an agreement, written or oral, by which the athlete agent will represent the athlete; or

8. Contact, directly or indirectly, a(n) [state] NCAA athlete to discuss the athlete agent’s representation of the athlete in the marketing of the athlete’s athletic ability or reputation or enter into any agreement, written or oral, by which the athlete agent will represent the athlete, until after completion of the athlete’s last intercollegiate contest, including post-season games, and may not enter into an agreement before the athlete’s last intercollegiate contest that purports to take effect at a time after the contest is completed.

§ 100.05. On-campus agent interviews.
If an institution of higher education located in [state] elects to sponsor athlete agent interviews on its campus before the [state] NCAA athlete’s final year of NCAA eligibility, a registered athlete agent may interview with the athlete to discuss the athlete agent’s representation of the athlete in the marketing of the athlete’s athletic ability or reputation. The athlete agent shall strictly adhere to the specific rules of each separate electing institution with regard to the time, place and duration of the athlete agent’s interviews. The interviews must be conducted in that final year during a period not to exceed ten (10) consecutive days.

§ 100.06. Violations - penalties.
A. A registered athlete agent who violates the provisions of § 100.03 or § 100.04 of this Act is subject to:

1. Payment of a civil penalty not to exceed ten thousand dollars ($10,000) to be determined by the seriousness of the violation;

2. Forfeiture of any right of repayment of anything of value either received by a(n) [state] NCAA athlete as an inducement to enter into any agent contract or received by an athlete before completion of the athlete’s last intercollegiate contest;

3. Payment of a refund of any consideration paid to the athlete agent on the athlete’s behalf;

4. Payment to the institution of higher learning in the amount of treble the damages incurred by the institution as a result of
the loss of the athlete's services due to ineligibility; and

5. Payment of reasonable attorney's fees and court costs incurred by an athlete in suing an athlete agent for a violation of this Act.

B. Any agent contract that is negotiated by an athlete agent who has failed to comply with this Act is void.

C. An athlete agent commits an offense if the agent knowingly or intentionally violates the provisions of this Act. An offense under this subsection shall have criminal penalties imposed using guidelines of the state where the violation occurred.

§ 100.07. Records to be kept by an athletic agent.
A. An athlete agent shall keep records approved by and filed annually with the Association. The records must contain:

1. The name and address of each person employing the athlete agent, the amount of the fee received from the person and the specific services performed on behalf of the person; and

2. All travel and entertainment expenditures incurred by the athlete agent including food, beverages, maintenance of a hospitality room, sporting events, theatrical and musical events and any transportation, lodging or admission expenses incurred in connection with the entertainment.

B. The records kept by the athlete agent under paragraph 2 of subsection A of this section must adequately describe the:

1. Nature of the expenditure;
2. Dollar amount of the expenditure;
3. Purpose of the expenditure;
4. Date and place of the expenditure; and
5. Person or persons in whose behalf the expenditure was made.

§ 100.08. Implementing rules and regulations.
The Association may adopt or amend rules necessary to carry out this Act.
§ 100.09. Application of the Act.
The provisions of this Act apply only to actions performed on or after the effective date of this Act.

§ 100.10. Time for registration and compliance with the Act.
An athlete agent is not required to be registered and is not required to comply with the provisions of this Act until October 1, 19XX.

§ 100.11. Attorneys exempt.
Attorneys licensed to practice law in [state] shall be exempt from §§ .02 through .10 of this Act provided they register with the clerk of the Supreme Court of [state] by filing an affidavit with the clerk stating their intentions to represent a(n) [state] athlete in contractual negotiations, and serve as lead counsel in the negotiations and are to receive their compensation directly from the represented [state] athlete and not from any other source.
THE MYTH OF NONAPPORTIONMENT AMONG TORTFEASORS UNDER TRADITIONAL TORT LAW AND ITS SIGNIFICANCE FOR MODERN COMPARATIVE FAULT

Leonard Charles Schwartz*

I. INTRODUCTION

Under traditional tort law (that is, tort law before modern comparative fault), could the loss suffered by the plaintiff be apportioned among the tortfeasors who caused the loss? Many courts and commentators have stated that, with the exception of a limited type of apportionment under the Uniform Contribution Among Tortfeasors Act and similar laws, traditional law did not allow apportionment. This article debunks the myth of nonapportionment. It shows that traditional tort law did allow apportionment, but that the method of apportionment differs from that of the Uniform Contribution Among Tortfeasors Act and modern comparative fault.

Section II discusses the rules under which traditional tort law allowed apportionment. Section III shows that the myth of nonapportionment arose primarily because of changes in procedure, and the relationship of those changes to the terminology of tort law. Section IV discusses the role of the Restatement of Torts in the persistence of the myth of nonapportionment. Section V discusses apportionment under the Uniform Contribution Among

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1. This myth has been asserted elsewhere. See, e.g., Gunder v. Tibbits, 153 Ind. 591, 55 N.E. 762 (1899); Owens v. Cerullo, 9 N.J. Misc. 776, 155 A. 759 (1931); Uniform Contribution Among Tortfeasors Act, § 1 comment (1939) and commissioners' prefatory note (1939), 9 U.L.A. 230-33 (1957); Uniform Comparative Fault Act prefatory note (1977), 12 U.L.A. 41 (Supp. 1991); Restatement of Restitution § 102 (1936); H. Woods, Comparative Fault §§ 13.4-13.5 (2d ed. 1987).

2. Likewise, there is a myth that the loss suffered by the plaintiff cannot be apportioned between the plaintiff and the defendant. Schwartz, The Myth of Nonapportionment Between a Plaintiff and a Defendant Under Traditional Tort Law and Its Significance for Modern Comparative Fault, 11 U. Ark. Little Rock L.J. 493 (1989).
Tortfeasors Act. Section VI compares apportionment under traditional tort law with apportionment under modern comparative fault.

The issue of apportionment arises where the total loss suffered by a plaintiff involves more than one substantial causal factor. In addition to the issue of determining the total harm suffered by the plaintiff and determining the amount of money that is commensurate with the harm, there is the issue of allocating liability for the loss. Methods of allocating liability among tortfeasors can be divided into two broad categories: nonapportionment rules and apportionment rules. Under a nonapportionment rule, one or more tortfeasors are liable for the entire loss. Under an apportionment rule, each tortfeasor is liable for only part of the loss.

For example, suppose that the plaintiff, P, suffers a $60,000 loss when P's house was harmed because (1) a car driven by T1 swerved off the road and into P's house, (2) a time bomb set by T2 exploded in P's backyard, and (3) the dispatcher at the fire department, T3, fell asleep and did not dispatch the firefighters. With a nonapportionment method of allocating liability, one or more tortfeasors are each liable for the entire $60,000. With an apportionment method, each tortfeasor is liable for only a share of the $60,000.

Important to the understanding of apportionment is the distinction between harm, loss, casualty, and damages. "Harm" in this article means a detriment. "Loss" means the compensatory value of the harm suffered. "Casualty" means an incident in which harm

5. If two or more tortfeasors are each liable for the entire loss, the plaintiff generally decides what share of the judgment will be enforced against each tortfeasor. Thus, even a nonapportionment rule involves an apportionment. But the apportionment is by the plaintiff, not the judge or jury. *Id.* at 192; Schwartz, *supra* note 2, at 495 n.14.

Apportionment of loss has also been called apportionment of harm and apportionment of damages. **Restatement (Second) of Torts** § 433A (1965). If the harm is caused only by defendants (and not also by the plaintiff) and if damages (the money remedy owed by the defendants) are compensatory, apportionment of the loss is also apportionment of damages. But if the harm is caused partly by the plaintiff, “apportionment of damages” is misleading. Schwartz, *supra* note 2, at 495 n.14.

7. This article is not concerned with the criteria by which harm is valued. Harm can be valued by at least two methods: (1) objective market value and (2) subjective personal value. Schwartz, *Particular Loss, Average Loss, and Actuarial Loss: The Ethics and Economics of Alternative Remedies of Wrongful Conduct*, 18 CONN. L. REV. 115, 115 n.1 (1985).
occurs. "Damages" means the monetary remedy for an invasion of a legally protected interest.

Damages are allowed only where there is an invasion of a legally protected interest. If an invasion involves no loss, damages generally are nominal. If an invasion involves loss, damages generally are compensatory.

Also important to the understanding of apportionment is the distinction between causation and blameworthiness. "Causation" in this article means causation in fact, which refers to the substantial factors that produce harm, loss, or a casualty. This article is not concerned with "legal cause" or "proximate cause," which refer to limitations on liability despite causation in fact. "Blameworthy" means a failure to meet some standard of right conduct, often described by terms such as "malicious," "intentional," "reckless," and "negligent."

II. APPORTIONMENT UNDER TRADITIONAL TORT LAW

Under traditional tort law, loss was apportioned among tortfeasors who were not acting in concert, at least if there were distinct harms or a reasonable basis for determining the contribution of each tortfeasor to a single harm. If the tortfeasor were acting in concert (including situations of vicarious liability), and sometimes if there were no reasonable basis for apportioning the loss based on causation, each tortfeasor was liable for the entire loss. Traditional tort law did not allow apportionment based on blameworthiness or any other criterion except causation.

The rule allowing apportionment among tortfeasors who were not acting in concert was quite broad. For example, where the plaintiff's back was injured by two tortfeasors several months apart, the loss was apportionable although it was hard to separate the loss from each injury. The loss was apportioned where a
plaintiff was assaulted by several tortfeasors who were not acting in concert.\textsuperscript{16} Apportionment was allowed where a pedestrian was struck almost simultaneously by two cars.\textsuperscript{17} Likewise, apportionment was allowed where the plaintiff's car was struck almost simultaneously by two vehicles.\textsuperscript{18} Where the plaintiff's grazing land was damaged by the livestock of several neighbors, each neighbor was liable for only the loss caused by his own livestock, even though there was no clear evidence regarding the extent to which the harm was caused by each neighbor.\textsuperscript{19} Where two dogs killed several sheep, the loss was apportioned, even though it was unclear how many sheep were killed by each dog.\textsuperscript{20} Loss has been

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Where the injury occasioned by the tortious act of a defendant is indistinguishable from that arising from a like act of others, the approved practice is to permit the jury, as reasonable men, to make from the evidence the best possible estimate and to award the plaintiff compensatory damages for the injury.

\textit{Id.} at 103, 18 P.2d at 1110. The rule that each tortfeasor is liable only for the harm caused by his own misconduct also applies where the plaintiff's grazing land was injured by his own livestock as well as that of several neighbors. Pacific Live Stock Co. v. Murray, 45 Or. 103, 76 P. at 1079 (1904).

It was also competent for the defendant to show ... that the plaintiff and other parties had cattle grazing on the same land with his sheep during the time of the alleged trespass, and that part of the injury complained of was caused by such cattle. He is liable only for the mischief done by his sheep, and not for that done by animals belonging to other parties.

\textit{Id.} at 103, 76 P. at 1080.


The common-law rule is that, where domestic animals of different owners unite in committing an injury, the wrong is not the joint wrong of the owners, but each owner is liable separately for the damages done by his own animal. Separate owners of several animals are not jointly liable for damages done by them all at the same time. ... It is, of course, often difficult to identify the owners of a pack of ... dogs and apportion the damages done by each dog.


Under the common-law rule it is proper for the jury ... to apportion the damages, in the event that they find that the injuries were inflicted by two or more dogs belonging to different persons. ... If the dogs were of apparently equal powers for doing damage, and there are no circumstances to render it probable that one did more than the other, there is a good ground for saying that each owner should be held liable for an equal share of the damages.

\textit{Id.} at 127, 101 N.W. at 782.
apportioned among tortfeasors whose air pollution harmed the plaintiff. Likewise, apportionment was allowed among tortfeasors who flooded the plaintiff's land.

Apportionment was also allowed where the tortfeasor aggravated the plaintiff's pre-existing harm. Such apportionment was allowed regardless of whether the pre-existing harm was caused by the plaintiff's conduct, a third person's conduct, an act of

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It is well settled that each person who acts in maintaining a nuisance is liable for the resulting damage. If he act independently, and not in concert with others, he is liable for the damages which result from his own act only. And the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of the contributor to the aggregate result does not affect the rule, nor make anyone liable for the acts of others.


Everyone who permits water to waste onto the land of others without right is liable for his proportionate share of the injury caused or the harm resulting therefrom.... If the injury follows as the combined result of the wrongful acts of several, acting independently, recovery may be had severally against each of such independent tortfeasors, in proportion to the contribution of each to the injury.

Id. at 791, 146 P. at 1106. Accord Lull v. Fox & Wis. Improve. Co., 19 Wis. 112 (1865). "The argument that there is difficulty in ascertaining the damage done or caused by the erection of each dam, or that it is impossible, is certainly no reason why one tortfeasor should pay for the damages caused by another with whom he is in no way connected."

Id. at 114.

23. A pre-existing harm can be distinguished from a predisposition to harm. With a pre-existing harm, such as a fractured skull, the harm is actual and certain. With a predisposition to harm, such as an egg-shell skull, the harm is potential and contingent. Schwartz, supra note 2, at 498-500.

24. Cleveland, C.C. & St. L. Ry. Co. v. Klee, 154 Ind. 430, 56 N.E. 234 (1900) (the plaintiff stepped in front of a moving train, thus causing a collision, and the train negligently did not stop quickly after the collision; the plaintiff could not recover damages for the loss caused by the original collision, but he could recover damages for the additional loss caused by the defendant's failure to stop quickly); Dillon v. Twin State Gas & Elec. Co., 85 N.H. 440, 163 A. 111 (1932) (the plaintiff fell off a bridge girder upon which he was playing, and was electrocuted when he hit a power line that the defendant had not properly insulated; apportionment allowed between the loss that the plaintiff would have suffered anyway and the extra loss, if any, that was caused by the electrocution).

25. Modave v. Long Island Jewish Med. Ctr., 501 F.2d 1065 (2d Cir. 1974) (the plaintiff's injuries from an automobile collision were aggravated by the malpractice of two hospitals; each hospital was liable only to the extent that it aggravated the plaintiff's loss); Gates v. Fleisher, 67 Wis. 504, 30 N.W. 674 (1886) (the plaintiff was treated by several doctors; in an action against one of them for malpractice, the court held that the jury should separate the harm caused by the defendant from the prior or subsequent harm caused by other doctors and any other cause).
nature, or unknown causes. Apportionment was also allowed where the tortfeasor’s prior conduct, although not itself a cause of a casualty, increased the extent of the plaintiff’s loss from a casualty caused by another tortfeasor or the plaintiff.

In summary, apportionment under traditional tort law was concerned with causation of loss. Traditional tort law was based on the principle that each tortfeasor was liable for only the loss caused by that tortfeasor. A tortfeasor was not liable for the loss caused by other tortfeasors, the plaintiff, or acts of nature. A fundamental goal of traditional tort law was the determination of the amount of loss each tortfeasor caused.

Since apportionment was allowed in such a wide variety of situations, why did the myth of nonapportionment arise?

III. THE HISTORICAL ORIGINS OF THE MYTH OF NONAPPORTIONMENT

A. The Tort Law Before the Modern Procedural Reforms

The coexistence of apportionment and the myth of nonapportionment can perhaps be explained best by considering the history of procedural law and the terminology of tort law. Before the modern procedural reforms, nearly all states had two legal systems with separate procedures. One system generally was called “courts

26. Louisville, N.A. & C. Ry. v. Jones, 108 Ind. 551, 9 N.E. 476 (1886) (the plaintiff’s pre-existing disease was aggravated by a derailment of the defendant’s train); Nelson v. Twin City Motor Bus Co., 239 Minn. 276, 58 N.W.2d 561 (1953) (the plaintiff’s arthritis was aggravated when the plaintiff was caught in the doors of the defendant’s bus and was dragged several feet); Dallas Ry. & Terminal Co. v. Ector, 131 Tex. 505, 116 S.W.2d 683 (1938) (the plaintiff’s kidney condition was aggravated by a collision of the defendant’s street cars); Texas Coca-Cola Bott’g Co. v. Lovejoy, 138 S.W.2d 254 (Tex. Civ. App. 1940) (the plaintiff had three prior abdominal operations; the plaintiff’s condition was aggravated when the plaintiff drank some broken glass from the defendant’s bottle).

27. Felter v. Delaware & Hudson R.R., 19 F. Supp. 852 (M.D. Pa. 1937), aff’d, 98 F.2d 863 (3d Cir. 1938) (the plaintiff’s house caught on fire from unknown causes; the defendant negligently blocked a railroad crossing, thus delaying the fire truck for 15-20 minutes; the defendant was liable for the extent to which its conduct increased the plaintiff’s loss).


29. Causation of loss is not necessarily related to causation of a casualty. A person can be a cause of loss regardless of whether he is a cause of a casualty. Furthermore, a person can be a cause of loss regardless of whether his conduct occurs before or after the casualty. Schwartz, supra note 2, at 496-500.
of law." The other system generally was called "courts of equity." 30

The jurisdiction of each court system depended primarily on the nature of the suit and the type of remedy sought by the plaintiff. A plaintiff who sought money damages generally was required to sue in a court of law. 31

Courts of law tried to limit the number of parties and the number of issues. Thus, the procedural rules rarely allowed joinder of parties or joinder of claims. 32 In a tort case, a plaintiff who was injured by more than one tortfeasor was allowed to sue the tortfeasors jointly only if they were acting in concert (including situations of vicarious liability). 33 Joinder was permitted, but not required. A plaintiff who was injured by five tortfeasors acting in concert could start one or more actions, each of which was against one or more of the tortfeasors. 34 The plaintiff could enforce the judgment(s) partly against each or entirely against one tortfeasor, since each tortfeasor was liable for the plaintiff's entire loss. The choice belonged to the plaintiff, not the tortfeasors. A tortfeasor who was sued was not allowed to implead a tortfeasor who was not sued. 35 A tortfeasor who paid a judgment (or who settled out of court) was not allowed to sue the other tortfeasor for contribution. 36

Tortfeasors who independently injured the plaintiff (that is, tortfeasors who did not act in concert) could not be joined. 37 The plaintiff was required to sue them separately. Each tortfeasor was liable for only a portion of the plaintiff's loss. 38

Regarding the terminology of tort law, tortfeasors who acted in concert were called "joint tortfeasors" and could be joined. Joint tortfeasors who were joined had "joint liability" for the plaintiff's entire loss; and joint tortfeasors who were sued separately had

31. Id. § 15.
33. W. PROSSER, supra note 10, §§ 46-47.
34. Id. §§ 47-48.
35. Id. § 47.
36. Id. § 50. But sometimes a tortfeasor had a right to indemnification from another tortfeasor. Id. § 51.
37. Id. § 47.
38. Id.
“several liability” for the plaintiff’s entire loss. Tortfeasors who acted independently were not “joint tortfeasors” and could not be joined.

B. Tort Law After the Modern Procedural Reforms

Procedural law has changed greatly in the past 150 years. These changes started with the “Field Code” in New York in 1848 and culminated with the Federal Rules of Civil Procedure in 1938. The new procedural laws eliminated the forms of action and merged courts of law and courts of equity. Important to the problem of multiple tortfeasors, the new procedures were more permissive regarding joinder of parties and joinder of claims. Under the new procedure, a plaintiff who was injured by more than one tortfeasor was allowed to sue the tortfeasors jointly even if they were not acting in concert.

The increased scope of joinder created a problem regarding the terminology of tort law. Independent tortfeasors could now be joined and often were called “joint tortfeasors,” a term which previously was applied only to tortfeasors who acted in concert. Since each “joint tortfeasor” (under the old definition) was liable for the plaintiff’s entire loss and could not sue another “joint tortfeasor” for contribution, some courts applied those rules to independent tortfeasors who now could be joined.

But other courts continued to follow the traditional rule that independent tortfeasors, even if they were joined, were each liable for only a portion of the plaintiff’s loss, at least if there were distinct harms or a reasonable basis for determining the contribution of each tortfeasor to a single harm. In some courts, apportionment depended on whether each person’s conduct, or the effects of the conduct, was concurrent or consecutive.

39. Id. §§ 46-47.
40. Id.
41. C. CLARK, supra note 30, §§ 7-8.
42. Id. § 15; R. MILLAR, supra note 32, at 66-67; Schwartz, supra note 2, at 501-04.
43. W. PROSSER, supra note 10, § 47.
44. Id. § 47 at 297-98.
45. Id. §§ 47, 50.
46. Id. §§ 47, 50, 51.
A case that illustrates the confusion on terminology and substantive law after the procedural reforms is *Phennah v. Whalen.* In this case, the plaintiff's osteo-arthritis condition was aggravated in two motor vehicle collisions several months apart. The court wrote:

The difficulty which confronts us is that the right to recovery under our cases is often confused and dependent on the characterization of the tortfeasor as joint, concurrent or successive. In *Seattle-First [National] Bank v. Shoreline Concrete Co.*, 91 Wash. 2d 230, 235, 588 P.2d 1308, [1312] (1978) (*Seattle First*), the Supreme Court classifies multiple tortfeasors into three categories:

... Joint [tortfeasors] are those who have acted in common or who have breached a joint duty .... Concurrent [tortfeasors] are those whose independent acts concur to produce the injury .... Significantly, the harm caused by both joint and concurrent [tortfeasors] is indivisible. The distinguishing factor between these types of [tortfeasors] is the duty breached. Joint [tortfeasors] breach a joint duty whereas concurrent [tortfeasors] breach separate duties.3

3 The concept of "successive" [tortfeasors] applies when none of the multiple [tortfeasors] could have caused the whole harm suffered and where the harm caused is clearly divisible ....

... Despite the wording of the definitions in *Seattle-First*, ... a review of the cases indicates that our courts have looked not to the divisibility of the harm, but to the manner in which the occurrence(s) took place in determining whether the tortfeasors are joint, concurrent or successive. We therefore do not read *Seattle-First* to mean that the characterization of the tortfeasors must turn on the divisibility of the harm. Defendants who were acting together, so as to share a common duty, are joint tortfeasors. Characterized as concurrent tortfeasors have been those defendants, one of whose negligence set in motion a series of events upon which the other's [sic] acted so as to produce the end result. The final category is successive tortfeasors, whose negligent acts are wholly unrelated in time and causation. Here the two accidents occurred entirely independently, separated by some three months, and the tortfeasors are therefore successive tortfeasors.
Yet despite the independence of the two occurrences, only one harm was produced. This indivisible harm produced by wholly unrelated negligent acts illustrates the anomaly in the law. 49

IV. THE RESTATEMENT OF TORTS AND THE PERSISTENCE OF THE MYTH

The original Restatement of Torts helped perpetuate the myth of nonapportionment. The Restatement allowed apportionment among tortfeasors where they independently contributed to a nuisance, 50 and sometimes where they caused distinct casualties or kinds of harm. 51 In all other situations, apportionment was not allowed. 52

The traditional rules on apportionment were clarified by the Restatement (Second) of Torts:

Apportionment of Harm to Causes
(1) Damages for harm are to be apportioned among two or more causes where
   (a) there are distinct harms, or
   (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

49. Id. at 22-24, 621 P.2d at 1306-07 (citations omitted).
50. Section 881:
   Where two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering with his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm.
RESTATEMENT OF TORTS § 881 (1939).
51. Section 879 comment a:
   The rule stated in this section [that each independent tortfeasor is liable for the plaintiff's entire loss] does not apply where one of the tortfeasors causes one harm and the other causes another and distinct harm. Nor does the rule apply where a person causes a harm which is aggravated by another; while each of the two tortfeasors is liable for the harm he causes, the joint liability is limited to the aggravation. In such cases, both may be liable for the harm caused by the aggravation, but the second tortfeasor is not liable for the original harm.
   Id. § 879 comment a (1939). This section reflects the view that causation of casualties was more important than causation of loss. See Schwartz, supra note 2, at 507-08.
52. "Except as stated in § 881, each of two or more persons whose tortious conduct is a legal cause of a harm to another is liable to the other for the entire harm." RESTATEMENT OF TORTS § 875 (1939). "Except as stated in § 881, each of two persons who is independently guilty of tortious conduct which is a substantial factor in causing a harm to another is liable for the entire harm, in the absence of a superseding cause." Id. § 879 (1939).
(2) Damages for any other harm cannot be apportioned among two or more causes.

Furthermore, “[i]f two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused.”

The scope of apportionment recognized by the Restatement is about as broad as that recognized by the courts. The Restatement even clarified some of the terminological confusion by giving a new term for this concept, “apportionment of harm to causes.”

Despite the abundance of authority allowing apportionment among tortfeasors, the myth of nonapportionment persists. One reason for the persistence of the myth is that the terminology of “joint tortfeasor” is too deeply embedded.

Another reason for the persistence of the myth of nonapportionment is the failure to distinguish apportionment by blame.
worthiness and apportionment by causation of loss. Although these methods of apportionment are fundamentally different, some courts have considered them to be practically the same. Prior to the adoption of comparative fault, some courts disallowed apportionment by causation of loss because they disallowed apportionment by blameworthiness. And after the adoption of comparative fault, some decisions are unclear on whether the court is allowing apportionment by blameworthiness, apportionment by causation of loss, or both.

The persistence of the myth is not related to the discussion of the merits of apportionment by blameworthiness (such as comparative negligence). The merits of apportionment by causation of loss have not been raised by the opponents of apportionment by blameworthiness. And the proponents of apportionment by blameworthiness have not criticized apportionment by causation of loss; they simply deny that it exists.

V. APPORTIONMENT UNDER THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

The Uniform Contribution Among Tortfeasors Act is concerned with tortfeasors who are “jointly or severally liable in tort for the same injury to person or property.” Each such tortfeasor is liable for the plaintiff's entire loss, but is allowed to sue the other tortfeasors for contribution so that the loss will be divided equally among the tortfeasors.

The Act does not clarify which tortfeasors are “jointly and severally liable in tort for the same injury to person or property.”

58. See infra text accompanying notes 67-71.
60. See, e.g., Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).
63. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, §§ 2(1b) and 1939; 2 commissioners' note (1939), 9 U.L.A. 236 (1957). But an optional section 2(4) of the 1939 Act allows apportionment based on fault. Section 2(4) was adopted only by Arkansas, Delaware, Hawaii, and South Dakota. See id. § 2 commissioners' comment (1955), 12 U.L.A. 87 (1975); id. § 2 statutory notes (1939), 9 U.L.A. 237 (1957).
Before the procedural reforms, only tortfeasors who acted in concert were jointly or severally liable. But after the procedural reforms, tortfeasors who acted independently sometimes were jointly and severally liable in some states.

The Act is not concerned with tortfeasors who are not "jointly or severally liable in tort for the same injury to person or property." Following traditional tort law, each of these independent tortfeasors is liable for only a portion of the plaintiff's loss. Apportionment among such tortfeasors is based on the extent to which each tortfeasor contributed to the plaintiff's total loss.

VI. APPORTIONMENT UNDER MODERN COMPARATIVE FAULT

Comparative fault has many meanings, including apportionment by causation of loss and apportionment by blameworthiness. The adoption of comparative fault did not eliminate apportionment by causation of loss. Rather, it added an additional method: apportionment by blameworthiness.

Apportionment by causation is based on the extent to which each person contributed to the plaintiff's loss. This method of apportionment is practical if there is a reasonable basis for deciding the extent to which each person contributed to the plaintiff's loss. Apportionment by blameworthiness is based on the relative degree of blameworthiness of each person's conduct. This involves not only an ordinal comparison of whether one person was more blameworthy than another, but also a cardinal comparison of the extent to which one person was more blameworthy than the other. This method of apportionment is practical if the blameworthiness of each person's conduct differs in degree, rather than in kind.

These two methods of apportionment have a fundamental difference. With apportionment by causation, the degree of blame-

64. See supra text accompanying notes 39-40.
65. See supra text accompanying notes 43-47.
66. See supra text accompanying notes 37-40.
69. See supra text accompanying notes 53-54.
70. Schwartz, supra note 4, at 196-97, 201-02.
71. Id. at 202 n.47; Schwartz, supra note 2, at 512.
worthiness is immaterial. With apportionment by blameworthiness, the extent to which each person contributed to the loss is immaterial.

There is no conflict between these two methods where one method is not possible. If there is no reasonable basis for determining the extent to which each tortfeasor contributed to the loss, apportionment by causation is not possible and apportionment can be based only on blameworthiness. If blameworthiness of each tortfeasor differs in kind, rather than in degree, apportionment by blameworthiness is not possible and apportionment can be based only on causation.

But where both methods are possible, the mixing of these two methods of apportionment creates a problem. There are at least three ways of dealing with the problem of the relative importance of apportionment by causation and apportionment by blameworthiness.

First, apportionment by causation can be the primary method of apportionment. If there is a reasonable basis for determining the extent to which each person contributed to the loss, apportionment is by causation, regardless of the degree of blameworthiness. For example, if the trier of fact decided that 80% of the loss was caused by one tortfeasor and 20% was caused by the other tortfeasor, neither tortfeasor could appeal on the ground that the percentages are disproportionate to the degree of blameworthiness of each person. Under this method, apportionment by blameworthiness is allowed only to the extent that there is no reasonable basis for determining the extent to which each person contributed to the loss, and thus apportionment by causation is not possible.72

Second, apportionment by blameworthiness can be the primary method of apportionment. If blameworthiness differs in degree, apportionment is by blameworthiness, regardless of the extent to which each person contributed to the loss. For example, if the trier of fact decided that one tortfeasor was three times as negligent as the other tortfeasor (and thus that one tortfeasor was liable for 75% of the plaintiff's loss and that the other was liable for 25%), neither tortfeasor could appeal on the ground

72. Sometimes the loss can be apportioned partly by causation, with a further apportionment by blameworthiness. See infra note 79.
that the percentages are disproportionate to the amount of loss caused by each person. Under this method, apportionment by causation is allowed only if blameworthiness differs in kind, and thus apportionment by blameworthiness is not possible.

Third, causation and blameworthiness can be considered together, with neither having priority. This method gives the trier of fact great discretion in deciding the relative importance of blameworthiness and causation. Thus, no one could appeal on the ground that the apportionment was disproportionate to the degree of blameworthiness or disproportionate to the amount of loss caused by each person.

The Uniform Comparative Fault Act makes apportionment by causation of loss the primary method of apportionment. Thus, where there is a reasonable basis for determining the extent to which each tortfeasor contributed to plaintiff's loss, each tortfeasor is liable only for that share of the loss. Where apportionment by causation is not possible (because there is no reasonable basis for determining the extent to which each cause contributed to the loss), apportionment is by blameworthiness. In making the apportionment by blameworthiness, the plaintiff’s loss is apportioned between the plaintiff and the tortfeasors collectively, and each tortfeasor is liable for the entire loss apportioned to the tortfeasors. But each tortfeasor can sue the other tortfeasors for contribution. Contribution is based on the relative blame-

73. “If the defendants cause separate harms or if the harm is found to be divisible on a reasonable basis, however, the liability may become several for a particular harm, and contribution is not appropriate. [See] RESTATEMENT (SECOND) OF TORTS § 433A (1965).” UNIFORM COMPARATIVE FAULT ACT § 4 comment (1979), 12 U.L.A. 52 (Supp. 1991). Furthermore:

The doctrine of avoidable consequences is expressly included in the coverage.

... Thus, negligent failure to fasten a seat belt would diminish recovery only for damages in which the lack of a [seat belt] restraint played a part .... A similar rule applies to a defendant's fault; a physician, for example, negligently setting a broken arm, is not liable for other injuries received in an automobile accident.


75. “The common law rule of joint-and-several liability of joint tortfeasors continues to apply under this Act.... The plaintiff can recover the total amount of his judgment against any defendant who is liable.” Id. § 2 comment (1979), 12 U.L.A. 49 (Supp. 1991).

worthiness of each tortfeasor,\textsuperscript{77} rather than equal shares as under the Uniform Contribution Among Tortfeasors Act.\textsuperscript{78}

In cases that have specifically considered the distinction between apportionment by causation and apportionment by blameworthiness, the courts follow the policy of the Uniform Comparative Fault Act and make apportionment by causation the primary method of apportionment.\textsuperscript{79}

Apportionment by causation of loss is superior to apportionment by blameworthiness. Apportionment by blameworthiness is inherently subjective and arbitrary.\textsuperscript{80} But apportionment by causation of loss is superior to apportionment by blameworthiness.


\textsuperscript{78} See supra text accompanying notes 62-63.

\textsuperscript{79} Protectus Alpha Navigation Co. v. North Pac. Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985) (applying Washington and admiralty law). In Protectus, the plaintiff’s ship caught fire (due to the negligence of its crew) while refueling at the defendant’s dock. The defendant’s foreman ordered the ship to cast off, contrary to the advice of the firefighters who had almost extinguished the fire. The court held that the extent of the liability of the defendant was based on the loss that occurred after the ship cast off, not on the relative negligence of the parties. “The principles of comparative negligence are not applicable when damages can be apportioned to separate causes....” Id. at 1383.

State ex rel. Tarrasch v. Crow, 622 S.W.2d 928 (Mo. 1981). In this case, a student was injured when the driver of his school bus negligently left the bus unattended, another student threw a ruler that hit the plaintiff in the eye, and a doctor negligently treated the eye. The student sued the other student, the bus driver, the doctor; the defendants filed crossclaims. The court held that the doctor was liable for only the extra loss caused by the negligent treatment.

Kalland v. North American Van Lines, 716 F.2d 570 (9th Cir. 1983) (applying Montana law). In Kalland, the plaintiffs were injured in two motor vehicle collisions a few minutes apart. The court stated, in dictum, that if the harm can be apportioned by causation, it should be so apportioned, and there is no need to compare the negligence of the parties. But if the harm is indivisible, apportionment should be by the relative degree of negligence. “Where injuries can be properly apportioned to separate causes based on evidence in the record, there is no occasion to invoke the doctrine of comparative negligence....” Id. at 573. Accord McLeod v. American Motors Corp., 723 F.2d 830 (11th Cir. 1984) (applying Florida law); Fidelity Sav. & Loan Ass’n v. Astns Life & Casualty Corp., 440 F. Supp. 882 (N.D. Cal. 1977), aff’d, 647 F.2d 933 (9th Cir. 1981).

Sometimes the loss can be apportioned partly by causation, with a further apportionment by blameworthiness. In Pittsburgh S.S. Co. v. Palo, 64 F.2d 198 (6th Cir. 1933) (decided under the Jones Act), a seaman’s arm was injured in two separate accidents, four days apart. The court stated, in dictum, that the loss from one accident should be apportioned by causation from the loss from the other accident; and then the loss from each accident should be apportioned by blameworthiness. In The Calliope, 1 Lloyd’s Rep. 84 (P. 1970) (admiralty case; dictum applying same principle to all tort cases), a ship was damaged in two collisions. The court held that the loss from one collision should be apportioned by causation from the loss from the other collision; and then the loss from each collision should be apportioned by blameworthiness.

sation is objective and rational, since it is possible only if there is a reasonable basis for determining the extent to which each person contributed to the plaintiff's loss. Causation has always been the essence of all tort liability. Although there sometimes was liability without blameworthiness, there never was liability without causation. Since no one should be liable for more harm than he causes, causation rather than blameworthiness should be the primary basis for the extent of liability, as well as the fact of liability. Thus, causation should be the primary method of apportionment. Apportionment by blameworthiness should be allowed only to the extent that apportionment by causation is not possible.

81. See supra text accompanying notes 53-54.
82. Schwarts, supra note 2, at 501-08.
One who decisively contributes to bring a mischief on himself may not impute it to another, ... but he who does hurt to his neighbor cannot escape liability for the damage thereby occasioned by showing that the person he has injured has also sustained another or additional damage of the same character through separate acts or omissions of his own. In such cases, each party is chargeable with the consequences of his own conduct, and neither of them is at liberty to shift his burden to the shoulders of the other.

Id. at 680.
UNITED STATES MAGISTRATE JUDGES:
SUGGESTIONS TO INCREASE THE EFFICIENCY OF
THEIR CIVIL ROLE

Michael J. Newman*

I. INTRODUCTION

Only some lawyers, few law students, and almost none of the
public know what United States magistrate judges are, how and
in what respect they differ from federal district judges (or even
that they are federal judicial officers), or the nature of their
distinct authority. This article answers the fundamental question,
what is a United States magistrate judge? and examines magis-
trate judges' role in civil litigation. To this end, the article is
comprised of two parts. Part one reviews magistrates' civil
function and expanding civil jurisdiction as evidenced by statute
and by application of the consent doctrine. Part two, premised
on the idea that magistrate judges are and will foreseeably
remain an essential element of district court case resolution,
provides suggestions to increase magistrates' judicial efficiency
within their role as now defined.

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graduate of American University's Washington College of Law. The opinions expressed in this
article are those of the author, and not of Magistrate Judge Sherman.

1. On December 1, 1990, the name “United States magistrate” was changed to “United

2. These identification problems are likely caused or compounded by the fact that not
all attorneys practice in federal court, and that, of those who do, only some appear before
magistrates. An additional factor may be that the term “magistrate” has a different
meaning in federal and state court. In some states, for example, magistrates, although
empowered to issue warrants and set bond, need not have legal training. See Judge Moran
Responds To Article By Non-Lawyer “Magistrate Judge,” 17 Fed. Magistrate Judges Ass'n
Bull. 4 (June 1991) (describing North Carolina law). United States magistrate judges, in
contrast, although also authorized to issue arrest warrants, 18 U.S.C. § 3041 (1988), and
set bail, 18 U.S.C. § 3141 (1988), must have, among other criteria, at least five years of
good standing bar membership prior to appointment. 28 U.S.C.A. § 631(b)(1) (West Supp.

3. Throughout this article, the terms “magistrate” and “magistrate judge” are used
interchangeably to denote United States magistrate judges.
II. THE MAGISTRATE'S CIVIL ROLE

A. What Is A United States Magistrate Judge?

United States magistrate judges are non-article III judicial officers who, sitting in federal court, hear cases identical to, and in addition to, those heard by district judges. As a direct result of their non-article III status, magistrate judges often render either reports and recommendations ("R&Rs") appealable to the district judge to whom the case is assigned, or orders

4. Article III, section 1 provides in relevant part:

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.


Two obvious distinctions of constitutional dimension between magistrates and district judges need to be made at the outset. First, magistrates are appointed by the district judges with whom they sit, see 28 U.S.C. § 631(a) (1988), whereas district judges are appointed by the President, by and with the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2. Second, full-time magistrates serve an eight-year renewable term, 28 U.S.C. § 631(e) (1988) (part-time magistrates serve four years, see id.), unlike district judges, who have life tenure and the accompanying undiminished salary. U.S. CONST. art. III, § 1. For these reasons, the unique powers granted to article III judges, including district judges, are not bestowed upon magistrates.

5. See discussion of civil consent, infra notes 29-34 and accompanying text.


7. See 28 U.S.C. § 636(b)(1) (1988), which provides in relevant part:

[any party may serve and file written objections to [the magistrate's R&R]. . . .

A judge of the court [i.e., a district judge] shall make a de novo determination of those portions of the [R&R] to which objection is made. [He or she] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

Accord FED. R. CIV. P. 72. A party's failure to timely object to the magistrate's R&R may operate as a waiver of the right to appeal that issue, provided the circuit court of appeals employs such a waiver rule. Thomas v. Arn, 474 U.S. 140, 144, 155 (1985). For circuits adopting the waiver rule, see Howard v. Secretary of Health & Human Services, 932 F.2d 505, 508 (6th Cir. 1991); Powell v. United States Bureau of Prisons, 927 F.2d 1239, 1246 (D.C. Cir. 1991) (Sentelle, J., dissenting); Small v. Secretary of Health & Human Services, 892 F.2d 15, 16 (2d Cir. 1989); Heath v. Jones, 863 F.2d 815, 822 (11th Cir. 1988).
appealable directly to the appropriate federal circuit court of appeals.\(^8\) Two independent factors determine whether the magistrate issues a R&R or an order: whether the motion ruled on by the magistrate is dispositive of the case, and whether the parties have consented to trial before the magistrate.\(^9\) Consent operates to dress the magistrate with the full authority of the district judge's robe, empowering the magistrate to hold trial in civil cases of any type,\(^10\) both jury and non-jury, and to order the entry of judgment.\(^11\)

**B. The Creation of Magistrates**

Magistrates were established by the Federal Magistrates Act of 1968,\(^12\) the history and purpose of which has been previously well-summarized in both law review articles\(^13\) and case

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8. See 28 U.S.C. § 636(c)(3) (1988) ("Upon entry of final judgment [in a consent case,] an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court.") See also Fed. R. Civ. P. 73(c) (identical provision). If the parties in a consent case so specify, a magistrate's orders may, instead, be appealed first to the district judge, and then to the circuit court of appeals. 28 U.S.C. § 636(c)(4) (1988); Fed. R. Civ. P. 73(d). For the procedures relevant to such an appeal, see Fed. R. Civ. P. 74-76.

9. If a civil case is of the non-consent variety, the magistrate may only recommend, not order, that a dispositive motion, e.g. to dismiss or for summary judgment, be granted or denied. 28 U.S.C. § 636(b)(1)(B) (1988); Fed. R. Civ. P. 72(b). The magistrate may, however, issue an order when ruling on any nondispositive motion in a non-consent case, e.g., discovery motions of all types, including to compel the production of documents or to limit the scope of discovery. 28 U.S.C. § 636(b)(1)(A) (1988); Fed. R. Civ. P. 72(a).

In consent cases, on the other hand, the magistrate may issue an order as to any motion, whether dispositive or nondispositive. 28 U.S.C. § 636(c)(1) (1988); Fed. R. Civ. P. 73(a).

10. See 12 C. Wright & A. Miller, Federal Practice and Procedure § 3077.1, at 63 n.11 (Supp. 1991) [hereinafter C. Wright & A. Miller].


13. Note, Is the Section 1983 Civil Rights Statute Overworked? Expanded Use of Magis-
law. Briefly stated, magistrates first replaced and absorbed the duties of United States commissioners, non-lawyers who issued federal arrest warrants and administered oaths, among other limited duties. The 1968 Act, designed to improve the quality of commissioners and to "relieve courts of unnecessary work," authorized district judges to appoint magistrates; established the current eight-year magistrates' term; and, with respect to civil cases, confined the authority of magistrates to, *inter alia*, assisting district judges "in the conduct of pretrial or discovery proceedings," serving as a special master, and conducting preliminary review of *habeas corpus* petitions.

The Act was amended significantly in 1976 and 1979. The 1976 amendments clarified the civil authority of magistrates to conduct evidentiary hearings in *habeas* cases and prisoner civil rights actions brought pursuant to 42 U.S.C. § 1983; to issue R&Rs when ruling on motions to dismiss or for summary judgment; and to review administrative denials of Social Security disability benefits.

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*Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980).


*Id.* at 1109 (codified as amended at 28 U.S.C. § 631(e) (1988)).


The 1979 amendments established the civil consent doctrine.

C. The Effect of Local Rules

Neither the Magistrates Act nor the Federal Rules of Civil Procedure dictate the magistrate's precise civil role. Instead, local rules particular to each district establish the limits, if any, on the magistrate's pretrial authority. The Southern District of Ohio's local rules, for example, authorize district judges in their discretion to "request magistrates to perform such duties as are not inconsistent with the Constitution and laws of the United States." While the Northern District of Ohio similarly authorizes magistrates to perform "the duties generally provided by 28 U.S.C. § 636 and such other duties as may be assigned by the Court or a Judge thereof," that district's local rules prohibit magistrate referral where a named defendant (other than a "John Doe") fails to enter an appearance.

D. The Consent Doctrine

Consent in its purest form operates simply: once the parties to civil litigation mutually consent, the case is handled from that moment on by the magistrate, up to and including trial. Non-consent, on the other hand, permits the district judge to retain case control and hold trial. How the district judge so retains control (that is, how the district judge utilizes the magistrate) is a

25. Id.
26. S.D. OHIO R. 2.4.3, reprinted in Ohio Rules of Court: Federal 499 (West 1991). Magistrates in the Southern District's Western Division (i.e., Cincinnati and Dayton, Ohio) may, for example, hear motions for injunctive relief, judgment on the pleadings, summary judgment, or dismissal under Fed. R. Civ. P. 12(b)(6); evaluate habeas petitions and preside over § 1983 prisoner civil rights actions; review Social Security disability benefits appeals; hold settlement conferences; conduct jury voir dire; receive grand jury returns; and accept civil jury verdicts in the district judge's absence. S.D. Ohio, W. Div. Ordinance No. 81-2, reprinted in Ohio Rules of Court: Federal 518-21 (West 1991).
30. See id.
matter in the judge's discretion and differs from judge to judge.\(^{31}\) Thus, as some district judges employ magistrates in non-consent cases, it is the magistrate who conducts all civil pretrial proceedings, from the motion to dismiss through discovery and summary judgment to the final pretrial conference, with the district judge then accepting "return" referral of the case just prior to trial. In such circumstances, the parties' decision whether to consent functions merely to direct which judicial officer will preside at trial, the district judge or magistrate. Other district judges control their dockets differently, however, by handling most or all pretrial aspects of the non-consent case themselves. In that setting, the parties' non-consent decision functions to preclude magistrate involvement in their case.\(^{32}\)

As can be seen from the above, the consent doctrine embodied in 28 U.S.C. § 636(c) is an important litigation tool to the skillful attorney. If the attorney thinks the district judge is likely to make a favorable ruling, and if the district judge does not refer non-consent cases to the magistrate, the smart litigator will refuse consent.\(^{33}\) Similarly, if a litigator sees the magistrate as potentially supportive of the litigator's position, consent should be agreed to. The only wrinkle in this approach, from the litigator's view, is that consent must be mutual.\(^{34}\) Thus, if opposing counsel disagrees on whether to consent, the strategy is to no avail.

Consent has other implications as well. It can be advantageous because if a magistrate presides over much or all of the case pretrial, the magistrate has an opportunity to become familiar

\(^{31}\) See, e.g., 28 U.S.C. §§ 636(b)(1)(A) (1988) ("[A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court ....") (emphasis added) and 636(b)(1)(B) (1988) ("[A] judge may also designate a magistrate to conduct hearings ....") (emphasis added). See also id. § 636(b)(3) (1988) ("A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.")

\(^{32}\) This is not to suggest that a case referred to the magistrate will be referred back to the district judge if the parties elect not to consent.

\(^{33}\) Parties are informed of the consent option as follows: when suit is first filed, the clerk so advises the parties; thereafter, either the district judge or magistrate may again remind the parties, provided it is also then explained that "they are free to withhold consent without adverse substantive consequences." 28 U.S.C.A. § 636(c)(2) (West Supp. 1991).

with the issues, the law, and the parties, and thus develop a good foundation upon which to hold trial. In addition, consent gives the parties some control over the case, as they, not the court, get to select the judicial officer presiding at trial.

Consent also has disadvantages. By giving parties the option of choosing whether to consent, they are motivated to "judge shop," an undesirable practice. Also, there is nothing that a party can do to secure a magistrate for trial if that party is the only one that elects to consent.

III. SUGGESTIONS TO INCREASE MAGISTRATE JUDGES' EFFICIENCY

The statutory expansion of magistrates' authority as detailed, and the existing backlog in federal courts, are strong evidence that the civil authority of magistrates, both pretrial and trial, is increasing. The following suggestions are made in that light.

1. Employ Additional Magistrate Judges

If, as this article suggests, magistrate judges are successful in easing the civil caseload burden faced by federal district courts, a sensible idea is to employ as many magistrates as is economically and logistically feasible. To this end, it is signifi-
significant that district judges are appointed by the President, by and with the advice and consent of the Senate, whereas magistrates are appointed by the district judges themselves. Thus, if, for political or other reasons, district judge vacancies are left open although a need exists for their immediate service, magistrates can fill that void by being appointed more quickly.

2. Employ More Law Clerks to Magistrate Judges

Regulations permit magistrate judges to employ one law clerk and district judges to employ two. While this rule is likely residual, a holdover from an earlier time when the authority of magistrates was limited, its purpose should today be questioned.

As anyone familiar with federal litigation is aware, district courts decide issues presented to them for review via opinions which are either written by the district judge or magistrate, or drafted by the judge's or magistrate's law clerk(s). It is no surprise then that, as the number of civil filings increases, and as civil cases progress in complexity, judges, magistrates, and their staffs are hard-pressed to issue opinions at their current productive rate. Because litigants and counsel are often dependent upon such rulings to continue forward with their cases, the

42. This is not an abstract concern. Today, 116 district court vacancies exist, and only 11 nominations are pending; and 25 court of appeals vacancies remain, with only 3 nominations pending. Fourteen of these vacancies are classified as "emergencies" by the Judicial Conference because they have been pending for more than eighteen months. 23 The Third Branch 11 (Admin. Off. U.S. Cts., June 1991).
45. The exception to this rule occurs when, ruling on a motion, the court asks the prevailing party to draft the proposed order.
46. See, e.g., Rep. of the Proc. of the Jud. Conf. of the U.S. 33 (Admin. Off. U.S. Cts., Mar. 12, 1991) ("In September, 1990, the Chief Justice appointed an Ad Hoc Committee on Asbestos Litigation to address the substantial number of asbestos personal injury cases and the complex issues they present.")
47. For example, a defendant may resist complying with plaintiff's discovery requests until its motion to dismiss is decided. Similarly, both parties may lessen or discontinue trial preparations in anticipation of the court's ruling on one or both of their summary judgment motions.
court's "slowdown" will directly affect, over time, the rate at which civil cases are decided and the attractiveness of federal courts as a means to resolve disputes. While I, therefore, do not propose the foolhardy notion that the inability of magistrates to each hire one additional law clerk will cause the ruin of our federal court system, I do suggest that the hiring of extra clerks will reap benefits far in excess of their relatively inexpensive cost.48

Several factors support this analysis. First, the consent doctrine operates to lessen district judges' caseloads only if parties and counsel routinely consent. One factor motivating consent is the idea that magistrates can bring cases to trial faster than district judges because, in theory at least, their calendars are not burdened by time-consuming felony criminal trials.49 But this idea loses force if a backlog of opinion writing chains magistrates to their desks, preventing them from having the time to hear additional motions or hold trials.

Second, even if magistrates can write and issue opinions quickly without the assistance of an additional law clerk, we need to ask: is this a good use of judicial resources? For, although many magistrates choose to draft their own opinions and do so in a timely manner, these judicial officers have, through years of experience, a unique expertise in hearing oral argument, evaluating evidence, and monitoring courtroom procedure. On the other hand, law clerks, once properly trained, have a specific expertise in research and writing. Thus, when necessary because of an overcrowded civil docket, does it not increase judicial economy to permit magistrates and law clerks to each perform the skills at which they are best?

48. In 1991, magistrate judges' law clerks without prior legal work experience qualify for Judiciary Salary Plan pay level 9 (approximately $26,000 annually); with bar membership, and four years of legal experience, two of which were spent as a federal clerk or staff attorney, magistrates' law clerks qualify for JSP pay level 14 (approximately $52,000 annually). 9 Guide to Jud. Pol'y & Proc., ch. V at 10 (Admin. Off. U.S. Cts., Feb. 1991).

49. One could therefore argue that, because district judges frequently hold jury trials from which no opinions issue, while magistrates more often hear motions for which opinions do issue, a better use of existing judicial resources would be to assign two law clerks to each magistrate, and one to each district judge. I do not suggest the adoption of such a rule, however, believing, as here explained, that magistrates and judges should each employ two clerks.
3. Amend 28 U.S.C. § 636(e) to Permit Magistrate Judges Issuance of Civil Contempt in Civil Consent Cases

Contempt is of two types, civil and criminal.50 Civil contempt is remedial in nature, to benefit the complainant.51 Criminal contempt, by contrast, is punitive and designed to vindicate the court’s authority.52 The purposes may overlap.53 Under either or both forms, contempt relief may include not only the imposition of a fine, but also imprisonment.54

Magistrate judges are prohibited by 28 U.S.C. § 636(e)55 from issuing both civil and criminal contempt56 in proceedings of any

51. Civil contempt, therefore, may be designed to either coerce compliance with a court order, or compensate a party for the contemnor’s offensive conduct. Lamar Fin. Corp. v. Adams, 918 F.2d 564, 566 (5th Cir. 1990).
52. Id. (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911)). The Supreme Court has suggested that, when both forms of contempt appear appropriate, civil contempt be used “to persuade a party to comply,” thus limiting criminal contempt to those instances when “disobedience continues.” United States Catholic Conf. v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 79 (1988).
53. See Hicks, 485 U.S. at 635-36. To properly characterize the contempt at issue, the court must examine the primary purpose of the contempt order or proceeding. Lamar Fin. Corp., 918 F.2d at 566; Barry v. United States, 865 F.2d 1317, 1323-24 (D.C. Cir. 1989). Construing the judge’s words alone is insufficient. Hubbard v. Fleet Mortgage Co., 810 F.2d 778, 781 (8th Cir. 1987) (citing Shillitani v. United States, 384 U.S. 364, 369 (1966)).
54. Hicks, 485 U.S. at 632. A contempt fine is classified as remedial, and thus civil in nature, if “paid to the complainant, and punitive when it is paid to the court.” Id. Similarly, contempt leading to imprisonment “is remedial if ‘the defendant stands committed unless and until he performs the affirmative act required by the court’s order,’ and punitive if ‘the sentence is limited to imprisonment for a definite period.”’ Id. (citing Gompers, 221 U.S. at 442).
55. 28 U.S.C. § 636(e) (1988) reads in its entirety as follows:
In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall
kind. Instead, the magistrate judge (1) must certify the facts constituting the alleged contempt to the relevant district judge (presumably by issuing a R&R), and (2) may order the party in question to appear before the district judge in order to show cause why contempt should not issue against him.\textsuperscript{57} It is the judge, not the magistrate, who then, “in a summary manner,” hears the evidence and punishes or sentences the contemnor accordingly.\textsuperscript{58}

Criminal contempt is, by definition, a criminal offense\textsuperscript{59} for which sentences greater than one year may be imposed.\textsuperscript{60} Because magistrate judges, as non-article III officers, can neither accept guilty pleas,\textsuperscript{61} hold trial,\textsuperscript{62} nor sentence defendants\textsuperscript{63} in felony cases, Congress correctly limited magistrates’ authority to impose such contempt.

The same argument cannot be made regarding the use of civil contempt in civil consent cases for several reasons. First, if a thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

58. Id.
59. See 18 U.S.C. § 401 (1988); see also Griffith v. Oles (In re Hipp, Inc.), 895 F.2d 1503, 1509 (5th Cir. 1990) (“[c]riminal contempt is a crime in the ordinary sense”) (quoting Bloom v. Illinois, 391 U.S. 194, 201 (1968)). Accordingly, the procedural safeguards typically associated with criminal proceedings attach, including, \textit{inter alia}, notice that the proceedings are criminal, see \textit{FED. R. CRIM. P. 42(b)}, the presumption of innocence, \textit{Griffith}, 895 F.2d at 1509, and the requirement that guilt be proven beyond a reasonable doubt.
Id.
magistrate judge is to act in a civil consent case in the same manner as would the district judge presiding over that action, logic dictates that all of the sanction powers normally granted a district judge, including the right to impose civil contempt, be granted to the magistrate judge.

Second, when such authority is vested in the magistrate judge, it conveys to the parties, if only symbolically, the idea that, in that consent case, the magistrate may truly act in all respects as a district judge. Some of the recurring practical problems now associated with civil consent that I have witnessed, for example, including litigants' perennial confusion as to whether the magistrate judge or the district judge retains final jurisdiction over their case both pre- and post-consent, might therefore be alleviated somewhat.

Third, because the section 636(e) contempt certification requirement is time-consuming, the statute as now written contradicts one of the primary purposes of magistrate judges, that is, to increase judicial efficiency. The Fourth Circuit's implementation of the rule is illustrative. In Proctor v. State Government of North Carolina, the court held that, in certifying facts to the district judge pursuant to section 636(e), the magistrate judge's R&R recommending civil contempt must be viewed as a "prima facie

64. See 28 U.S.C. § 636(c)(1) (1988) (granting the magistrate judge, in a civil consent case, authority to "conduct any or all proceedings ... [whether] jury or nonjury ... and order the entry of judgment.")

65. In discovery, for example, these powers include, among others, the right to sanction by (1) awarding costs and attorney's fees, FED. R. CIV. P. 37(a)(4); (2) ordering that specific facts be taken as established, FED. R. CIV. P. 37(b)(2)(A); or (3) striking pleadings, FED. R. CIV. P. 37(b)(2)(C).

66. District judges' civil contempt power is authorized by 18 U.S.C. § 401 (1988), which provides in its entirety:

A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as

1. Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
2. Misbehavior of any of its officers in their official transactions;
3. Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.


67. See Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980); see also C. Wright & A. Miller, supra note 10, § 3076.1, at 32 (Supp. 1991).

68. 830 F.2d 514 (4th Cir. 1987).

69. Proctor addressed only the imposition of civil, not criminal, contempt. Id. at 517 n.1.
statement” upon which the district judge may, in his or her discretion and without other evidence, find a party in contempt. Suggesting that “the better practice is to allow any party the opportunity to introduce evidence upon request,” the court went on to require district judges, after receiving such evidence, to consider that evidence “together with” the facts contained in the magistrate’s R&R. Without addressing the merits of such an approach, one thing is clear: it is slow. Instead of the magistrate imposing civil contempt directly, the magistrate is obligated to issue an opinion (the R&R) which the district judge must then read and (1) afford the parties an opportunity to present additional evidence; (2) read their written objections; (3) likely hold a hearing; and (4) review the R&R de novo. Consequently, attention is needlessly directed away from matters pending before the magistrate (a topic of crucial concern in an ongoing civil trial). Magistrates, desiring efficient judicial proceedings, may therefore discontinue using civil contempt as a viable sanction. Such a result would be a needless waste of an important weapon in the district court’s arsenal.

In addition, with respect to those litigants prone to file numerous or overly-long pleadings, the certification requirement here explained invites such abuse by giving litigants opportunities to question, in writing, the magistrate’s judgment once consent is agreed upon. That situation has the potential to create a “paper war” where there need not be one.

4. Require Parties to Attend Mandatory Settlement Conferences Conducted by Magistrate Judges

The judicially economic advantages of settling cases instead of litigating them are obvious. Magistrates can supply welcome aid in settlement efforts of the district courts by holding mandatory settlement conferences in cases which meet specific

70. Id. at 521.
71. Id. at 522.
72. All R&Rs, to which written objections are made, are reviewed by the district judge de novo. 28 U.S.C. § 636(b) (1988). To conduct that analysis with respect to a R&R recommending the imposition of civil contempt, the district judge must evaluate: (1) the harm from noncompliance; (2) the probable effectiveness of the sanction; (3) the financial resources of the contemnor and the burden the sanctions may impose; and (4) the willfulness of the contemnor in disregarding the court’s order. United States v. United Mine Workers, 330 U.S. 258, 304, 306-07 (1947).
73. They include, inter alia, making the docket less crowded, so that other unsettled
criteria designed to predict which cases will likely settle.\footnote{5} While criteria can vary from district to district, courts might well begin by examining cases in which the dispute turns on the amount of damages only, or where liability is not strongly contested.\footnote{6}

5. Change the Manner of Civil Case Referral to Alleviate District Judges' Docket Burden

As previously noted, there is no doubt that district judges' dockets are now overburdened.\footnote{7} One factor contributing to this problem is the requirement that district judges, not magistrates, conduct felony trials.\footnote{8} To alleviate that burden, district courts that have not already done so might consider dividing the docket (for a short period or indefinitely) into two categories: (1) felony criminal cases, and (2) all other matters, whether civil or misdemeanor criminal. Under this system, every case of whatever type would still be assigned for consent purposes to a district judge; but all civil cases, including discovery issues, would then be automatically referred from the district judge to a magistrate for pretrial resolution.\footnote{9} Such an ordering of the docket would alleviate the need for district judges to spend time reviewing their civil calendars in order to select those discovery or other pretrial issues ripe for magistrate referral and review.

Courts not desiring to so rearrange their docket might also consider establishing a procedure whereby civil cases, when opened, are automatically referred (but not assigned) to both district judges and magistrates in equal numbers. This procedure

\footnote{74. See Fed. R. Civ. P. 16(a)(5) (authorizing mandatory conferences to "facilitat[e] the settlement of the case").}

\footnote{75. In non-consent cases, the magistrate judge to whom the case is referred would hold the settlement conference; in consent cases, by contrast, the magistrate, in order to maintain the impartiality needed to preside at trial, would refer the settlement conference to one of the other magistrates (assuming there are more than two).}

\footnote{76. For example, a breach of contract case in which the damages, not the breach, are at issue; or, a personal injury case where the defendant is clearly liable.}

\footnote{77. See supra note 37.}

\footnote{78. See supra notes 59-63 and accompanying text. The Speedy Trial Act, 18 U.S.C. § 3161 (1988), is another factor.}

\footnote{79. Because such a referral would involve pretrial issues only, a litigant's right to trial by an article III judge would not be impinged. Compare McCarthy v. Bronson, 111 S. Ct. 1737, 1740 (1991).}
would enable a magistrate to begin working on the pretrial aspects of civil cases immediately, without waiting for referral from the district judge. The docket would likely speed up accordingly. In addition, such a procedure would introduce more litigants and counsel to the local magistrate(s). If that contact is favorable, more civil consents might result. This, too, would hasten the dockets of district judges without sacrificing fairness to counsel or parties.

6. Lengthen Magistrate Judges' Tenure

Article III provides district judges with life tenure in order to foster separation of powers among the three branches of government, maintain the judiciary's independence from political forces, and promote confidence in judicial decisions, among other concerns. As discussed, magistrate judges are not appointed for life, but for eight-year renewable terms. Because magistrates act in civil consent cases with the same authority as district judges, the criteria used to support district judges' life tenure is applicable when critiquing the wisdom of magistrates' eight-year term.

Viewed in that light, eight years is an insufficient period to obviate the potential for ethical abuse a short term approach fosters. For example, magistrates who suspect in the latter years of their tenure that they will not be reappointed (or who fail to seek reappointment), might be unnecessarily forced into an ethical conflict by having to decide cases argued by the very firms for whom they may subsequently be employed. The obvious rebuttal to that argument is that if a magistrate is being interviewed by a firm, or has accepted employment with a firm, the magistrate should discontinue hearing cases argued by that firm. The practical problem that argument overlooks, however, is that before job inquiries are made, the magistrate may not even know with which firm he or she seeks employment. Thus, if the magistrate

80. For the provisions of article III, see supra note 4.
first leaves the magistrate position, then looks for work in private practice and is hired immediately by a firm whose case(s) the magistrate ruled favorably on just weeks before, the appearance of impropriety would be needlessly great, even if no ethical duties were breached.

A second ethical conflict of concern is that the eight-year term may not be long enough to insulate the magistrate with the freedom needed to make unpopular decisions. As an illustration, suppose that a magistrate in year seven of his or her term is faced with an issue of lasting economic importance to the local legal community. Would the fact that the magistrate is thinking of leaving the bench at the end of year eight influence the magistrate when ruling on that issue? It should not, but that is not the relevant test. Of relevance is not only whether ethical violations occur, but whether the public, rightly or not, perceives them as occurring or likely to occur. For, without continued public trust, the role of magistrates, as judges to whom parties may consent, will lessen.

A longer term would not automatically resolve either of these potential ethical conflicts. It would, though, at least postpone the dilemmas for a sufficient number of years, during which time the probability of the magistrate desiring term renewal would likely increase, and the risk of ethical conflict would likely decrease.

The appointment rule also presents problems of another scope: whether an eight-year term suggests that the role of magistrate is nothing more than a temporary job for the lawyer now sitting on the bench. This issue has two aspects. First, whether the eight-year rule influences civil litigants to treat the magistrate's rulings with less weight because they were not issued by a district judge. Second, whether the rule operates to lessen the number of civil consents by either compromising parties' perceptions of magistrates, or by causing additional confusion between the roles of magistrates and district judges.

The latter problem is easily remedied through education. In this regard, local judges and magistrates might consider drafting one or more form paragraphs which explain to parties the role and importance of magistrates. The forms could then be distributed to parties or counsel when civil cases are initially opened.

84. For example, the permissible scope of lawyer advertising.
85. A corollary is whether civil litigants treat the magistrate himself or herself with less respect because he or she is not a district judge.
86. The Southern District of Ohio, for example, employs such a rule to explain the
Resolution of the former problem is more difficult. For example, I have found in my clerking experience that some civil litigants appeal almost every R&R or order filed by the magistrate, while others appeal none. Although those appeals may be an attempt to challenge the magistrate's authority or knowledge of the relevant facts or law, they can as easily be merit-based.

In light of the above, the fourteen-year term served by bankruptcy judges\(^7\) might be a satisfactory compromise of these issues.

7. Establish an Early Consent Deadline

As consent currently works, the parties are not restricted by statute from consenting when they so desire, at any stage of the litigation.\(^8\) By requiring consent to take place earlier, perhaps within a short period of the filing of defendant's answer, the court, not the parties, will retain additional control over cases. To illustrate this point, suppose that a magistrate manages civil consent cases in a more "direct" fashion than the non-consent civil cases referred to the magistrate by the district judge. Thus, it is only in the consent cases that the magistrate might require the parties to participate in numerous conferences, including a settlement conference. Parties desirous of avoiding the court's settlement efforts would merely have to delay their consent decision until a time when a settlement conference could no longer be conveniently scheduled.\(^9\) As a result of the parties' manipulation, a case ripe for settlement might not settle but proceed instead to trial, wasting judicial resources and needlessly increasing litigation costs.

Late consent costs judicial efficiency in other ways as well. For example, under the current system, a district judge might routinely delay civil trials just prior to commencement because the judge's court calendar is full. The district judge would have little incentive to inform the magistrate of that decision both

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\(^8\) Local rules in some districts may establish consent deadlines, however.
\(^9\) This scenario assumes, of course, that the magistrate, once informed of the parties' consent, does not then issue a new calendar order or otherwise continue the trial date.
because the magistrate would have completed his or her pretrial role in the case, and because the case remained non-consent. Thus, the fact that a magistrate is then available to try the case may never be brought to the parties' attention, and parties willing to then consent in order to proceed immediately to trial will not get that opportunity. In such a circumstance, if consent happened earlier in the litigation, trial may or may not have occurred any faster. But, both the district judge's and magistrate's trial calendars would have been used more efficiently, with both knowing well in advance which cases they would and would not eventually try.\footnote{An important benefit of such advance planning is that the judge or magistrate is given the time to immerse himself or herself in the facts, law, and procedural history of the case well before trial.}

As further proof that late consent is unproductive, it is noteworthy that a magistrate, assuming the district judge has no objection, may work on a non-consent case even after the final pretrial conference.\footnote{Such a situation may arise in a complex civil case, for example, when the parties file cross summary judgment motions on or near the dispositive motions deadline.} If the district judge is one who adheres to trial dates without exception, the judge is then left with little or no time to become familiar with the case once the magistrate refers it back.\footnote{Even if early consent is not adopted, district judges and magistrates may want to consider scheduling biweekly or monthly reviews of pending civil cases with approaching trial dates. During such a briefing, the magistrate could inform the district judge of the case status by summarizing the facts, his or her rulings, and pending trial issues.} Early consent alleviates that burden by permitting the magistrate or district judge in charge of the case to monitor not only his or her own progress in resolving motions and issuing opinions, but also the parties' progress in completing discovery. This ability to monitor the case provides the magistrate or district judge with an opportunity to adjust the calendar order accordingly, if necessary.

\subsection*{IV. CONCLUSION}

The civil role of magistrate judges has increased dramatically since their creation in 1968. All indications are that magistrates will continue to serve both litigants and the court system well. As suggested in this article, even greater service to litigants and the courts could be accomplished by providing for more effective and efficient use of United States magistrate judges.
IRCA, LABOR CERTIFICATION AND "PRECONCEIVED INTENT": IS THERE AN UNRESOLVED GAP IN THE LAW?

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I. INTRODUCTION

The labor certification process facilitates American employers to bring in aliens to fill job vacancies where American workers are scarce or nonexistent. (The terms "employer" and "business" will be used interchangeably throughout this article.) The Immigration Reform and Control Act of 1986 ("IRCA"), however, is a check not only on illegal aliens, but also on skilled and professional alien labor. This latter effect is primarily indirect. Usually, aliens are first recruited to jobs on temporary worker visas such as H-1 and L-1. At the time of recruitment, aliens may be out of the country or on a student visa, either J-1 or F-1, or may be on some other nonimmigrant visa. The focus here will be on

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aliens who are already in the United States and have H-1 or L-1 visas.  

After testing the alien's work performance, the employer may file an application for labor certification on the alien worker's behalf. The employer/petitioner must certify that American workers are unavailable, and that prevailing wages will be offered so that the United States labor market will not be adversely affected by such an alien worker's entry.  

A problem arises, however, as to what happens to the alien's permanent residency application if the temporary worker visa expires before the permanent residence application (commonly referred to as "adjustment of status" or "visa preference") is processed and the business continues to employ the alien. Another related issue under IRCA is what, if any, penalties such an employer will face by continuing to employ the alien worker.

This article will attempt to assess the labor certification "adjustment of status" and "preconceived intent" concepts and how they interact with IRCA, and what, if any, recourse the alien, the employer, and the immigration practitioner have, to solve the problem without violating the immigration laws. Usually the alien's and employer's objectives are identical; therefore, the immigration law practitioner's focus should be from their viewpoint.

II. HIRING ALIENS

When an American employer hires an alien, two problems may occur if an H-1 or L-1 petition is filed for a period of three years (the maximum period permissible for the initial petition) and then a labor certification is filed during the alien worker's authorized period of stay. If the two-part Labor Certification/Preference Petition process has not been completed, the alien would have to leave the country when the H-1 or L-1 visa expires. Failure to leave the country will place the alien under the "out of status" or "illegal alien" category. Furthermore, continued employment with the employer will be a violation of the alien's immigration

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status and of IRCA by the employer. Even if the alien employee works without pay, employment would be unauthorized. This problem arises for those aliens hired after November 6, 1986, IRCA’s enactment date. Employees hired prior to that date may be allowed to continue working despite the problems that may arise when they apply for lawful permanent resident status.

The employer is faced with a dilemma when an alien worker is out-of-status, but indispensable. Should the employer disregard IRCA and continue to employ this alien while the labor certification is pending? The answer is no. If the employer continues to employ the alien, the employer would be violating section 274A(a)(2) of IRCA, and be subject to a fine of $250 to $2,000 for the first offense, and up to $10,000 per unauthorized alien for subsequent offenses.

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8. See Matter of Hall, 18 I. & N. Dec. 203 (BIA 1982). (A missionary for the Unification Church was deemed to be employed within contemplation of section 245(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1255(c)(2) (1988) and, therefore, his employment without the permission of the Immigration and Naturalization Service (“INS”) barred him from adjusting his status to permanent residence. Id. at 207.)

9. IRCA, supra note 1.


(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.


(i) Examination of documents and completion of Form I-9.

(A) Complete Section 1 - “Employee Information and Verification” on the Form I-9 at the time of hiring; or if an individual is unable to complete the Form I-9 or needs it translated, someone may assist him or her. The preparer or translator must read the Form to the individual, assist him or her in completing section 1 - “Employee Information and Verification,” and have the individual sign or mark the Form in the appropriate place. The preparer or translator should then complete the “Preparer/Translator Certification” portion of the Form I-9; and

(B) Present to the employer or the recruiter or referrer for a fee documentation as set forth in paragraph (b)(1)(v) of this section establishing his or her identity and employment eligibility within the time limits set forth in paragraphs (b)(1)(i) through (v) of this Section.


Civil penalties for violations of § 274A(a)(2) of IRCA are provided for in 8 C.F.R. §
Another factor that the employer, and his attorney, should keep in mind is that the Immigration and Naturalization Service will scrutinize labor certifications filed after November 6, 1986, to ascertain if the employee was authorized to work after that filing date. If the employee was not authorized to work, then the employer may be subject to sanctions under IRCA. Some of the ameliorative provisions of IRCA would not apply to such unauthorized workers. The employer could not claim under the “good faith” exception of IRCA, section 274A(a)(3), that compliance with the I-9 employment eligibility verification procedures at the time of employment bars the employer from being sanctioned. The argument that the employer was attempting to legalize the alien’s immigration status by filing a labor certifica-

274a.10 as follows:

(b) Civil Penalties. An employer or a recruiter or referrer for a fee may face civil penalties for a violation of section 274A of the Act....

1. Respondent found by the Service or an Administrative Law Judge to have knowingly recruited or referred for a fee, an unauthorized alien for employment in the United States or to have knowingly continued to employ an unauthorized alien, shall be subject to the following order:
   (i) To cease and desist from such behavior;
   (ii) To pay a civil fine according to the following schedule:
       (A) First offense - not less than $250 and not more than $2,000 for each unauthorized alien, or
       (B) Second offense - not less than $2,000 and not more than $5,000 for each unauthorized alien; or
       (C) More than two offenses - not less than $3,000 and not more than $10,000 for each unauthorized alien; and
   (iii) To comply with the requirements of section 274a.2(b) of this part, and to take such other remedial action as is appropriate.


   A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

15. See 8 C.F.R. § 274a.2, “verification of employment eligibility,” which sets forth the specifics for employment eligibility verification and the necessary requirements for completion of the Form I-9.

tion petition, and was thereby acting in conformance with the general law, would not be acceptable. Apart from that, the employer could not claim that failure to terminate such an employee was intended to avoid violating the anti-discrimination provisions of IRCA, section 274B(a)(1). Those provisions apply only to the firing of aliens or legal permanent residents authorized to work in this country. The employer also cannot continue to hire the alien after the Labor Department has issued a labor certification and the visa number is pending without running afoul of IRCA. Therefore, the employer should extend the H-1 or L-1 petitions prior to the expiration of the alien's current visa.

III. OBTAINING INTERIM WORKER VISAS

The attorney who counsels the parties involved and files the interim H-1 or two-part Labor Certification/Preference Petitions may also be liable for criminal prosecution under IRCA's fraud provisions, regardless of whether the attorney had knowledge of the violation of status or unauthorized employment. For the reasons stated above, if the employer is desperately in need of the alien employee, he should file an extension of the H-1B or L-1 visa provided that the extension requested does not exceed

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17. Id.
   (1) General rule
   It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—
   (A) because of such individual's national origin, or
   (B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such individual's citizenship status.

See also Employer’s Sponsorship of Alien Employee for Labor Certification Could be Construed as Knowledge by the Employer that the Alien is or may be, Unauthorized for Employment, supra note 16; Labor Cert. Sponsorship Can Lead to Employer Sanctions Violations, INS Warns, 65 INTERPRETER RELEASES 901, 902 (Sept. 2, 1988).


20. Cf. Court Dismisses Charges Against Attorney in First IRCA Prosecution, 66 INTERPRETER RELEASES 35 (Jan. 9, 1989) (Government criminally prosecutes attorney for filing Special Agricultural Worker (“SAW”) applications which were based on false facts and documentation under Immigration and Nationality Act § 210).
the statutory maximum number of years. This maximum statutory period has been changed by the Immigration Act of 1990, which is scheduled to go into effect on October 1, 1991. Under this new law a H-1B visa can be extended up to a maximum of six years. However, the limited number of visas available, only 65,000, may cause further hardships on aliens extending their H-1B visas. The L-1 visas will still be issued for a maximum of five years for employees with specialized knowledge and as long as seven years for those in an executive or managerial capacity.

Prior to 1985 the Immigration and Naturalization Service ("INS") adhered to an almost literal interpretation of the law as it applied to H-1B and L-1 petitions on the basis that the nonimmigrant worker was an intending immigrant. The concept of dual intent was nullified somewhat by the promulgation of new INS regulations effective March 30, 1987, which acknowledged that an alien and an employer may have an immigrant intent. The new


H-1A and H-1B limitation on admission. An alien who has spent five, or in certain extraordinary circumstances, six years in the United States under section 101(a)(15) (H)(i)(a) or (H)(i)(b) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under the H or L visa classification, unless the alien has resided and been physically present outside of the United States, except for brief trips for pleasure or business, for the immediate prior year. In view of this restriction, a new petition shall not be approved for an alien who spent five or six years in the United States under Section 101(a)(15) (H)(i)(a) or (H)(i)(b) and/or (L) of the Act, unless the alien has resided and been physically present outside the United States for the immediate prior year.

(Under the Immigration Act of 1990, the maximum statutory period of authorized stay has been extended to six years. See infra note 23.)


24. Id. (to be codified at 8 U.S.C. § 1184(c)(1)(A)).


26. Id. (to be codified at 8 U.S.C. § 1184(c)(2)(D)(ii)).


29. See 50 Fed. Reg. 5747 (1987) (setting forth comments on proposed regulations 8 C.F.R. § 214.2(h)(12), which was initially codified at 8 C.F.R. § 214.2(h)(13) (1988), and 8 C.F.R. § 214.2(h)(16)).
law has eliminated dual intent for purposes of H-1B and L-1 nonimmigrants. The fact that an alien is a beneficiary of a visa preference or labor certification shall no longer constitute evidence of an intention to abandon foreign residence.

As indicated above, if the H-1B or L-1 extension of stay is filed immediately prior to the expiration of the alien's temporary visa, due to the alien's hospitalization or some other emergency or due to INS' delays in processing the extension of the visa, the alien employee can continue to work for a period not exceeding 120 days while the extension is being processed by the INS. Although employer sanctions do not apply to employers who continue to hire such technically out-of-status alien employees during the grace period of 120 days, it is not clear what repercussions might follow if the INS does not issue the extension during that period. Whether the IRCA laws apply to the employer, and whether the threat of deportability applies to the alien employee, is not clarified. The INS regulations seem to presume that the extension of stay would be processed within the regulatory grace period. The backlog in some regional processing centers makes this presumption rather dubious. An amendment to the extension of stay regulation should be considered to account for contingency situations where the INS processing delays run beyond 120 days. The Immigration Act of 1990 fails to address this contingency situation.

31. Id.
32. 8 C.F.R. § 274a.13(d) (1991):

Interim employment authorization. The district director shall adjudicate the application [for employment authorization] within 60 days from the date of receipt of the application by the Service. Failure to complete the adjudication within 60 days will result in the grant of an employment authorization document for a period not to exceed 120 days. Such authorization shall be subject to any conditions noted on the employment authorization document. However, if the district director adjudicates the application prior to the expiration date of the interim employment authorization and denies the individual's employment authorization application, the interim employment authorization granted under this section shall automatically terminate as of the date of the district director's adjudication and denial.

See also 8 C.F.R. § 274a.3 (1991):

Continuing employment of unauthorized aliens. An employer who continues the employment of an employee hired after November 6, 1986, knowing that the employee is or has become an unauthorized alien with respect to that employment, is in violation of Section 274A(a)(2) of the Act.

IV. ADJUSTMENT OF STATUS AND RELATED CONFLICTS

Under the hypothetical situation described here, if the alien's H-1B or L-1 extension of stay has expired, the employee cannot continue to work for the employer until the labor certification is issued, a preference petition is approved, and the visa number is available. However, since the alien employee is considered indispensable, it is imperative that the employee's preference application be approved and status to legal permanent residence be adjusted in the United States. If not, the alien would have to return to his country of last residence or citizenship to obtain the visa.

Section 245(a) of the Immigration and Nationality Act ("INA") provides for adjustment of status at the discretion of the Attorney General for an alien who has been lawfully admitted into the United States if:

(1) the alien makes an application for such adjustment,
(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
(3) an immigrant visa is immediately available to him at the time his application is filed.

There are a number of grounds of statutory ineligibility for adjustment of status where no discretion may be exercised by the Attorney General in favor of granting adjustment. First, the alien must not be excludable on any of the thirty-two grounds for exclusion set forth in section 212(a) of INA. Furthermore, if the alien was engaged in unauthorized employment after 1977, adjustment of status would be denied. A departure from the United States and re-entry does not redeem the effect of the

37. Id. § 3.9(a), at 3-138. (The Immigration Act of 1990 has added additional grounds of exclusion. Pub. L. No. 101-649, § 601(a) (effective date Oct. 1, 1991) (to be codified at 8 U.S.C. § 1182(a)).
38. Id. § 3.9(a), at 3-142.
statutory bar to adjustment even if the alien engages in authorized employment after re-entry.\(^3\) Therefore, an alien employee is barred from adjusting status if he failed to maintain valid status on a previous visit, even by overstaying an authorized period of stay.\(^4\) One point that is not clarified is whether students who are reinstated to valid status, and subsequently try to adjust to permanent residence, are considered in violation of the bar.\(^4\)

In the past, it was permissible to continue employment after the adjustment application was filed, but not while the labor certification application was pending. Employment authorization was granted when the adjustment application was filed or at the alien's interview with the INS.\(^4\) However, after IRCA was implemented, this practice has been modified. Aliens applying for adjustment are now required to apply for work authorization on Form I-765.\(^4\) No interim rule has been established to permit work authorization for those aliens whose labor certification or visa number is pending. IRCA is also silent on this issue. Where the alien employee is indispensable to the employer, the issue becomes effective adjustment of status within the United States.

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39. See Matter of Battista, 19 I. & N. Dec. 484 (BIA 1987) (The bar of section 245(c)(2) of the INA, which precludes adjustment of status to any alien, other than an immediate relative who is not in legal status at the time of filing, is limited to those who file for adjustment on or after November 6, 1986. Id. at 486-87.; see generally 8 C.F.R. § 245.1(c)(3) (1991):

*Effect of departure.* The departure and subsequent re-entry of an individual who was employed without authorization in the United States after January 1, 1977 does not erase the bar to adjustment of status in section 245(c)(2) of the act. Similarly, the departure and subsequent reentry of an individual who has not maintained a lawful immigration status on any previous entry into the United States does not erase the bar to adjustment of status in section 245(c)(2) of the Act for any application filed on or after November 6, 1986.

40. FRAGOMEN, supra note 36, § 3.9(a), at 3-142.

41. Id.

42. See Tien v. INS, 638 F.2d 1324 (5th Cir. 1980) (David Pei-Chi-Tien, a citizen of the Republic of China, arrived on a nonimmigrant visitor's visa in 1973, and to avoid deportation at the expiration of his visitor's visa, applied for labor certification and adjustment of status to that of a permanent resident based upon qualification as a Chinese specialty cook. The labor certification was issued in November of 1973, but application for adjustment of status was denied in 1976. Id. at 1325. Tien worked for another restaurant until 1977, and again filed for adjustment of status as a sixth preference permanent resident alien. Id. This too, was denied, id. at 1326, but the court upheld the January 1974 adjustment application despite unauthorized employment. Id. at 1330. Note that this issue would be decided differently today, particularly after January 1, 1977, because unauthorized employment bars adjustment.)

43. See 8 C.F.R. §§ 274a.12(a) and 274a.13 (1991).
Absent unauthorized employment during the interim period, the alien employee could be expected to adjust to legal permanent residence without many obstacles.

A related obstacle to permanent residence is "preconceived intent." This obstacle can be triggered by problems at the time of the application for adjustment, or by any brief trips abroad prior to the filing of the adjustment application. It is usually advisable to wait a fair amount of time after the employee enters on a temporary work visa to file the labor certification and visa preference application. If not, the INS would mechanically assume that the alien employee entered the United States as a nonimmigrant with the preconceived intent of remaining permanently, thereby circumventing the regular consular visa-issuing processes.

In earlier decisions, preconceived intent to remain in the United States was looked upon as a factor to deny adjustment of status, particularly if fraud was committed in obtaining the nonimmigrant visa or labor certification. In *Chan v. INS* the employee was denied adjustment of status. One reason for the denial was because he had obtained a business visitor's visa on the pretext that he was coming to the United States to learn about the restaurant business. Once in the United States, though, he engaged in unauthorized employment as a cook. The training he received was the basis of his subsequent labor certification. He was deemed to have had a preconceived intent to permanently remain in the United States at the time he applied for his business visa, and the administrative courts and the appellate court denied adjustment of status, disregarding his length of residence.

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45. See Administrative Appeals Unit Decisions [names of parties unpublished] 6 ILPR B2-13 to B2-14 (1988); Matter of Baltazar, 16 I. & N. Dec. 108 (BIA 1977) (Alien divorced his wife in order to obtain immigration benefits and at the time of entry had a preconceived intent to remain in the United States. This is a negative factor to be considered when granting an application for discretionary relief. *Id.* at 110.); Ameeriar v. Immigration and Naturalization Service, 438 F.2d 1028 (3d Cir. 1971) (Zalmai S. Ameeriar, native of Afghanistan, came to the United States as a visitor for pleasure, but sought and obtained employment within a few days of arrival and then applied for adjustment of status. The Third Circuit Court of Appeals held that he had a preconceived intent of bypassing normal consular procedures for obtaining permanent residence and, therefore, denied him adjustment of status. *Id.* at 1033.)


47. *Id.* at 979-81.

48. *Id.* at 983.
and seemingly valid labor certification. 49

A similar fate befell Dong Sik Kwon, who entered this country on a nonimmigrant tourist visa. 50 Within a few months after entering the country he bought two wig stores. Since Mr. Kwon had overstayed his authorized visit under a visitor visa, he sought to adjust his status from that of an illegal alien to that of a lawful permanent resident. 51 He supported his application for adjustment of status as a nonpreference immigrant by seeking a determination that he was exempt from labor certification requirements because he was an investor. His application was denied and at the subsequent deportation hearing the immigration judge ruled that even if Kwon had qualified as an investor, he had a preconceived intent to permanently live in the United States when he sought entrance as a pleasure visitor. 52

Paul Ching-Szu Chen also came on a tourist visa. 53 He attempted to adjust status on many occasions between 1961 and his deportation, through employers and marriage to an American citizen. 54 Chen was also deemed to have not harbored a "bona fide" nonimmigrant intent at the time of entry, and was thereby barred from any discretionary relief. 55

Probably one of the worst case scenarios is illustrated in Patel v. INS, 56 where the alien came on a nonimmigrant student visa and thereafter engaged in unauthorized employment without even completing his course of studies. 57 The Court of Appeals for the Seventh Circuit affirmed the decision of the Board of Immigration

49. Id. at 980, 985.
50. Kwon v. INS, 646 F.2d 909 (5th Cir. 1981) (en banc).
51. Id. at 914.
52. Id. at 914-15. Kwon's subsequent appeal to the Board of Immigration Appeals did not reach the merits, but rather was dismissed because the board found that "nonpreference visas . . . had been unavailable at all times relevant to his application." Id. at 915-16. Kwon, during the course of appeal, sought a labor certification and obtained a sixth preference status, but no visa number was then available for him. Id. at 915 n.14. The majority of the Fifth Circuit's consideration of the case was devoted to whether Kwon was entitled to retroactive priority of his application for sixth preference status based on the INS' failure to advise him of the lack of nonpreference visas at the time he sought investor status (Kwon claiming that had he known, "he would instead have filed immediately for admission as a sixth preference applicant and would have sought a labor certificate to obtain the earliest possible priority date."). Id. at 916.
54. Id. at 931-32.
55. Id. at 935.
56. 738 F.2d 239 (7th Cir. 1984).
57. Id. at 241.
Appeals that Patel's engaging in unauthorized employment soon after arrival evidenced his preconceived intent to remain here permanently, and that his subsequent "labor certification was not a sufficiently favorable factor to outweigh the adverse factor of unauthorized employment." The court of appeals noted that if Patel had come to the United States as a bona fide nonimmigrant, the subsequent approval of a labor certification on his behalf would have been a favorable factor for adjustment of status, despite his unauthorized employment.

Most of the above cases seemed to have been decided on the preconceived intent issue rather than on the unauthorized employment issue. Therefore, it is imperative that an alien employee seeking admission to the United States on a H-1B or L-1 visa carefully plan the course of events to avoid running afoul of the statutory bar to adjustment.

An ambiguity still surrounds almost all adjustment applications filed after November 6, 1986. It is unclear how INS will interpret the requirement of continuous legal status since "entry." If the term "entry" refers to the alien's last entry, then the alien could cure any defects in that entry by leaving the country and re-entering as a nonimmigrant. However, this too contravenes the preconceived intent bar to adjustment of status.

One administrative law court has decided that an alien unauthorized to work in the United States cannot file a labor certification because he or she is already in the United States and cannot be a beneficiary of an application for labor certification. That court seems to have confused "time of application for a visa" with "admission into the United States." The administrative law court is stating in effect that anyone who is already working at a job cannot simultaneously be applying for admission. If this reasoning is followed by other administrative law

58. Id.
59. Id. at 243. See also Matter of Khan, 17 I. & N. Dec. 508, 510 (BIA 1980).
60. FRAGOMEN, supra note 36, § 3.9(a), at 3-142.
61. Id.
62. Id.
64. Id.
65. Id.
courts, it would effectively thwart any alien from applying for labor certifications, even if authorized to work and/or remain in the United States, since the petitions would be denied under the above reasoning. IRCA is silent about labor certifications, and there is a major gap in the law as to how labor certification recipients should be treated during the interim period of waiting for their immigrant visas.

As discussed above, the issue of preconceived intent also causes a major conflict with respect to IRCA and adjustment of status. The saving grace, however, is that preconceived intent could be defeated during adjustment proceedings if the alien has maintained status, has engaged in only authorized employment, has family ties in the United States, would experience personal hardship and hardship to the employer if required to travel abroad to obtain the visa, and has a considerable length of residence in this country.

These equities are usually balanced against the negative factor of preconceived intent during adjustment of status proceedings. Preconceived intent is only one factor to be considered. Therefore, under the main hypothetical situation, the employer may have his wish granted — the alien employee will be permitted to adjust status to legal permanent residence without having to return to the last place of legal residence or citizenship. If an

66. Id.

67. See A. FRAGOMEN, JR. & S. BELL, IMMIGRATION PRIMER § 10.6, at 45 (Supp. 1987); see also Matter of Arai, 13 I. & N. Dec. 494 (BIA 1970) (When adverse factors, i.e., preconceived intent, exist in a given application for adjustment, then outstanding equities such as family ties, hardship, length of residence in the United States should be considered. Id. at 496. In a rare case, the alien in question was granted adjustment of status on an approved petition despite the fact that he had entered the United States on a tourist visa and accepted employment prior to the temporary worker visa being issued. The alien's "good health" and "good moral character" seemed to have swayed the BIA's decision. Id. at 495.)

68. Matter of Khan, 17 I. & N. Dec. 508, 511 (BIA 1980). See also Matter of Ro, 16 I. & N. Dec. 93 (BIA 1977) (South Korean aliens were denied applications for adjustment of status since they entered on nonimmigrant investor visas and filed their adjustment applications only 16 days after arrival in the United States. Id. at 95.); Matter of Allotey, 15 I. & N. Dec. 351 (BIA 1975) (Alien from Ghana, age 27 who entered the United States on a tourist visa in 1971, and within two days of arrival flew to Oregon and commenced studies in an institute he had previously arranged to attend, id. at 351-52, could not adjust status in the United States despite his marriage to an American citizen some years later because of alleged preconceived intent to become a student after arrival. Id. at 52.); Matter of Battista, 19 I. & N. Dec. 484, 486 (BIA 1987).

alien initially enters the country on an H-1B or L-1 visa, and files a labor certification petition soon after, it is more difficult to overcome the preconceived intent notion, considering the case law on point.

Another uneasy situation occurs when an alien leaves the United States for a brief period after approval of the labor certification and then re-enters on a nonimmigrant visa and attempts to adjust status. In this latter case as well, if the alien can establish bona fide reasons for these actions then adjustment of status may be granted in the discretion of the INS.71

V. POLICY SUGGESTIONS

Congress should consider amending the relevant provisions of IRCA and the Code of Federal Regulations to fill in the gaps and reduce the ambiguities mentioned above. Two revisions are needed. One would be to shorten the time taken to process labor certification petitions by combining the labor certification and adjustment application processes. The other would be to leave the two-part labor certification process intact, but amend IRCA to authorize those aliens who have received an approval of their labor certification to engage in employment only for the employers/petitioners until their visas become available. This would apply only if the alien is already in the United States.

The gap in the law with respect to the 120-day period on H-1 and L-1 extensions should also be clarified. Although there is much hue and cry against liberalizing entry of professionals and skilled workers into this country, the Department of Labor’s own report revealed that overall economic effects of alien labor are positive and benign.72 Immigration has become an increasing source of boosting the labor force over the last two decades with eleven percent growth in the 1970s and an estimated twenty-two percent in the 1980s.73 Labor certification applications have in-

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70. Administrative Appeals Unit Decisions, [names of parties unpublished] 6 ILPR B2-13 (1988) (applicant believed INS preferred that immediate business trips be completed prior to applying for adjustment so as to avoid unnecessary processing of advanced parole requests).
73. Id.
creased by over thirty-five percent over the last two years, probably as a result of IRCA and employer anxiety to legalize their undocumented work force.74

Despite the influx of too many professionals and skilled workers into the country and the need of the United States to curb illegal immigration, it is imperative that the gaps in IRCA and the labor certification laws be filled without undue delay. The increase in labor certification applications also calls for these amendments. If American employers need alien employees on a continuous basis, then the law should account for these business-related needs with appropriate modifications of the Immigration and Nationality Act or the Code of Federal Regulations. The recent amendments to the immigration laws, as evidenced by the Immigration Act of 1990, do not cover this gap, even though the 1990 Act expands the number of visas for employment-related immigrants. Until the above-mentioned changes are made, IRCA and related provisions of the Code of Federal Regulations may be effective in curbing illegal immigration, but will hinder the effective operations of employers that need alien workers throughout the United States.

74. Labor Certification Applications Soar, 65 Interpreter Releases 1294 (Dec. 12, 1988).
I. INTRODUCTION

Uninsured motorist coverage was created in automobile liability insurance policies as an alternative to mandatory insurance.¹ The purpose of uninsured motorist coverage is to indemnify the insured against losses incurred from collisions with those motorists who are not insured.² Statutes in every state mandate the existence of uninsured motorist coverage although, in most states, a purchaser may reject it.³ Although insurance companies generally recognize their responsibility to policyholders under uninsured motorist clauses, there have been a number of attempts by the companies to limit the scope of this coverage.⁴ Generally, jurisdictions which strike down the restrictions do so on public policy grounds.⁵ The backbone of this line of reasoning is the viewing of uninsured motorist coverage as personal in nature, meaning that it follows the insured and not the vehicle.⁶

¹. Those states which follow a policy of mandatory insurance require proof of insurance prior to obtaining license plates, and sometimes, if the insurance lapses, the license plates are retrieved. However, uninsured motorist coverage still exists in those states to insure against out-of-state uninsured drivers, uninsured operators, and uninsured auto thieves involved in accidents. 12A G. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW §§ 45:620, 45:679-682 (R. Anderson 2d ed., M. Rhodes rev. vol. 1981).
². See A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE (1969).
³. A majority of states, however, require insurance companies to provide uninsured motorist coverage within their policies, but the purchaser is able to reject it in writing if he wishes. See A. WIDISS, supra note 2, at §§ 3.4, 8.3.
⁴. For example, there have been provisions included in policies precluding recovery if there is other applicable insurance to cover the loss, or if there is applicable workman's compensation insurance covering the loss. Insurers have also attempted to deny recovery to an injured insured who operated a government-owned vehicle. Id.
⁶. This view is generally recognized nationwide. See A. WIDISS, supra note 2, at § 2.8; P. PRETZEL, UNINSURED MOTORISTS (1972); SCHERMER, AUTOMOBILE LIABILITY INSURANCE: NO-FAULT, UNINSURED MOTORISTS, AND COMPULSORY COVERAGE (Supp. 1980).
In an opinion regarding one such limitation, a divided Kentucky Supreme Court has lifted the "stacking" restriction that prevented people injured by uninsured drivers from collecting larger benefits from their own automobile insurance policy. Insurance companies often seek to prohibit stacking of coverage through the use of "other insurance clauses" or through other limiting language within the insurance policy. The enforceability of these contractual limitations has been severely limited by the latest Kentucky Supreme Court decision regarding the stacking of uninsured motorist coverages.

On April 26, 1990, the Supreme Court of Kentucky rendered an opinion in Hamilton v. Allstate Insurance. This case is the latest attempt to answer the much disputed question of whether a person may stack uninsured motorist coverages under more than one policy or under multiple endorsements under the same policy.

II. FACTS AND PROCEDURE BELOW

Hamilton was originally brought in the United States District Court for the Eastern District of Kentucky. The Supreme Court of Kentucky was given the case on a request for a certification

7. "Stacking" means aggregating monetary limits from two or more policies. For example, John has two autos insured under two different policies, each policy with a $10,000 ceiling for recovery under the uninsured motorist provision. If John is injured by an uninsured motorist, and John's injuries amount to $15,000, then by stacking the limits from his two policies, he could recover for his entire loss. Stacking may also pertain to aggregation of limits from two autos insured within one policy. See Schermer, supra note 6, at § 24.02. Stacking contemplates reimbursement of the insured by more than one policy. Liability on the insured's second policy usually arises only after the coverage limit of the insured's primary policy is exhausted. Thus, where stacking is permitted, an insured has additional sources of compensation. P. Pretzel, Uninsured Motorists § 25.5(B) (1972); Straub, Kentucky Law Survey-Insurance, 68 Ky. L.J. 587, 596 n.42 (1979-80).

8. See Meridian Mutual Ins. Co. v. Siddons, 451 S.W.2d 831, 833 (Ky. 1970). Meridian Mutual attempted to limit their uninsured motorist liability by inserting a clause stating:

[If] the insured has other similar insurance available to him, and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the Company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

Id.

9. 789 S.W.2d 751 (Ky. 1990).
of law from the Federal District Court. The question presented to the court was whether the policy restrictions which prohibited stacking violated the Kentucky Uninsured Motorist Statute or any other principle of Kentucky law.

Cindy Hamilton was a passenger in a motor vehicle being operated by her brother, Gary Bender, when it was struck by an uninsured motorist. Her damages were alleged to have been in excess of $100,000. Her brother's insurance policy paid $10,000 in basic reparation benefits as well as $25,000 in uninsured motorist benefits. At the time of the accident, the Hamiltons owned a policy of insurance with Allstate. The policy covered three separate vehicles and included uninsured motorist coverage in the amount of $25,000 for each of the vehicles. There was a separate premium charge for each of the vehicles' uninsured motorist coverages. The main contention between the Hamiltons and Allstate was whether the three coverages could be stacked or whether Cindy Hamilton was limited to a single recovery of $25,000.

The policy contained a limitation of coverage clause that clearly stated that if more than one automobile was covered by the policy, the coverages could not be stacked. It specifically stated that if none of the insured vehicles were involved in the accident, the insured "may choose any single auto shown on the Declarations Page and the coverage limits applicable to that auto will apply." The court stated, "To resolve the issue (of stacking) . . .

10. Id.
11. The actual question of law that was certified to the Kentucky Supreme Court is as follows: "Are Allstate's uninsured motorist policy provisions prohibiting the stacking or aggregation of uninsured motorist coverage limits in an automobile insurance policy insuring multiple vehicles violative of the Kentucky Uninsured Motorist Statute, KRS 304.20-020(1) or any other principal of Kentucky law?" Id. at 752.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. The actual clause stated, "When YOU have two or more AUTOS insured in YOUR name and none of them is involved in this accident, YOU may choose any single AUTO shown on the declarations page and the coverage limits applicable to that AUTO will apply." Id.
we need look no further than this Court’s decision in Meridian Mutual v. Siddons21 ... and Ohio Casualty Insurance Company v. Stanfield22 ...”23

III. BACKGROUND

Meridian Mutual v. Siddons was the first major Kentucky case to consider stacking of uninsured motorist coverages.24 It involved the wrongful death of the stepson of the named insured under two separate Meridian Mutual insurance policies.25 The deceased, a pedestrian, was struck and killed as he crossed the street near his home.26 His stepfather, Ronald Siddons, was the named insured on two liability insurance policies covering two separate vehicles.27

The administratrix received a judgment against the uninsured tortfeasor in the amount of $15,567 and sought to stack the coverage of the two $10,000 uninsured motorist coverages.28 Meridian Mutual Insurance Company contended that its liability should have been limited to $10,000 because of an “other insurance” clause contained in each policy.29

The Kentucky Supreme Court declared that the “other insurance” clause was invalid because it conflicted with what the court perceived as the legislative intent of section 304.682(1) of the Kentucky Revised Statutes, the former Kentucky Uninsured Motorist Statute.30 The court reasoned that since the statute required each policy to contain uninsured motorist coverage, it was the intent of the legislature to allow stacking of the uninsured motorist coverages.31 The court stated, “The legislature very well, and reasonably, could have considered that an insured who had

21. 451 S.W.2d 831 (Ky. 1970).
22. 581 S.W.2d 555 (Ky. 1979).
24. The Court in Siddons found the clause excluding the “other insurance” available violated the uninsured motorist provisions of the statute and held it invalid. Siddons, 451 S.W.2d 831, 834 (Ky. 1970).
25. Id. at 832.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id. at 833. Kentucky Revised Statute § 304.682(1), originally enacted in 1970, was reenacted in 1978 as Kentucky Revised Statute § 304.20-020.
31. Id. at 834.
occasion to acquire two liability policies would benefit by having a doubled amount of uninsured motorist coverage."\(^{32}\) In allowing the stacking of the two policies to satisfy the judgment, the court laid the groundwork for the second major case regarding the stacking of uninsured motorist benefits.

The second case considered by the *Hamilton* court, the case of *Ohio Casualty Insurance Co. v. Stanfield*\(^{33}\) set out limitations upon stacking. It also set guidelines to be considered in cases where stacking could be applicable. James Stanfield, a Newport, Kentucky, police officer, was seriously injured by an uninsured motorist while operating a motorcycle owned by the City of Newport.\(^{34}\) The City of Newport had sixty-three vehicles insured under a fleet policy with the Ohio Casualty Insurance Company.\(^{35}\) This policy included uninsured motorist coverage for each of the sixty-three vehicles.\(^{36}\) As an employee authorized to operate a motor vehicle belonging to the city, Stanfield sought to stack the uninsured motorist coverages of all of the city’s vehicles to compensate him for his injuries.\(^{37}\) In addition, Stanfield personally owned two vehicles that were insured under one policy issued by Buckeye Union Insurance Company.\(^{38}\) Both of these vehicles were insured with the state minimum level of uninsured motorist coverage.\(^{39}\) However, the Buckeye policy contained no anti-stacking language.\(^{40}\)

In reaching its decision, the *Stanfield* court stated that the definition of “Persons Insured” contained in the policy issued by Ohio Casualty to the City of Newport created two separate classes of insureds.\(^{41}\) Each class of insured was entitled to different protection under the policy.

The court reasoned that the insureds of the “first class” were offered the broadest protection under the policy.\(^{42}\) Insureds of

\(^{32}\) Id. at 835.

\(^{33}\) 581 S.W.2d 555 (Ky. 1979).

\(^{34}\) Id.

\(^{35}\) Id. at 556.

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) Id.

\(^{39}\) Id.

\(^{40}\) Id.

\(^{41}\) Id.

\(^{42}\) Id.
the “first class” included “the named insured, the insured who bought and paid for the protection and who has a statutory right to reject uninsured motorist coverage, and the members of his family residing in his household.” The court stated that the protection afforded the insureds of the “first class” is broad because “[they] are protected regardless of their location or activity from damages caused by injury inflicted by an uninsured motorist.”

Insureds of the “second class,” however, are afforded only the protection of the uninsured motorist coverage of the vehicle they are in at the time of the accident. Insureds of the “second class,” under the Ohio Casualty policy, were defined as “others” not included in the definition of insureds of the “first class.” Their protection under the policy is confined to damages inflicted by an uninsured motorist while they are occupying an insured vehicle. In other words, insureds of the “second class” are offered the protection of the uninsured motorist coverage solely because they are occupying an insured vehicle, not due to their payment of a premium.

It should be noted that this protection relates only to primary coverage. If an insured of the “second class” is injured in a motor vehicle accident, the limitation on stacking is applicable only to the primary coverage. After the primary uninsured motorist benefits are paid, the injured plaintiff may turn to his own secondary policy and may stack the uninsured motorist benefits under that policy, if all of the other requirements are met.

In reaching a decision, the court considered the liability of both the city’s insurance carrier and Stanfield’s personal carrier. The court concluded that Stanfield was an insured of the “second class” as to the vehicles owned by the City of Newport. His recovery from Ohio Casualty was subsequently limited to the

43. Id. at 557. The members defined by Ohio Casualty as being in the “first class” are typical of many insurance contracts.

44. Id. By defining “first class” members in this way, protection is “personal” to the insured, and follows him no matter in whose car he may be traveling.

45. Id. at 557.

46. Id. at 558.

47. Id.

48. Id.

49. Id.

50. Id. at 559.
$10,000 in uninsured motorist coverage on the vehicle he was operating at the time of the accident.\textsuperscript{51}

However, when the court turned to Stanfield's personal automobile policy, it came to a different conclusion. The single policy issued by Buckeye Union covered two vehicles. Since Stanfield was the main insured under that policy, he was an insured of the "first class" and was permitted to stack the coverages offered under that policy.\textsuperscript{52}

The court also discussed the doctrine of reasonable expectations. The Kentucky Supreme Court, citing the Alabama Supreme Court's decision in \textit{Lambert v. Liberty Mutual Insurance Co.},\textsuperscript{53} adopted the principle of reasonable expectations.\textsuperscript{54}

The Court [in \textit{Lambert}] first noted that by permitting the insured to stack his coverages, it had "simply honored the reasonable expectations of the 'named insured' that his payment of an additional premium will result in increased coverage for those falling within the definition of 'named insured,' and where an expectation of this nature is in conflict with a limiting clause in the policy, the resulting ambiguity must be resolved in favor of the insured due to the nature of insurance contracts."\textsuperscript{55}

\textbf{IV. THE COURT'S REASONING}

The doctrine of reasonable expectations was reaffirmed and carried forward in \textit{Hamilton v. Allstate Insurance Co.}\textsuperscript{56} As stated previously, the court relied solely upon the \textit{Siddons} and the \textit{Stanfield} cases in deciding this case.\textsuperscript{57} They reiterated that the "other insurance" exclusionary clause in \textit{Siddons} violated the Uninsured Motorist Statute and was therefore void.\textsuperscript{58} They also stated that the effect of the limiting language in the case at bar

\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} 331 So. 2d 260 (Ala. 1976).
\textsuperscript{54} Ohio Cas. Ins. Co. v. Stanfield, 581 S.W.2d 555, 558 (Ky. 1979).
\textsuperscript{55} Id. (quoting Lambert v. Liberty Mutual Ins. Co., 331 So. 2d 260, 263 (Ala. 1976)).
\textsuperscript{56} 789 S.W.2d 751, 753 (Ky. 1990). The principle of reasonable expectations insures that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. R. KEETON, BASIC TEXT ON INSURANCE LAW § 6.3(a), at 351 (1971).
\textsuperscript{57} \textit{Hamilton}, 789 S.W.2d at 753.
\textsuperscript{58} Id.
was "remarkably similar" to the "other insurance" clause contained in Siddons. Allstate had contended that the Siddons case authorized stacking if the language was unambiguous. The court said that this interpretation of Siddons was improper.

Reiterating the doctrine of reasonable expectation espoused in Stanfield, the Hamilton court stated, "Under the doctrine of reasonable expectations, we have held that when one has bought and paid for an item of insurance coverage, he may reasonably expect it to be provided." Using these two points as a basis, the court reaffirmed that such anti-stacking provisions relating to uninsured motorist coverages are void.

The court also expressly overruled the court of appeals case of State Farm Fire and Casualty Co. v. Short. Short upheld anti-stacking language contained in a policy exclusion that was similar to the Hamilton language. The court of appeals prohibited Short from stacking uninsured motorist coverages under his policy.

The apparent policy of the state regarding the stacking of uninsured motorist coverages, prior to the decision in Hamilton, could have been stated as follows. When a person was injured in a vehicle which was not covered under their policy, they would be able to stack coverage if and when they turn to their policy as a secondary coverage. The reason they were able to stack was, when they turned to their policy, an ambiguity presented itself. The ambiguity developed between limitation language in the policy and reasonable expectations of the insured that the separate premiums were paid for separate coverages.

However, if the plaintiff was injured in a vehicle that was insured under the same policy as his other vehicles, he would not be able to stack. Using the reasoning in Short, this person

59. Id. In each instance, the applicable policy provision attempted to limit the insurance liability to recovery upon only one uninsured motorist policy.

60. From the opinion in Siddons, the Hamilton court observed that the clarity or lack thereof of the "other insurance" clause does not appear to have influenced the Siddons Court's decision. Id.

61. Id. Otherwise, any additional policies which may exist are thus unavailable and the coverage afforded illusory. What is given with one hand is taken away with the other, leaving the insured with one or more purchased policies which pay no benefits. Id. at 754.

62. Id.

63. 603 S.W.2d 496 (Ky. Ct. App. 1980).

64. Id. at 498.
could not stack because so long as the language is clear, no ambiguity develops. He is not faced with coming into the policy and confronting the ambiguity of which coverage to choose. Since there is no ambiguity, the plain language of the policy governed. This view was also consistent with the policy espoused in the case of Butler v. Robinette.

In Butler, the court held that a plaintiff operating an insured vehicle could only collect the liability insurance covering that car. "If any insured is in an accident while he is driving one of the cars described in a policy, covering two or more cars, the liability coverage for bodily injury is not doubled or multiplied by the number of cars."

By reiterating the doctrine of reasonable expectations and overruling Short, the court in Hamilton seemed to permit stacking in each of these situations. Now, the rule is simply since separate premiums are paid, a person could reasonably expect that separate coverages would be afforded, and he will be able to stack multiple uninsured motorist coverages under the same or different policies. This rule accompanied with a finding that anti-stacking provisions are void, at least as to uninsured motorist coverages, appears to have substantially broadened uninsured motorist coverage liability.

V. ANALYSIS: KENTUCKY AT ODDS WITH NEIGHBORING STATES

The question of whether uninsured motorist benefits may be stacked has frequently arisen in this country, and there is no reason why Kentucky should be excepted from this multitude of inconsistently reasoned cases. Not infrequently the question has

65. Id.
66. Id.
67. 614 S.W.2d 944 (Ky. 1981).
68. Id. at 947.
69. Id.
71. Id.
surfaced in choice-of-law situations, and has even reached the United States Supreme Court in that context.\textsuperscript{73} In these cases, different states are said to be either stacking or nonstacking jurisdictions. The parties and even some courts have assumed that resolution of conflict-of-laws questions necessarily resolves the issue.

But the characterization of the issue as a pure conflict-of-laws question is not entirely accurate. A primary task in any insurance coverage case is to determine the validity and meaning of the particular policy provisions at issue. The choice of law may affect this determination because either statutorily or judicially the states may have imposed certain obligations, invalidated certain provisions, or interpreted certain language in a policy to have a certain meaning. The choice of law determines the jurisdiction whose laws will be looked to in considering the validity and meaning of the policy at issue, but the particular policy itself must still be considered to determine the contractual rights of the parties.

The fact that \textit{Hamilton} firmly establishes Kentucky as a stacking state will bring with it conflict-of-law problems with Kentucky’s surrounding states, as automobiles from neighboring states travel and tour Kentucky's highways. For example, Ohio's legislature, after considering the issue of stacking of uninsured motorist coverage, statutorily allows insurance companies to insert provisions in an automobile liability policy that would prohibit such a claim if they are clear, conspicuous, and unambiguous.\textsuperscript{74} Section 3937.18(G) of the Ohio Revised Code has been interpreted to provide that express anti-stacking provisions, as well as other exclusionary provisions which would act to prevent insureds from receiving payments under more than one policy, are valid and enforceable policy limitations.\textsuperscript{75} Although perhaps unclear to the

\textsuperscript{73} Allstate Ins. Co. v. Hague, 449 U.S. 302 (1983). In \textit{Hague}, the United States Supreme Court did not consider the soundness of the state court's choice-of-law decision. Instead, it addressed only the question of whether the full faith and credit or the due process clause of the federal Constitution precluded the choice-of-law decision made in the court below. The United States Constitution provides a minimal standard in choice-of-law matters.

\textsuperscript{74} \textsc{Ohio Rev. Code Ann.} § 3937.18(G) (Baldwin 1987) (formerly \textsc{Ohio Rev. Code} § 3937.18(E)).


What good is such a provision if it can only be comprehended by lawyers and insurers? It is the ordinary purchaser of insurance who needs to understand what
insured, to require insurance sellers to explain in detail every sentence of an insurance contract as a prerequisite to its effectiveness would be "unduly burdensome." 76

A 1982 amendment to the Uninsured Motorist Statute of Indiana ensures that an injured party is provided with uninsured motorist coverage of at least the state required minimum, but does not ensure the right to stack such coverage. 77 By passing such an addition, the legislature revealed they did not intend to preclude the use of anti-stacking clauses, and in fact changed the public policy of the state. 78 As the law stands in Indiana, an insurance company may limit uninsured motorist coverage through the use of anti-stacking provisions. 79

Although a court is deciding the rights of the parties under their insurance contracts, the basic inquiry is more in the nature of a conflicts question. This is because contract provisions that prohibit stacking will be declared either valid or void, depending upon which state's law the Kentucky forum will apply.

VI. IMPOSING KENTUCKY LAW ON OUT-OF-STATE INSURANCE COMPANIES

In a conflict-of-laws situation, Kentucky courts have traditionally applied the Commonwealth's substantive law whenever poss-
sible. In Wessling v. Paris, the Kentucky Court of Appeals reversed its previous policy of applying the law of the state where the tort was committed in favor of the theory of "most significant contacts." However, in 1968 the court modified its position by holding that a conflict-of-laws question should be resolved on the basis of whether Kentucky has enough contacts to justify applying Kentucky law. The Arnett court found that the mere fact that the accident occurred within Kentucky's borders is, by itself, sufficient to justify the application of Kentucky law. This is especially relevant when a court is confronted with a contract which flies in the face of Kentucky public policy. Kentucky has previously recognized that the law of the place of performance of a contract should appropriately measure the respective parties' rights, except in cases where a provision of the contract is obnoxious to the public policy of the forum. In fact, if there are sufficient contacts and no overwhelming interests to the contrary, Kentucky law will apply to a contract issue even if the parties have voluntarily agreed to apply the law of a different state. In order to preserve the statutorily mandated policies concerning automobile insurance contracts, it seems that Kentucky courts, whenever possible, must apply Kentucky law whenever a stacking issue arises.

The imposition of Kentucky insurance law upon out-of-state insurance companies who are licensed to do business in Kentucky has already been legislatively mandated. For example, foreign companies are required to meet Kentucky's basic reparations benefits coverage. Kentucky Revised Statute section 304.39-050, when considered with Kentucky Revised Statute section 304.39-

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80. Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Grant v. Bill Walker Pontiac-GMC, Inc., 523 F.2d 1301 (6th Cir. 1975).
81. 417 S.W.2d 259 (Ky. 1967).
82. Id. at 260.
83. Arnett, 433 S.W.2d at 113.
84. Id.
88. Dairyland Ins. Co. v. Assigned Claims Plan, 666 S.W.2d 746, 748 (Ky. 1984). Dairyland involved an out-of-state insurance company, licensed to conduct business in the Commonwealth, refusing to extend no-fault protection to its insured. The insured was a resident of Tennessee who purchased his insurance while in Tennessee, but was injured in an accident in Kentucky. Id.
mandates that basic reparations benefits coverage by out-of-state insurance companies be the same as and commensurate with the required coverage of in-state companies. The statutory mandates of the uninsured vehicle provisions of the subtitle require out-of-state companies to provide coverage in strict accordance with the policies enunciated in subtitle 39.

Additionally, out-of-state insurance companies licensed to do business in the state may not exclude or reduce the minimum tort liability coverage required of in-state companies. The Kentucky Supreme Court has invalidated family exclusion clauses under the Motor Vehicle Reparations Act. The court noted that liability coverage is mandatory in nature. Such exclusions infringe upon the mandatory nature of the insurance and giving such an exclusion validity would run directly against the purposes of the statute. Minimum tort liability coverage cannot be dominated or eliminated by exclusions.

In light of the aforementioned precedents, Hamilton must be regarded as a valuable tool for stacking out-of-state uninsured motorist policies, resulting in a coup for the forum shopping plaintiff. The Commonwealth has a clearly stated policy requiring stacking. This policy would be subverted if a foreign state's law, disallowing stacking, is applied. The Supreme Court has on occasion stated that precluding a state with an interest from applying its laws would unduly invade the forum's sovereignty.

89. Id.
90. Id.
92. Id. at 867.
93. Id.
94. Id.
95. Id.
97. Ohio Casualty Ins. Co. v. Stanfield, 681 S.W.2d 555 (Ky. 1979); Meridian Mutual Ins. Co. v. Siddons, 451 S.W.2d 831 (Ky. 1970); Hamilton v. Allstate Ins. Co., 789 S.W.2d 751 (Ky. 1990); Chaffin v. Kentucky Farm Bureau Ins. Co., 789 S.W.2d 754 (Ky. 1990). Chaffin is the companion case to Hamilton. In Chaffin, an owned auto exclusion clause that prevented stacking of uninsured motorist benefits was at issue. The Kentucky Supreme Court held that uninsured motorist coverage is personal to the insured; that an insured who pays separate premiums for multiple items of the same coverage has a reasonable expectation that such coverage will be afforded; and that it is contrary to public policy to deprive an insured of purchased coverage, particularly when the offer of such is mandated by statute, Id. at 756.
98. See, e.g., Nevada v. Hall, 440 U.S. 410, 426-27 (1979) (were California not free to
Although there is contrary case law refusing to apply Kentucky forum law to such situations, *Hamilton* may have silently overruled it. Kentucky’s Supreme Court has previously stated that where insurance contracts were entered into in a foreign state, between citizens of the foreign state, and the contracts concerned automobiles which were licensed and garaged in the foreign state, it is the foreign state’s law, rather than Kentucky law, that governs the rights and liabilities under the uninsured motorist provisions of the contract, notwithstanding the fact that the collision occurred in Kentucky and involved an uninsured Kentucky resident.99

The *Lewis* court recognized that traditionally the rule had been that the validity of a contract was to be determined by the laws of the state in which the contract was made, while the remedies to be enforced were those provided by the state in which the suit was brought.100 The court decided that such a mechanical approach was no longer favored, and ignoring present case law, decided that the modern test is “which state has the most significant relationship to the transaction and the parties,” contained in section 188 of the *Restatement (Second) of Conflicts*.101

While technically still valid precedent, the *Lewis* decision was rendered prior to *Stanfield*,102 which acknowledged stacking and attempted to set guidelines to be considered where stacking

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100. *Id. at 581* (citing *Fry Bros. v. Theobold*, 205 Ky. 146, 265 S.W.2d 498 (1924)).
101. *Id. Section 188 states in part:*

*Contracts of Fire, Surety, or Casualty Insurance*

The validity of a contract of fire, surety, or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to a particular issue, some other state has a more significant relationship under the principles stated in sec. 6 to the transaction and the parties, in which event the local law of the other state will be applied.

*Restatement (Second) of Conflict of Laws* § 188 (1971).

The Kentucky Court of Appeals has recently held that a nonresident operator’s automobile insurance carrier, not registered to conduct business inside the Commonwealth, could not be required to comply with the Kentucky No Fault Act, and could not be required to subrogate the insurer for paid underinsured motorist benefits. *State Farm Mut. Ins. Co. v. Tennessee Farmers Mut. Ins. Co.* 785 S.W.2d 520 (Ky. Ct. App. 1990).

could be applicable. Additionally, *Lewis*, devoid of any policy discussion, was rendered prior to *Bishop*, which declared that certain exclusionary provisions fly in the face of the purposes of the Kentucky Motor Vehicle Reparations Act.

VII. CONCLUSION

Since the *Lewis* decision, Kentucky has declared that an out-of-state insurance company, licensed to conduct business in the Commonwealth of Kentucky, must extend the required Kentucky minimum no-fault protection to its insureds. *Hamilton* closes any gap that remained, by declaring that uninsured motorist policies may be stacked, and any prohibitions in the policy prohibiting such stacking are to be interpreted as void. Logically, any out-of-state insurance company which is licensed to conduct business in the state is subject to the *Hamilton* holding.

Kentucky law requires an insurance carrier to offer uninsured motorist coverage with every policy insuring a motor vehicle. It is no different than basic reparation coverage or minimum tort liability coverage, in that they are also statutorily mandated. Since the supreme court has announced that anti-stacking clauses are invalid and unenforceable no matter how clearly written, out-of-state motorists who come into the Commonwealth and are insured by companies licensed to do business in Kentucky should be allowed to stack their uninsured motorist coverage. If a court were to hold otherwise, different rules would apply to the mandatory coverage for liability insurance and the mandatory coverage for basic reparations benefit insurance than would apply to the mandatory coverage for uninsured motorist collisions.

Over the past twelve years, the Kentucky legislature, in cooperation with the courts, has established a strong public policy permitting stacking of uninsured motorist policies. If the insured's claim results in a lawsuit heard in a Kentucky court, it remains

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104. *Id.* at 866.
to be seen what weight a court will give to the place of contracting, particularly in light of this state's firm refusal to give credence to such illusory yet exclusionary provisions. There is a strong belief that since out-of-state insurance companies have agreed to provide the Kentucky minimum required coverage, and since Kentucky has made it clear that anti-stacking provisions pertaining to uninsured motorist coverage are void, Lewis has been silently overruled and Hamilton should be applied to all cases where the accident at least occurs within the borders of the Commonwealth.
UNITED STATES V. KOKINDA: REDEFINING PUBLIC FORA?

Dennis J. Courtney

I. INTRODUCTION

The first amendment to the United States Constitution prohibits the enactment of federal laws which "abridg[e] the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances." This prohibition is given further effect by its extension to the states via the incorporation clause of the fourteenth amendment to the United States Constitution. Although this language appears simple and straightforward, its application has proven to be a most difficult task.

Over the years, the United States Supreme Court has had the opportunity to redefine and clarify the constitutional parameters surrounding certain areas of the first amendment. One of the more complex and problematic facets of this amendment concerns the rights of individuals to engage in expressive activities upon public properties. The lawfulness of the activity depends upon such issues as the specific time, place, and manner of the speech, the speaker, and the subject-matter of the speech. Despite the first amendment's ostensibly clear wording, this liberty is not absolute and cannot be invoked "whenever, and however and wherever [one] please[s]."

1. U.S. CONST. amend. I.
There are a plethora of statutes, ordinances, and regulations which purport to restrict certain facets of expression and speech upon public properties. To determine whether such restrictions are constitutionally permissible, courts must first determine what type of forum is at issue and then apply the appropriate analysis. Insofar as the analysis depends on the forum involved, forum determination appears to be the more difficult and crucial issue for the courts to decide.

The Court has historically attempted to distinguish particular fora as they relate to specific, physical areas where expressive activities occur. For the most part, three types of fora have been identified: the traditional public forum, the limited public forum, and the nonpublic forum.8

Traditional public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate...."9 Usually, streets, sidewalks and parks are the typical examples of such places.10 In these fora, the government is barred from totally excluding expressive activities, although it may engage in some forms of regulation.11 First, a content-based regulation may be valid if it serves a compelling state interest and the regulation is narrowly tailored to accomplish that goal.12 Second, a time, place, and manner regulation may be enforced if it is "content-neutral, serves a significant governmental interest, and leaves open alternative channels of communication."13

The second type of forum which the Court has recognized is the "limited" public forum.14 This class of forum consists of public property which has been designated by the government as an area for "expressive activity."15 Although the same restrictions may be applied to a limited public forum as are applied to traditional public fora, the government is not required to maintain the designation ad infinitum.16 That is, the state may revert the property back to its original status—a nonpublic forum.

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9. Id. at 45.
10. Id.
12. Perry, 460 U.S. at 45.
15. Id. at 45.
16. Id. at 46.
Finally, a nonpublic forum is the third arena in which expressive activities are analyzed. This classification is used to describe "[p]ublic property which is not by tradition or designation a forum for public communication." Restrictions on speech may occur in nonpublic fora so long as they are reasonable and not merely a public official's attempt to suppress the communicator's view.

The concept of nonpublic fora recognizes the notion that "'...[t]he state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" Moreover, the original, intended purposes of public property may be retained without opening it up to other communicative activities.

The United States Postal Service, as a governmental entity, has long been cognizant of the problems associated with individuals exercising their first amendment rights on Postal Service property. This is evidenced by its initial ban on all forms of solicitation adopted in 1958. Five years later, however, the Postal Service relaxed its strict prohibition on solicitation. The Service gave the local postmaster authority to allow "established national health, welfare, and veterans' organizations" to solicit funds from postal patrons while on government property. This exception was later expanded to allow local and national nonprofit entities organized for charitable and philanthropic interests to

17. Id.
18. Id.
19. Id.
22. The U.S. Postal Service was given the status of an independent governmental agency by the Postal Reorganization Act of 1970.
solicit contributions on Post Office property. Although these limited exceptions were available on a case-by-case basis, the general rule against solicitation remained in force.

After several more years of attempting to accommodate the numerous groups and individuals who wished to utilize postal premises for solicitation purposes, the Postal Service promulgated the current regulation which, in essence, flatly prohibited all solicitation. The Postal Service based its decision to enact the new regulations upon “real-world experience”; it made no mention of scientific studies or hearings in this regard. In defense of this stricter policy, the Postal Service relied on its past years of attempting to enforce the solicitation regulations. It was felt that insufficient resources prevented effective enforcement and that “such regulations would be, of necessity, so restrictive as to be tantamount to prohibition, and so complex as to be unadministrable.”

II. BACKGROUND

Marsha Kokinda and Kevin Pearl (hereinafter collectively referred to as “Kokinda”) were members of the National Democratic Policy Committee. On August 6, 1986, Kokinda placed a table on a Bowie, Maryland post office sidewalk in order to “solicit contributions, sell books and subscriptions to the organization’s newspaper, and to distribute literature addressing a variety of political issues.” The table was approximately five to six feet from the post office’s main entrance and partially blocked the sidewalk. However, neither the solicitors nor their table impeded the free flow of traffic utilizing the sidewalk.

26. 39 C.F.R. § 232.1(h)(1) (1989). The Postal Regulation notes that “[s]oliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited.” Id.
31. Id. at 3116 (quoting the syllabus).
34. Id.
The walkway upon which Kokinda and the others solicited postal patrons was the sole means of ingress and egress from the parking lot to the post office. Both the parking lot and the sidewalk were wholly-owned by the Postal Service. In addition, the sidewalk was situated so that it was at least "75 feet from the street and the public sidewalk abutting the street." During the course of their activities, approximately forty to fifty complaints were received by postal workers regarding Kokinda's solicitations. After the solicitors refused to leave at the request of the postmaster, postal inspectors arrived at the scene and proffered a copy of the postal regulations which prohibited solicitation. When this second request to leave was ignored, the solicitors were arrested.

The United States District Court for the District of Maryland held that the sidewalk was not a traditional public forum and that the postal regulations were reasonable. The Court of Appeals for the Fourth Circuit, however, construed the walkway to be a public forum and held the postal regulation to be a time, place, and manner restriction. The court of appeals went on to find that no significant governmental interest was furthered by the prohibition and that the regulation was not sufficiently narrow to achieve the purported governmental interest. Therefore, the district court's ruling was reversed.

Upon reaching the United States Supreme Court on appeal, a plurality overturned the decision of the appellate court. The Court dismissed Kokinda's contentions that, since the sidewalk was indistinguishable from the public walkway next to the street, it must be a traditional public forum. The Court reasoned that "mere physical characteristics" are not indicative of the genre of forum.

35. Brief for Petitioner, supra note 32, at 5.
36. Id.
37. Id.
40. Id.
41. Id.
44. Id.
45. Id.
46. Id. at 3120.
The Kokinda plurality drew a distinction between the traditional public forum which embodies the public thoroughfare and the sidewalk at issue. The former was "‘continually open, often uncongested, and constitute[d] not only a necessary conduit in the daily affairs of a locality’s citizens, but also a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment.'” The latter, on the other hand, was built exclusively to facilitate the movement of persons between the parking area and the post office entrance.

As in other cases, sidewalks may be available to and used by the public; however, this by itself is not enough to elevate governmental property to the status of a traditional public forum. Furthermore, the mere fact that the government owns a parcel of property does not necessarily convert that parcel into a public forum for citizens’ use for first amendment purposes. In order for a nonpublic forum to be transformed into a public forum, the government must have intended to create a traditional public forum. However, in Frisby v. Schultz Justice O’Connor noted that “our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a ‘cliche,’ but recognition that ‘[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.’”

Taken on its face, this reference seems to indicate that sidewalks are construed as traditional public fora by virtue of their being sidewalks. In the case of the postal sidewalk, however, the Court did not recognize it as a traditional public forum. In addition, the plurality in Kokinda asserted that no intentional opening of the sidewalk for first amendment purposes had occurred. Moreover, the forum represented by the postal entry-

48. Id.
49. Id.
50. Id. at 3119.
51. Id. at 3121.
54. Id. The Postal Service only opened up a single forum—certain bulletin boards within the premises.
way constituted a nonpublic forum subject to a reasonableness analysis.\textsuperscript{55}

In addition to the government's intention to open or dedicate the sidewalk to expressive activities, the Court also looked to the physical location of the sidewalk to determine whether the thoroughfare constituted a public forum.\textsuperscript{56} In United States v. Grace, the Court held that Congress' attempt to deny public forum status to a sidewalk adjoining the Supreme Court grounds was impermissible.\textsuperscript{57}

The postal sidewalk in Kokinda was distinguished from the sidewalks at issue in Grace. In Grace, the Court noted that there was "no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter to the Court grounds that they have entered some special type of enclave."\textsuperscript{56} In contrast to the sidewalk at the Bowie post office, the sidewalks and streets surrounding the United States Supreme Court grounds were physically closer to areas not dedicated to a governmental purpose.

III. ANALYSIS OF THE PLURALITY OPINION

The first amendment right to freedom of speech is not an absolute right. In 1939 Supreme Court Justice Owen J. Roberts recognized one limitation of this fundamental liberty by asserting that

\[ \text{[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good}\]

\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} United States v. Grace, 461 U.S. 171, 181 (1983). Traditional public forum property occupies a special position in terms of first amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Id.
\textsuperscript{58} Id. at 179-80.
order; but it must not, in the guise of regulation, be abridged or denied.\textsuperscript{59}

This opinion has been credited with the formation of two separate lines of free speech analysis. The first is referred to as the "speech-dedicated" standard.\textsuperscript{60} The second is known as the "incompatibility" standard.\textsuperscript{61}

The \textit{Kokinda} plurality appears to have adopted the "speech-dedicated" standard of analysis. The reasoning behind this standard is based upon the idea "that whether or not publicly owned premises are to be regarded as 'public forums' ... turns upon factors divorced from the proposed speech itself.... [P]ublicly owned property may be 'dedicated' for various purposes, and such property becomes a 'public forum' only if it has been 'dedicated' to the public."\textsuperscript{62}

The problem of determining whether a forum has been dedicated to expressive activities has caused significant controversies. The Court took the opportunity in \textit{Greer v. Spock}\textsuperscript{63} to clarify the ostensible misunderstanding which some courts had developed subsequent to \textit{Flower v. United States}.\textsuperscript{64} The lower courts in \textit{Greer} had misinterpreted the per curiam \textit{Flower} decision to stand for the proposition that "whenever the members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment."\textsuperscript{65} However, the decisions of the Court support the notion that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government."\textsuperscript{66}

The Court in \textit{Kokinda} apparently gave great weight to the fact that the Bowie, Maryland post office sidewalk was far removed (that is, seventy-five feet) from the street fronting the post office.\textsuperscript{67} Comparing the postal sidewalk in \textit{Kokinda} and the

\textsuperscript{61.} \textit{Id.} at 4-72.
\textsuperscript{62.} \textit{Id.} at 4-70.
\textsuperscript{63.} 424 U.S. 828 (1976).
\textsuperscript{64.} 407 U.S. 197 (1972).
\textsuperscript{65.} \textit{Greer}, 424 U.S. at 836.
sidewalks surrounding the Supreme Court, it appears that there may be a measurement that individuals could make to identify whether a passageway is a traditional public forum. That is, seventy-five feet from a municipal street is evidently too great a distance for public forum status to attach. On the other hand, the nondedicated sidewalk of *Grace* is so close to the street that Congress was unable to prevent public forum status from attaching. However, the Court does not offer any guidance for determining the distance undedicated public property must be from other public fora before it becomes a traditional public forum.

Emphasis was also placed on the sidewalk's purpose or intended use by analogy to the Court's decision in *Greer v. Spock*. In that case, respondents attempted to distribute campaign literature on a military reservation. Although some types of expressive activity had been allowed on the post and visitors were generally welcome there, partisan political speech was prohibited. The Supreme Court held that the primary function of a military reservation is to train soldiers, not to provide a public forum. That the reservation had been "open to the public" was not deemed determinative of the type of forum which existed at the reservation. Moreover, the *Greer* Court explicitly rejected the lower court's assumption that "whenever members of the public are permitted freely to visit a place owned or operated by the Government ... that place becomes a 'public forum' for purposes of the First Amendment." Thus, the military reservation, like the post office sidewalk, was not deemed to be a public forum merely by virtue of its ownership, public access, or its proximity to conceded public fora.

The plurality in *Kokinda* based its finding that the postal sidewalk constituted a nonpublic forum on several factors. As previously noted, the sidewalk's proximity to other public fora was not sufficient to confer upon the passageway heightened first amendment protections. In addition, the plurality noted

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68. Id. at 3120-21.
70. Id. at 830.
71. Id. at 838. "The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false." *Id.*
72. Id. at 836; See also *Adderley v. Florida*, 385 U.S. 39, 48 (1966).
that the Postal Service had not dedicated that area to expressive activities. In fact, the only fora the Postal Service dedicated to expressive speech were the several bulletin boards located within the premises. Finally, although other forms of speech had been allowed to occur on postal grounds, the plurality did not feel that such limited permission automatically constituted a dedication of a public forum. Thus, the passageway between the parking lot and the entrance of the post office did not rise to the level of a traditional or limited public forum and, consequently, was determined to be a nonpublic forum.

Nondedicated public fora (that is, nonpublic fora) are scrutinized by means of a "reasonable relation" analysis. To meet this standard, regulations and laws must be reasonable vis-a-vis the governmental purposes served and must be viewpoint neutral. In this context, reasonableness does not connote the "most" reasonable or the "only" reasonable regulation to effect the desired purpose. That is, there may be other, more reasonable, approaches which would secure the asserted interest. However, as long as the regulation at issue is itself reasonable, it will pass constitutional muster. In addition, the regulation cannot be an attempt to suppress the speaker's message merely because the official does not agree with it.

The Postal Service listed several problem areas which were allegedly ameliorated by the regulation. First, the "considerable time and energy fielding competing demands for space and administering a program of permits and approvals" caused postal facility managers to neglect their primary functions. Second,
the demand for the facilities was greater than the availability of space and time; therefore, some groups were excluded. 84 Third, the congressional mandates to the Postal Service suffered. Moreover, Congress stated that the purpose of the new Postal Service was to provide postal delivery in the most efficacious manner possible. 85 The organization was to be run like a business—self-sustaining and responsive to the needs of its patrons. 86

In determining that the regulation was reasonable in light of the purposes served, the plurality analyzed the nature of solicitation vis-a-vis other forms of permitted speech. 87 The plurality agreed with the conclusions of a Postal Service study and adopted several of its conclusions concerning solicitation. 88 First, the Court held that solicitation, by its very nature, was a more disruptive form of speech than picketing or orating. 89 The Court reasoned that solicitation was "likely to produce hostile reactions and cause people to avoid post offices." 90

The plurality felt that only minimal interpersonal exchanges occurred when literature was being distributed. 91 By contrast, solicitations generated more anxiety because of the confrontations which the Court perceived as inevitable in these types of encounters. 92 Thus, the Court believed that solicitation possessed a more aggressive quality than the permitted activities. 93 It was deemed reasonable to omit this type of protected speech because the government had a legitimate interest in providing efficient services and preventing disruption. 94

The Court's reasoning in Kokinda is not unlike its current holdings in shopping center cases. Shopping centers are largely private property, as contrasted with the public area involved in Kokinda. However, different types of private property may be comparable to publicly held lands. For instance, a private resi-

84. Id.
85. Id. at 3122.
86. Id.
87. Id. at 3121.
88. See id. at 3123.
89. Id. at 3124.
90. Id.
91. Id. at 3123.
92. Id.
93. Id. at 3125.
94. Id. at 3123.
idence which is not susceptible to use by the public as a forum for expression is analogous to a nonpublic forum. On the other end of the spectrum, certain portions of a company town may be utilized for expressive activities and are comparable to a traditional public forum.

One of the most prominent cases in this area is Marsh v. Alabama.\textsuperscript{95} In Marsh a Jehovah's Witness was convicted of trespass under state law for distributing religious materials in the business district of a company town.\textsuperscript{96} The town, Chickasaw, was the property of the Gulf Shipbuilding Corporation and "ha[d] all the characteristics of any other American town."\textsuperscript{97} Thus, the Court was required to balance the individual's first amendment rights against the corporation's property interests.\textsuperscript{98}

The Court determined that such first amendment rights warranted preferential status vis-a-vis property rights.\textsuperscript{99} In coming to this conclusion, great emphasis was placed upon the town's unique character. In this regard, the Marsh majority asserted: "Ownership does not always mean absolute dominion. The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."\textsuperscript{100}

Although the company town and the private home probably represent opposite ends of a spectrum, shopping centers ostensibly occupy a position somewhere in between.\textsuperscript{101} Prior to 1972, shopping centers were generally considered to be public fora. However, in Amalgamated Food Employees Union v. Logan Valley Plaza,\textsuperscript{102} the Court compared the private shopping center with public areas but did not foreclose the possibility of regulation of

\textsuperscript{95} 326 U.S. 501 (1946).
\textsuperscript{96} Id. at 502-03.
\textsuperscript{97} Id. at 502. The narrow issue before the Court was deemed to be whether the occupants and visitors of Chickasaw could "be denied freedom of press and religion simply because a single company ha[d] legal title to all the town." Id.
\textsuperscript{98} Id. at 509.
\textsuperscript{99} See id.
\textsuperscript{100} Id. at 506.
\textsuperscript{101} See NIMMER, supra note 60, at 4-110.
\textsuperscript{102} 391 U.S. 308 (1968). The Court in Logan Valley found the shopping center to be the "functional equivalent" of the business district in Marsh. Id. at 318. Utilizing reasoning similar to that used in Marsh, the Court observed that certain private property may "be treated as though it were publicly held." Id. at 316.
speech. In fact, the Court observed that even "where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State." The interference of which the Court spoke was the unreasonable interference with courthouse passageways and the obstruction of the administration of justice. Justice Marshall also posited that "the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public with an equal right of access to it."

In *Lloyd Corp. v. Tanner*, the Court encountered a slightly different twist on the customary shopping center theme—the mall. Handbills were distributed inside the mall by individuals protesting the Vietnam War. The *Tanner* Court distinguished both *Marsh* and *Logan Valley*. The former was limited to the specific facts of that case. The latter involved labor union picketing that was "directly related in its purpose to the use to which the shopping center property was being put,' and where ... no other reasonable opportunities for the pickets to convey their message ... were available."

The *Tanner* Court represented a swing toward greater recognition of property rights as compared to first amendment rights. In finding for the mall owners, the Court noted that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes." A move toward "dedication" was also presaged. This occurred when the Court intimated that the mall owners' failure to dedicate their property to "public use" was sufficient to deprive the leafleeters of any asserted first amendment right. Thus, a constitutional similarity between limited public fora and shopping centers is apparent.

103. *Id.* at 320.
104. *Id.*
105. *Id.* at 320-21.
107. *Id.* at 553.
108. *Id.* at 556.
109. *Id.* at 562-63.
110. *Id.* at 563 (quoting Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 320 n.9 (1968)).
111. *Id.* at 569.
112. *Id.* at 570.
The Supreme Court's shift in this area was again documented in Hudgens v. NLRB. Labor picketers within a shopping center were held to have no first amendment right to such conduct. Although the facts and circumstances of the case were quite similar to those of Logan Valley, the Court asserted that Lloyd had overruled Logan Valley and ruled that the holding in Lloyd was to be applied in shopping center cases without regard to the content of the speech. Therefore, the Hudgens decision apparently provides "a First Amendment right to engage in speech activities on private property contrary to the wishes of the owner ... only if such property consists of a company town or other entity which performs 'the full spectrum of municipal powers and [stands] in the shoes of the State.'"

The final case of import in the shopping center cases is Pruneyard Shopping Center v. Robins. Although the rule applicable to shopping centers was thought to have been firmly established in Hudgens and Lloyd, the Supreme Court upheld a California Supreme Court interpretation of that state's constitution which permitted peaceful speech in shopping centers despite the owners' disapproval. The Supreme Court appears to allow the states some discretion as to whether such speech shall occur in these circumstances. That is, a state constitution can be construed as having "dedicated" the owners' property in the limited facts of that case.

The Court seems to recognize the same type of property rights in the government as it does in connection with private citizens. As the owner of the property, both the mall owners and the government have a right to dedicate it or not as each desires. Without such dedication, it appears that any property which is not clearly a public forum will be designated nonpublic.

IV. ANALYSIS OF THE CONCURRING OPINION

Although concurring in the plurality's decision in Kokinda, Justice Kennedy disagreed sharply with the Court's finding that
the sidewalk was a nonpublic forum.\textsuperscript{119} Justice Kennedy preferred the view that the Postal Service had created some type of public forum "because of the wide range of activities that the Government permit[ted] to take place on this postal sidewalk."\textsuperscript{120} However, he also reasoned that it was unnecessary to determine whether a public or nonpublic forum existed because the regulation at issue represented a valid time, place, and manner restriction.\textsuperscript{121}

A time, place, and manner regulation may be upheld if it is content-neutral, narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication.\textsuperscript{122} "Facilitating the customers' postal transactions," in Kennedy's opinion, is a sufficient governmental interest.\textsuperscript{123} Therefore, even if the sidewalk were a traditional public forum, the regulation as applied would not impermissibly impinge the respondents' first amendment rights.

Although the concurring justice had a fundamental disagreement with the plurality regarding the type of forum established by the Postal Service's regulations, he acceded to their view of solicitation. Moreover, Justice Kennedy did not disagree with the plurality that, in light of the Postal Service's empirical conclusions, "in-person" solicitation was a different form of speech "deserving different treatment from alternative forms of solicitation and expression."\textsuperscript{124} In support of this assertion, he made note of other instances in which this type of fundraising had been restricted.\textsuperscript{125}

\begin{itemize}
  \item\textsuperscript{119} United States v. Kokinda, 110 S. Ct. 3115, 3125 (1990) (Kennedy, J., concurring).
  \item\textsuperscript{120} Id.
  \item\textsuperscript{121} Id. at 3125-26.
  \item\textsuperscript{122} Id. at 3126.
  \item\textsuperscript{123} Id. at 3126.
  \item\textsuperscript{125} Id. Justice Kennedy failed to elaborate on how customers' transactions would be facilitated by allowing the postal regulation to stand.
\end{itemize}
V. ANALYSIS OF DISSENTING OPINION

Finally, Justices Brennan, Marshall, Stevens, and Blackmun dissented from the plurality's decision. The dissenters strongly asserted that the postal sidewalk was a traditional public forum.\(^{126}\) They noted that the strictest first amendment scrutiny must be applied when attempts to proscribe protected expressive activities are made.\(^{127}\) Therefore, the postal sidewalk should be analyzed under the most exacting standards.\(^{128}\)

The dissent in *Kokinda* espoused the "incompatibility" standard.\(^{129}\) In contrast to "speech-dedicated" analyses, this theory turns on "whether the speech activities would be incompatible with the use to which the premises are dedicated or primarily devoted."\(^{130}\)

The dissent took exception to the plurality's view that the narrow purpose of the particular sidewalk at issue should be allowed to greatly influence the disposition of the case.\(^{131}\) The dissent noted that streets, parks, and sidewalks are usually built for purposes other than to create public fora.\(^{132}\) For this reason, the dissent would have had the Court place greater emphasis upon the similarity of the passageway at issue in *Kokinda* to a 'regular' sidewalk; that is, both offer unrestricted passage for pedestrians.\(^{133}\) In determining that the postal sidewalk was a public forum, substantial weight was placed upon the accessibility of the area to the citizenry.\(^{134}\) "[T]hat the walkway ... is ... open and accessible to the general public is alone sufficient to identify it as a public forum."\(^{135}\) In further support of this contention, the dissent noted that

\[\text{quintessential examples of a "public forum" are those open spaces—streets, parks, and sidewalks—to which the public generally has unconditional access and which "have immemorially been held in}\]

\[\text{access by the public."}\]

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126. *Id.* at 3128 (Brennan, J., dissenting).
127. *Id.* at 3131-32.
128. *Id.*
129. See generally *Nimmer*, supra note 60, at 4-72 (discussing the "incompatibility" standard).
130. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 3129.
trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” 136

Justice Brennan also observed, “It is only common sense that a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural place for speech to occur . . . .” 137

In the dissent’s eyes, the “openness” and “accessibility” to the public was determinative of the issue. In their view a reasonableness test was inappropriate in any case “where government property was open to the public.” 138 The Court’s decision in Greer v. Spock was inapposite and readily distinguishable because the military reservation was not open and accessible in the same manner as the “quintessential” public fora. 139

The only concession which the dissent was prepared to make, arguendo, was that instead of the sidewalk being a traditional public forum, it was a limited public forum. 140 However, in conceding this for the purpose of argument, Justice Brennan noted that since the Postal Service had allowed such a broad variety of speech to occur on the premises, its ability to proscribe respondents’ solicitations was greatly curtailed. 141 This argument is supported by the plurality’s own assertion that the postal passageway “‘has been dedicated to some First Amendment uses and thus is not a purely nonpublic forum.’” 142 Thus the dissent’s level of scrutiny would be much stricter than the plurality’s based upon the type of forum the dissenting justices believed existed at the sidewalk leading to the entrance of the Bowie, Maryland post office.

VI. CONCLUSION

It seems that a recurring area of disagreement among the Justices of the Supreme Court concerns the identification of the type of forum involved in a particular situation. In a given case,

137. Id.
138. Id. at 3131.
139. Id. at 3131 n.5.
140. Id. at 3132.
141. Id.
142. Id. (quoting plurality opinion at 3121 (emphasis added in dissenting opinion)).
once this decision has been made, the Court appears to readily agree on the corresponding level of scrutiny to apply to the facts. Therefore, the methodology which leads the Court to a specific forum determination is of vital importance. Unfortunately, this methodology is not illuminated in Kokinda.

The plurality’s initial decision that the post office sidewalk was a nonpublic forum was determinative of the outcome of its subsequent analysis. Moreover, their substantial reliance on Greer v. Spock is misplaced. A military post that may exclude all civilians and a post office sidewalk constructed to facilitate patrons’ movement are hardly analogous.

A prudent manner to decide if a public place which has all the trappings of a traditional public forum is in fact open as a public forum would be to use a “systemic” approach. Under this approach, if an area was so proximate to a governmental operation that its use as a public forum could potentially cause significant interference with the operation, then the area should not be classified as a public forum. However, the interference must rise to the level envisioned by Justice Marshall—unreasonable or obstructive. The main thrust of this approach would be to create a presumptive characterization of a public place as a public forum unless its characterization as public forum would significantly impede governmental functions. Thus, mere inconvenience would not be sufficient to obviate a finding of a public forum.

As an example of a systemic analysis, a military installation may be thought of as a system. Within the perimeter of the post, a multitude of defense-related activities occur. The functions of the military occur both inside and outside of the installations’ buildings. This fact is due to the unique nature of the military. Training missions and support services require personnel to constantly move about within the installation to accomplish specific goals. Protection of such areas is required so as not to jeopardize the military’s mission.

In contrast, the systemic nature of a post office is more appropriately defined by the space within the building itself. With the exception of route deliveries, postal duties are performed, to a great extent, within the post office building. Ad-

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144. Consistent with this approach, the Supreme Court has never given “official convenience” much weight as a reason to regulate constitutional rights.
mittedly, certain arrangements must be made for loading and deliveries to the postal facility. In this regard, special outside areas for official loading and unloading are commonly set aside. These nonpublic entrances and loading docks and their approaches should obviously be viewed as nonpublic fora.

Considering the facts in Kokinda, undoubtedly the government could prohibit expressive activities within the post office building or even in the special loading areas; these are areas where governmental functions are carried out. However, the Kokinda plurality attempts to bring within its protective umbrella property owned by the government merely because it is physically "connected" to a nonpublic forum.

The plurality asserts that the Bowie post office has an interest in keeping its passageways free from obstructive solicitors. However, neither in Greer nor in Grace did the Court attempt to ban expressive activities outside the respective public fora. The main distinction for the Court seems to lie in the fact that the Bowie post office sidewalk was physically closer to a nonpublic forum than it was to a traditional public forum. This approach appears to require a "yardstick analysis" to determine whether a public sidewalk is open to the citizenry as a public forum. If this is so, a domino effect could occur. First, a questioned walkway or street would be classified as a certain type of forum based upon its nexus to another of that type. Then, the once questioned area, having now been classified a traditional or nonpublic forum, would become the measure of its adjacent areas. Thus, the measuring point itself would move.

The Court's plurality decision could easily be undermined in several ways. First, if Justice Kennedy should reach the question of what type of forum exists in a case with similar circumstances, he would probably determine it to be at least a limited public forum. If this happens, it would seem unlikely that he could adhere to the conclusion of the plurality in Kokinda. Moreover, if Justice Kennedy should decide that the forum presented in a similar case was some type of public forum, the weight of past decisions would certainly indicate a more strict analysis of the regulations. The postal regulations in Kokinda would be unlikely to withstand such heightened scrutiny.

Further, in Kokinda, no clear line of demarcation was drawn to delineate the physical proximity required to transform a non-dedicated forum into a traditional public forum; a similar sidewalk fifty feet from the public street may be held a public forum. Although the physical distance between the disputed forum and the nearest similar traditional public forum was not the sole reason for the Court's decision in this case, it certainly played a significant role. Insofar as the plurality failed to construct a "bright-line" test for determining the extent to which proximity influences the nature of the forum, it is quite likely that a similar case could be decided differently if the disputed forum was merely closer to a street, park, sidewalk or other traditional public forum.

Another facet of the plurality's reasoning concerns the alleged difficulties which the Postal Service would encounter if it allowed expressive activities on the sidewalk. The Postal Service asserted that effective regulations would be too costly and complex to be administrable. However, this statement, unsubstantiated by any analytical evidence, does no more than prohibit expressive speech for the sake of administrative convenience. In the past, the Court has been reticent, if not unwilling, to allow curtailment of fundamental rights merely because the government is inconvenienced.

Finally, the Court states that solicitation is "an inherently more intrusive and complicated activity than is distributing literature." In the Court's scenario, the distributor says nothing to passersby; he mutely and inoffensively hands pedestrians his literature. This view is overly simplistic and naive. Quite often, persons seeking to disseminate information attempt to engage others as they traverse public sidewalks and streets. The street corner orator who desires to engage specific passersby in debate is much more intrusive than a solicitor who merely sits behind a table and waits for individuals to approach him. Therefore, categorical exclusion of solicitation on this basis is merely an ad hominem argument to help bolster an otherwise shaky decision.

Similarly, the "studies" which the plurality relied upon in part to base its arguments about the intrusiveness of solicitation may

146. Id.
147. Id. at 3123.
148. Id.
not withstand critical analysis. The studies which the Postal Service conducted, and to which the Court deferred, did not appear to have the characteristics of a proper scientific study. The collection techniques were neither identified nor discussed in the opinion. Further, the information gathered may not have been completely objective. The results may have been compiled by individuals with a great bias against solicitors. The inherent prejudice of such persons would have likely been reflected in negative findings under the guise of an “empirical study.” Therefore, the credibility of these studies is suspect.

In conclusion, it appears that the plurality’s decision in Kokinda to allow the Postal Service to exclude solicitors from their sidewalks is based upon reasoning which is difficult to quantify. Although the “speech-dedicated standard” which the Court utilizes is not without merit, it is not necessarily the best analytical standard. A more speech-protective view would have resulted in a determination that the postal sidewalk was a traditional public forum and the regulations would have been strictly scrutinized under the appropriate analysis for such a forum.
I. INTRODUCTION

In 1964 the Supreme Court decided Van Dusen v. Barrack.1 That decision was the culmination of numerous civil actions filed as a result of an airplane crash in Boston Harbor.2 About one-third of the cases were filed in the United States District Court for the Eastern District of Pennsylvania by personal representatives of the victims.3 The defendants moved the court, pursuant to 28 U.S.C. § 1404(a),4 to transfer the action to the district court in Massachusetts upon the grounds that other suits from the same accident were pending there and that most of the witnesses were residents of that state.5 Plaintiffs objected, arguing that the language of section 1404(a) permitted a transfer only to another district where the action “might have been brought.” Since plaintiffs were not qualified under Massachusetts law to sue as decedents’ representatives, they maintained that Massachusetts was not a venue where they might have brought suit.6 The United States Supreme Court, however, held that in transfers under section 1404(a) the statutory language “where it [the civil action] might have been brought” refers to proper venue, not to substantive law or other procedural prerequisites.7

The Court further held that upon such transfer the law of the transferor state would apply.8 In its opinion the Court stated that

2. Id.
3. Id. at 614.
4. 28 U.S.C. § 1404 (1988) is the federal statutory provision governing changes of venue. Subsection (a) permits litigation filed in a federal court having proper venue to be transferred for purposes of convenience, and in the interest of justice, to another district or division where it might have been brought.
5. Van Dusen, 376 U.S. at 614.
6. Id.
7. Id. at 621-623.
8. Id. at 639.
in cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms. 9

The Court clearly did not intend the decision to be a rule applied in all section 1404(a) transfer situations. It stated that, "We do not attempt to determine whether for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) . . . ." 10

In the twenty-five plus years since Van Dusen, the lower federal courts have continued to struggle with the question of what law applies where a transfer is initiated by a plaintiff. In March 1990 the Supreme Court, in the 5-4 decision of Ferens v. John Deere Co., 11 finally answered this question. It remains to be seen whether the Court's seemingly simple answer will, in reality, create more problems than it solves for the federal courts in diversity actions.

II. BACKGROUND

A. Erie and Progeny

Since the adoption of the Constitution federal courts have struggled in their role in adjudicating state causes of action. 12 Section 34 of the Judiciary Act of 1789 provided:

The laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the courts of the United States in cases where they apply. 13

9. Id. (emphasis added).
10. Id. at 640.
12. Article III, section 2 of the United States Constitution provides:
The judicial Power shall extend . . . to Controversies . . . between citizens of different States . . . .
U.S. CONST. art. III, § 2.
In the landmark case of *Erie Railroad v. Tompkins*, the Supreme Court determined that the Act mandated that federal courts utilize both the statutory and the common law of a state in diversity actions. The *Erie* Court reached this conclusion upon the grounds that scholarly research had recently shown that the purpose of the section [34] was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written.

Within a few years following *Erie*, the Supreme Court was faced with the issue of proper application of state conflict-of-law rules in cases based on diversity jurisdiction. In *Klaxon Co. v. Stentor Electric Manufacturing Co.*, the Supreme Court held that the *Erie* prohibition against federal courts making independent determinations of applicable law extended to the conflict-of-laws field. *Klaxon* thus required federal courts in diversity actions to follow conflict-of-law rules prevailing in the states in which the federal courts sit.

Another problem confronting the courts in the exercise of federal diversity jurisdiction concerned venue, specifically the doctrine of forum non conveniens. In *Gulf Oil Corp. v. Gilbert*, the Supreme Court ruled that a New York federal district court did not exceed its authority in dismissing a complaint upon forum non conveniens grounds. In that case the plaintiff, a Virginia

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

14. 304 U.S. 64 (1938).
15. Id. at 78.
16. Id. at 72-73.
17. 313 U.S. 487 (1941).
18. Id. at 496.
19. In general, the doctrine of forum non conveniens provides that where a plaintiff has a choice of forum, a court, in its sound discretion, can refuse jurisdiction if the case could more conveniently, yet justly, proceed in another forum. 20 AM. JUR. 2D COURTS § 173 (1965).
21. Id. at 512. The court noted that "[t]he principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." Id. at 507 (emphasis added).
resident, sued a Pennsylvania corporation in New York federal court, where venue was proper. Defendant, which was qualified to do business and had agents to receive process in both New York and Virginia, moved to dismiss the complaint on the basis of forum non conveniens. Defendant contended that the plaintiff lived in Virginia, as did most of the witnesses, events in question occurred there, and defendant did business and was subject to jurisdiction there. 

The Supreme Court, in its opinion, recognized that district courts have the power to decline jurisdiction under exceptional circumstances, and upheld the dismissal under the doctrine of forum non conveniens. In support of its conclusion the Court noted that "[t]he course of adjudication in New York federal court might be beset with conflict of laws problems all avoided if the case is litigated in Virginia where it arose." 

B. Section 1404(a)

Following closely on the heels of the Gilbert decision was the enactment, on June 25, 1948, of section 1404(a) which provides that:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

22. Id. at 502-03.
23. Id. at 503.
24. Id. at 503.
25. Id. at 504.
26. The Court found, in applying this doctrine, that it was required to "weigh relative advantages and obstacles to fair trial." Id. at 508. It refused to allow the plaintiff to harass, oppress or vex the defendant by inflicting on him the trouble and expense of litigating in an inconvenient forum unnecessary to plaintiff's own right to pursue his remedy. On the other hand, the court further stated that a strong balance in defendant's favor must occur to warrant disturbance of plaintiff's forum choice. Id.

The Court considered a number of private and public interest factors. Private interest factors included ease of access to sources of proof, availability of compulsory process for unwilling witnesses, cost of obtaining attendance of willing witnesses, possibility of view of premises, judgment enforceability, and any other practical considerations for ease and inexpensive expedition of trial. Id. Public interest factors included administrative pile up of litigation, imposition of jury duty on community with no relation to the matter, interest of having localized disputes decided at home, and having a diversity trial in a place at home with the state law governing the case. Id. at 508-09.

27. Id. at 512.
Although there is little in the way of legislative history to section 1404(a), the little there is points to its enactment as a remedy for the dismissal necessarily mandated by the granting of forum non conveniens. 29 While Congress failed to provide much guidance when it enacted section 1404(a), subsequent case law has interpreted this section as not merely a codification of forum non conveniens, but also a revision thereof. 30 There is, however, nothing in the legislative history to indicate that, at the time it enacted this federal venue transfer provision, Congress considered its effect on the application of state choice-of-law principles imposed upon federal courts sitting in diversity in accordance with the rule in Klaxon.

In Van Dusen the Supreme Court, for the first time, addressed the application of choice-of-law principles in the context of a venue transfer under section 1404(a). 31 In that case, the Court struggled with the proper role of the federal courts in both application of section 1404(a) and adherence to the principles of Erie. Under the facts of Van Dusen the Court found that, in order to comply with Erie and section 1404(a), the law of the transferor court must be applied by the transferee court upon the defendant's motion. 32 To rule otherwise would permit a defendant to negate the plaintiff's forum selection advantage by effecting a change of law as part of a transfer from a proper, although inconvenient, forum. 33 Moreover, this result was required by the principle of Erie which mandates "an identity or uniformity between federal and state courts." 34 However, the Court cautioned that such a result would not blanket the entire application of section 1404(a) transfers.

29. See Reviser's Note which states, Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper .... The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.


32. Id. at 639.
33. Id. at 634.
34. Id. at 639.
We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens.*

III. FACTUAL BACKGROUND OF THE FERENS DECISION

On July 5, 1982, Albert Ferens, a Pennsylvania resident, suffered an amputation of his right hand after it became entangled in the rotating augur of a combine manufactured by John Deere Company. On July 3, 1985, Albert and Margaret Ferens filed an action for breach of express and implied warranties of merchantability and fitness for use against John Deere Company in the United States District Court for the Western District of Pennsylvania. Since the defendant John Deere Company was a Delaware corporation with its principal place of business in Illinois, the suit was based on diversity of citizenship.

Pennsylvania has a four-year statute of limitations for breach of warranty actions, but only a two-year statute of limitations for personal injury actions. For reasons unknown, Mr. and Mrs. Ferens failed to file an action for personal injuries in the Pennsylvania courts within the two-year limitation.

Not wanting to forego their products liability action, on July 25, 1985, the Ferenses filed a negligence/strict liability action for the same accident against John Deere Company in the United States District Court for the Southern District of Mississippi, Jackson Division. At the time the action was filed, Mississippi had a six-year statute of limitations for personal injury actions. Defendant

35. *Id.* at 640 (footnotes omitted) (emphasis added).
37. *Id.*
38. *Id.*
39. *See 28 U.S.C. § 1332(c) (1988)* which provides that a corporation is considered, for purposes of diversity jurisdiction, a citizen of its state of incorporation or where its principal place of business is located.
44. *See Miss. Code Ann. § 15-1-49 (1972).* This section was amended by the Mississippi legislature effective July 1, 1989, to provide for a three-year period of limitations.
John Deere Company was qualified to do business in Mississippi and had appointed a local registered agent. No party disputed that Mississippi had no contact with this occurrence other than the fact that John Deere Company was subject to jurisdiction and venue in that state. Indeed, plaintiffs acknowledged that they had filed their cause of action in Mississippi to take advantage of its lengthy statute of limitations.

Deere filed its answer in the Mississippi federal court and, within one week and before any further action was taken, the Ferenses filed a motion for a change of venue under section 1404(a) to the federal court in Pennsylvania where their breach of warranty action was pending. Defendant Deere did not op-

45. Ferens, 862 F.2d at 33. 28 U.S.C. § 1391(c) (1988) formerly provided that:
A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.
Section 1391(c) was amended effective November 19, 1988, P.L. 100-702, Title X, § 1013(a), 102 Stat. 4669, to provide:
For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.
46. See Ferens, 862 F.2d at 32-33.
47. See Brief for Petitioners at 23, Ferens v. John Deere Co., 110 S. Ct. 1274 (1990) (No. 88-1512) (LEXIS, Genfed library, Briefs file). The Federal District Court for the Western District of Pennsylvania noted that most states provide for borrowing statutes that essentially adopt the statute of limitation of the jurisdiction where the claim arose. Mississippi's borrowing statute provided that it would adopt such foreign limitation of the "state ... where the defendant has resided before he resided in this state." MISS. CODE ANN. § 15-1-65 (1972). The court noted this statute was interpreted to apply "where a nonresident in whose favor the statute has accrued afterward moves into this state" (citing Louisiana & Mississippi R. Transfer Co. v. Long, 159 Miss. 654, 131 So. 84, 88 (1930)). Because of this unusual interpretation by the Mississippi courts, and in light of the fact that Deere was considered a resident of Mississippi at the time of accident because it was registered to do business there, the Pennsylvania federal court noted that Mississippi's borrowing statute would not apply and that the Mississippi federal court would have applied Mississippi's six-year, rather than Pennsylvania's two-year, statute of limitations to the action. Ferens v. Deere & Co., 639 F. Supp. 1484, 1489-90 (W.D. Pa. 1986).
MISS. CODE ANN. § 15-1-65 was amended by the legislature effective July 1, 1989 to provide that if a cause of action arose outside the state of Mississippi and that state has a shorter period of limitation, such limitation shall apply unless the cause of action accrued in favor of a Mississippi resident.
49. See id. at 3, 26-30. Plaintiffs' motion provided the following grounds in support of
pose the transfer motion and an order granting transfer was entered. The two cases were then consolidated in the Pennsylvania federal district court.

Subsequent to the transfer, John Deere Company filed a motion to dismiss all claims, asserting the Pennsylvania two-year statute of limitations bars the negligence and strict liability claims. Thus, the federal district court in Pennsylvania was faced with the very question which the Van Dusen court had reserved, namely, when transfer is sought by a plaintiff what law must govern in the transferee court?

IV. THE DECISIONS OF THE LOWER COURTS

The Pennsylvania District Court granted Deere's request for summary judgment as to the negligence and strict liability claims. It found that the law of the transferee state (Pennsylvania),

a change of venue:

1) That plaintiffs are residents of Pennsylvania,
2) That the accident which is the subject of their claim occurred in Pennsylvania and that "plaintiffs' claim does not arise out of or have any connection with any acts by the Plaintiffs or Defendant or facts or circumstances arising in this State and this District."
3) That defendant is doing business in the Commonwealth of Pennsylvania,
4) That a breach of warranty action of plaintiffs against defendant is presently pending in the Pennsylvania federal court,
5) That said breach of warranty action arises from the same accident,
6) That both suits contain common questions of fact and law,
7) That Deere & Co. is already actively pursuing defense of the breach of warranty action in Pennsylvania,
8) That feasibility of consolidation is great and convenience of the parties will be served by transfer,
9) That transfer would also save judicial time and effort and ensure against the possibility of inconsistent verdicts,
10) That a substantial number of witnesses are located in the jurisdiction of the Federal District Court for the Western District of Pennsylvania,
11) That substantial medical, hospital and vocational records are located in Pennsylvania, and
12) That "to require plaintiff to pursue two separate actions involving common questions of fact and law at the same time and in Pennsylvania and Mississippi would place an unreasonable burden on Plaintiff."

Id.

51. Id.
including Pennsylvania's two-year statute of limitations, would apply to the action. The Ferenses had contended that, in light of *Van Dusen*, the law of the transferor state (Mississippi), including Mississippi's longer statute of limitations, should remain with the case. The court, while acknowledging a disagreement among the circuits and commentators as to whether the transferor or transferee law should apply, nevertheless ruled that the law of the transferee court should apply. It reasoned this would prevent plaintiffs from "transform[*] § 1404(a) into a device which would enable them to forum shop for a favorable limitation period." It held that to allow such "legal footwork" — the filing of a complaint and an immediate transfer to a district where the claim is time-barred — would violate the "interest of justice" provision of the statute.

The Third Circuit Court of Appeals affirmed the summary judgment by the District Court, but for a different reason. The court of appeals held that the application of Mississippi's six-year statute of limitations was unconstitutional in light of that state's obviously insignificant contacts with the parties and occurrence. However, subsequent to that court's opinion, the Supreme Court in *Sun Oil Co. v. Wortman* held that it is not unconstitutional for a state to apply its own statute of limitations in a conflict-of-laws setting, despite the fact that under those same conflict-of-law rules the substantive law of another state applied. The opinion of the court of appeals in *Ferens* was thereafter vacated and remanded by the Supreme Court in light of the *Sun Oil Co.* holding.

On remand the Third Circuit Court of Appeals again applied the transferee court's law, this time specifically addressing the issue of which state's law controls in a plaintiff-initiated section 1404(a) transfer. Although recognizing that the lower courts have differed in their approach to the problem, the appellate court

54. *Id.* at 1490-91.
55. *Id.* at 1492.
56. *Id.* (citing *Kaiser v. Mayo Clinic*, 260 F. Supp. 900, 907 (D. Minn. 1966)).
57. *Id.* at 1492.
59. *Id.* at 427.
61. *Id.* at 722.
nevertheless held that the transferee state’s law (that is, Pennsylvania’s) must govern because “§ 1404(a) should be interpreted in a manner that promotes federal-state uniformity.” It noted that in Van Dusen, which involved a defendant-initiated transfer, the Supreme Court had held that the federal statute “should be construed to achieve uniformity between the Massachusetts federal court (transferee court) and the state courts of Pennsylvania where the action was filed.” The court thereby preserved the plaintiffs’ right to select a proper forum.

The Third Circuit observed that in the Ferens case, though, “there is no danger of the defendant using § 1404(a) to defeat the plaintiffs’ federal venue selection privilege” and thus, “no reason to depart from the goal of federal-state uniformity as set forth in Erie.” The circuit court saw that it was the plaintiffs’ “hope to use § 1404(a) and a brief stop in Mississippi to achieve a result in the federal courts of Pennsylvania that they could not achieve in the state courts of Pennsylvania.” Accordingly, the Third Circuit ruled that applying the law of the transferee state in this case would serve the goals of Erie.

The Ferenses sought a writ of certiorari on the grounds that the Third Circuit’s holding conflicted with the Supreme Court’s reasoning in Van Dusen and with the reasoning in decisions from other circuit courts of appeal. The Ferenses further asserted that the case involved an important question of federal law (construction and operation of 28 U.S.C. § 1404(a) in plaintiff-initiated transfers). The Supreme Court granted their petition.

64. Id. at 35.
65. Id.
66. Id. at 36.
67. Id.
69. Id. at 15-19 (citing Roofing & Sheet Metal Serv. v. La Quinta Motor Inns, 889 F.2d 982, 991 n.14 (11th Cir. 1982) and Martin v. Stokes, 823 F.2d 469, 471 (6th Cir. 1980) [both cases involved defendant-initiated transfers and those courts, in dicta, determined that the law of the transferor court should apply in all § 1404(a) transfers]; and citing Gonzales v. Volvo of America Corp., 734 F.2d 1221, 1224 (8th Cir. 1984), superseded, 752 F.2d 295 (7th Cir. 1985) [plaintiff-initiated transfer where the court adopted the Martin and Roofing & Sheet Metal Serv. dicta to support its holding that the transferor law applies, regardless of which party initiated the transfer, provided venue and personal jurisdiction are proper in the transferor court; that opinion was subsequently vacated and the case decided on other grounds]).
PLAINTIFF-INITIATED TRANSFERS

V. THE ARGUMENTS

A. The Ferenses' Contentions

In their brief to the Supreme Court, plaintiffs (petitioners) made two contentions in support of their request for reversal of the Third Circuit's decision. They argued that the transferee court (Pennsylvania) was obligated to apply the law of the transferor state (Mississippi) on a plaintiff-initiated section 1404(a) transfer from an unopposed motion, and that their use of the transfer statute did not constitute impermissible forum shopping.

The plaintiffs presented several arguments in support of their claim that the law of the transferor court should be applied. First, they argued that Mississippi law should apply since they had the option of remaining in Mississippi and taking advantage of its six-year statute of limitations. Second, plaintiffs argued that the reasoning of Van Dusen should simply be extended to plaintiff-initiated transfers. Plaintiffs relied upon that portion of the Van Dusen opinion which had interpreted section 1404(a) as a federal judicial housekeeping measure to deal with the placement of litigation in federal courts and to generally be but a change of courtrooms with respect to applicable state law. The Ferenses interpreted Van Dusen as equating the "interest of justice" language of section 1404(a) with convenience in arguing that "[t]he purpose of § 1404(a) is to allow federal civil suits to be transferred, in the interest of justice, to the most convenient forum." Since the Van Dusen court recognized that a plaintiff's state law advantage from selecting a forum should not be defeated upon a defendant-initiated transfer, plaintiffs argued that their state law advantage likewise should not be defeated when they chose to exercise the right to seek a transfer under section 1404(a).

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71. Id. at 22-26.
72. Id. at 10-12.
73. Id. at 13-14.
74. Id. at 15.
1404(a). The plaintiffs believed that the statute should allow either party to request a transfer.

Plaintiffs relied on authority from other circuits to support their position for application of transferor law on a plaintiff-initiated transfer. Mr. and Mrs. Ferens contested that the Third Circuit's cited authorities supporting its ruling were cases that appeared to have been brought in an improper forum, whereas venue and personal jurisdiction in this case were proper in Mississippi.

Plaintiffs also contended that the Third Circuit erred in its perception that they had impermissibly forum shopped. The Ferenses asserted that Van Dusen protects a plaintiff's venue selection privilege and that a proper exercise of their right to select a favorable forum is not improper forum shopping. Since jurisdiction and venue were proper in Mississippi, plaintiffs argued that they were entitled to select that forum to gain the advantage of its favorable statute of limitations.

The Ferenses also claimed that, since their initial filing in Mississippi was permissible, their motion to transfer likewise did not constitute improper forum shopping. Plaintiffs argued that they did not gain any additional legal advantage by transferring under 1404(a) for the convenience of the parties. Instead, they were "simply" meeting the "very purpose" for which section 1404(a) was enacted, that is, making the trial more convenient and utilizing judicial resources more efficiently.

The Ferenses further maintained that the holding of the Third Circuit to apply the transferee law in plaintiff-initiated transfers

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77. Id. at 15.
78. See id. at 16 (citing In re Bendectin Litigation, 857 F.2d 290, 306 (6th Cir. 1988), cert. denied sub nom. Hoffman v. Merrell Dow Pharmaceuticals, 488 U.S. 1006 (1989); Gonzalez v. Volvo of America Corp., 734 F.2d 1221, 1224 (4th Cir. 1984), superseded, 752 F.2d 295 (7th Cir. 1985); Roofing & Sheet Metal Serv., Inc. v. La Quinta Motor Inns, 689 F.2d 982, 991 n.14 (11th Cir. 1982); and Martin v. Stokes, 623 F.2d 469, 471 (6th Cir. 1980).
79. Brief for Petitioners at 19-20, Ferens v. John Deere Co., 110 S. Ct. 1274 (1990) (No. 88-1512) (LEXIS, Genfed library, Briefs file). Plaintiffs' position was that if the original forum was proper as to both venue and jurisdiction, there should be no change of law on a plaintiff-initiated transfer. Id. at 21-22.
80. Id. at 22.
81. Id. at 23.
82. Id. at 23-24.
83. Id. at 24.
could, in fact, allow a form of forum shopping. They cited the example of a less diligent plaintiff who, having filed in a forum with a less favorable law, could use section 1404(a) to obtain the advantage of a more favorable law in the transferee forum. 84

In summary, the plaintiffs argued that their initial forum selection was proper, and their use of section 1404(a) to transfer their case to a convenient forum should not deprive them of the state law advantages to which they were entitled. Indeed, they relied upon Van Dusen in support of their position that the Pennsylvania federal court, upon transfer, must apply the law of Mississippi, the state in which their action was filed.

B. John Deere Company's Contentions

In its brief, defendant John Deere Company's primary contention was that Congress did not intend, by enacting section 1404(a), to allow these plaintiffs to litigate their time-barred Pennsylvania cause of action in the federal courts of Pennsylvania by applying the longer Mississippi statute of limitations. 85 Defendant argued that by their use of section 1404(a) the Ferenses had effectively "filed" their tort claim in Pennsylvania, which they could not have done directly. Deere & Company also argued that section 1404(a) should not be interpreted to allow such legal maneuvering absent a clear legislative intent. 86

84. Id. at 24 (citing Ferens v. Deere & Co., 862 F.2d 31, 36 (3d Cir. 1988) (Seitz, J., dissenting) and Martin v. Stokes, 623 F.2d 469, 472 (6th Cir. 1980)).
85. Brief for Respondents at 2-22, Ferens v. John Deere Co., 110 S. Ct. 1274 (1990) (No. 88-1512) (LEXIS, Genfed library, Briefs file). A second issue raised by defendant Deere & Company in its Brief was that the plaintiffs' interpretation of § 1404(a) would be an unconstitutional infringement by the federal government on the powers reserved to the states and a denial of equal protection. Id. at 22. Citing the case of Guaranty Trust Co. v. York, 326 U.S. 99 (1945), and that court's interpretation of the Erie doctrine, Deere & Company maintained that federal courts sitting in diversity must apply the statute of limitations which would be applied by the courts of the state in which the federal court sits. Id. at 23-24.

The defendant's equal protection argument was based upon the fact that had Deere been a Pennsylvania resident, the plaintiffs' action against it could not have been maintained in either the state or federal courts of Pennsylvania. The Pennsylvania state court action would have been barred by Pennsylvania's statute of limitations and there would have been no diversity for an action in federal court. Thus, Deere argued that the accident of diversity had subjected it to suit in Pennsylvania as a result of the application of Mississippi's statute of limitations. Id. at 24-25.

The majority of the Supreme Court did not, however, address the defendant's constitutional argument as part of its opinion.
86. Id. at 2-3.
Looking to the limited legislative history surrounding section 1404(a), defendant contended that nothing within that history indicated Congress had even considered choice-of-law rules when enacting this provision. Deere & Company pointed to the fact that section 1404(a) was drafted in accordance with the doctrine of *forum non conveniens* and allows transfers provided it is for the convenience of the parties and witnesses and in the interest of justice to do so. Congress intended a transfer under section 1404(a) to mitigate the harsh effect of a dismissal under *forum non conveniens* and not necessarily to alter a change in the applicable choice-of-law rules which would normally have resulted after dismissal and refiling in the proper forum. Defendant maintained that choice-of-law rules changed with a *forum non conveniens* dismissal because of the general view that such rules were obtained from the forum where the action was actually litigated. Therefore, argued Deere, when a plaintiff seeks a transfer to the forum where he intends to litigate, in accordance with the doctrine of *forum non conveniens* a change of applicable choice-of-law rules would be necessitated.

The defendant also pointed out that at the time it was enacted section 1404(a) was not meant to be a radical change in the existing law. Deere asserted that the legislative history surrounding section 1404(a) indicates instead that the statute was intended to provide for a transfer for the convenience of parties and witnesses. The proposed revisions to the Judicial Code [which included section 1404(a)], contended Deere, contained many noncontroversial improvements which, when taken together, were intended to improve and modernize laws relating to the federal judiciary. Defendant asserted that this legislative history of minor, noncontroversial changes did not envision or intend results allowing “plaintiffs with state common law claims to effectively

87. Id. at 3 (citing Note, *Choice of Law After Transfer of Venue*, 75 *Yale L.J.* 90, 94 (1965)).
88. Id. at 4.
89. Id. at 8-9.
90. Id. at 9 (citing *Restatement of Conflict of Laws* § 7 (1934) as an example of such general principle).
91. Id. at 10.
92. Id. at 5-6.
93. Id. at 7 (citing S. Rep. No. 1559, 80th Cong., 2d Sess. 2 (1948)).
implement the most favorable state choice of law rules as federal law." 94

The defendant took issue with the plaintiffs' attempt to extend the reasoning of *Van Dusen* to plaintiff-initiated transfers 95 and questioned why the *Van Dusen* court would go to such extent to limit its holding if its considerations were so equally compelling in a plaintiff-initiated transfer setting. 96 Deere theorized that 1) the *Van Dusen* court may have foreseen manipulation of section 1404(a) in plaintiff-initiated transfers, or 2) that in finding a lack of congressional intent to have a change of law with a defendant-initiated transfer, the door was left open for the opposite conclusion with a plaintiff-initiated transfer. 97

The defendant also took issue with the *Van Dusen* finding that section 1404(a)'s legislative background supports the view that it was not designed to defeat state law advantages accruing from exercise of plaintiff's venue privilege. 98 This seemed inaccurate, in Deere's view, since section 1404(a) was drafted in accordance with *forum non conveniens* which would have necessitated a change in applicable choice-of-law rules. Deere claimed that to the extent that the legislative history can be looked to for direction, it supports change of law as being in accord with *forum non conveniens* and a "straightforward" reading of *Erie*, that is, applying the law of the state in which the federal court sits. 99

Deere then set forth what it perceived to be undesirable consequences of the plaintiffs' interpretation of section 1404(a) as requiring application of the transferor law in plaintiff-initiated transfers. For example, Deere argued that a plaintiff could file in an inconvenient forum for the purpose of "capturing" favorable procedural choice of law rules 100 other than those related solely

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94. *Id.* at 7.
95. *Id.* at 10-11.
96. *Id.* at 12.
97. *Id.*
98. *Id.* at 12-13.
99. *Id.* at 13.
100. Generally, choice of law or conflict of laws deals with situations where a court must determine what state's law is to govern in a particular case where the law of two or more states may apply. *Restatement (Second) of Conflict of Laws* §§ 1-10 (1971).

A variety of theories are or have been in use by the states to determine which state's law governs a particular action. R. Leflar, L. McDougal & R. Felix, *American Conflicts Law* §§ 86-96 (4th ed. 1986); Kay, *Theory into Practice: Choice of Law in the Courts*, 34 Merc. L. Rev. 521 (1983). There has been some debate as to whether sensible choice

Choice-of-law or conflict-of-law principles also distinguish between choice of substantive law and choice of procedural law. E. SCOLES & P. HAY, CONFLICT OF LAWS §§ 3.8-3.12 (1982). Because of this distinction, a state may determine that, according to the particular choice of law theory to which it adheres, the substantive law of another state may govern the action. However, the forum state, even under these circumstances, is still permitted to choose to apply its own choice of procedural law to the action pending in its courts. 2 J. BEALE, A TREATISE ON CONFLICT OF LAWS §§ 584.1-606.1 (1935); R. LEFLAR, L. MCDougAL & R. FELIX, AMERICAN CONFLICTS LAW §§ 121-30 (4th ed. 1986); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 122-143 (1971).


102. Brief for Respondent at 16, Ferens v. John Deere Co., 110 S. Ct. 1274 (1990) (No. 88-1512) (LEXIS, Genfed library, Briefs file). Thus, for example, a plaintiff could file in a particular forum to gain its more favorable view of burden of proof and then transport that procedural choice of law rule, through use of a § 1404(a) transfer, to the actual courtroom where plaintiff intended to litigate the action.

103. Defendant relied on the final draft of that study published in 1969 and the comment thereto which proposed that for plaintiff-initiated transfers, the transferee court should apply the same law it would have applied had the action been originally filed in that court. Brief for Respondents at 17, Ferens v. John Deere Co., 110 S. Ct. 1274 (1990) (No. 88-1512) (LEXIS, Genfed library, Briefs file).

The comment to that study provides:

When transfer is granted in lieu of dismissal or when the plaintiff for some other reason is seeking a transfer, he ought not to carry with him the choice of law advantage resulting from his initial choice of forum, even if that choice was made without full knowledge of the facts.

STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1306(c) commentary (1969).
conclusion of no change of law on a defendant-initiated transfer, as well as the treatise *Federal Practice & Procedure*. Defendant urged the adoption of the Third Circuit's reasoning as being the better approach and cited district court opinions that applied the transferee law after plaintiffs had either intentionally or improvidently filed in an inconvenient forum.

VI. THE OPINION

A. The Majority's View

The majority opinion, written by Justice Kennedy with Justices Rehnquist, White, Stevens and O'Connor joining, held simply that when a plaintiff seeks a transfer under section 1404(a) the law of the transferor state must apply. In support of its holding the majority relied upon what it perceived as three independent reasons underlying the *Van Dusen* decision. Those stated reasons were:

First, §1404(a) should not deprive parties of state law advantages that exist absent diversity jurisdiction.

Second, §1404(a) should not create or multiply opportunities for forum shopping.

Third, the decision to transfer venue under §1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law.

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105. Defendant referenced the 1976 edition of that treatise which provided that transferee state law should control in a transfer on plaintiff's motion. Brief for Respondents at 18, Ferens v. John Deere Co., 110 S. Ct. 1274 (1990) (No. 89-1512) (LEXIS, Genfed library, Briefs file) (citing 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* §3846, at 234 (1976)). Defendant pointed out that the 1986 edition also cited the ALI study as support that the transferee law should apply in such a situation, although noting that the cases seem to be applying the transferor law regardless of which party moved for transfer if the court had proper venue and personal jurisdiction. *Id.* at 18-19 (citing 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* §3846, at 367 (2d ed. 1986)).

106. *Id.* at 21 (citing Jenkins v. Armstrong World Indus., 643 F. Supp. 17 (D. Idaho 1985)).


109. *Id.* at 1280.
The Court reiterated the *Van Dusen* Court's belief that parties should not be deprived of state law advantages upon transfer of venue.\(^{110}\) The Court made the observation that a defendant will lose no "legal" advantage by an application of the law of the transferor state since that state's law would have applied had the plaintiff chosen to litigate there anyway.\(^{111}\) The defendant would lose the "nonlegal" advantage caused from forcing the plaintiff to litigate in an inconvenient forum.\(^{112}\) The loss of any such "nonlegal" advantage to the defendant would be slight in light of the purpose of section 1404(a), which is to eliminate inconvenience without altering permissible venue choices.\(^{113}\) The majority found that to apply the law of the transferee court would seriously undermine *Erie* since this would result in a change of state law in this federal diversity case.\(^{114}\)

In addition, the majority did not view the plaintiffs' use of section 1404(a) as impermissible forum shopping, noting that the plaintiffs already had the luxury of shopping for a forum since they could have remained in the courts of Mississippi.\(^{115}\) The Court stated that:

> If it does make selection of the most favorable law more convenient, it does no more than recognize a forum shopping choice that already exists....

> ...Applying the transferee law, to the extent that it discourages plaintiff-initiated transfers, might give States incentives to enact similar laws to bring in out-of-state business that would not be moved at the instance of the plaintiff.\(^{116}\)

\(^{110}\) *Id.* The Court stated: "The existence of diversity jurisdiction gave the defendants the opportunity to make a motion to transfer venue under § 1404(a), and if the applicable law were to change after transfer, the plaintiff's venue privilege and resulting state-law advantages could be defeated at the defendant's option." *Id.* (citing *Van Dusen v. Barrack*, 376 U.S. 612, 678 (1964)).

\(^{111}\) *Id.*

\(^{112}\) *Id.*

\(^{113}\) *Id.* at 1280-81.

\(^{114}\) *Id.* at 1281.

\(^{115}\) *Id.* at 1282.

\(^{116}\) *Id.* at 1282. Although unclear, it appears the majority in this passage attempts to support its holding by asserting that if it were to rule that the transferee state's law applied on a plaintiff-initiated transfer, a state might be inclined to enact laws similar to Mississippi's to bring in out-of-state litigation business for attorneys that would not be moved at the plaintiff's request. This inference, however, that a state would act specifically to encourage litigation to support its bar, seems remote at best and weak support for a finding that the transferor law must apply.
The majority next interpreted the *Van Dusen* decision as standing for the principle that transfer decisions under section 1404(a) should be based on convenience rather than the possibility of prejudice occasioned by a change of law. The majority held that to consider prejudice in determining the applicable law in a section 1404(a) transfer would require the court to "make an elaborate survey of the law, including statutes of limitations, burdens of proof, presumptions, and the like." This would demand too much judicial time and resources for what is supposed to be a matter of convenience. Moreover, the Court noted that if the law of the transferee state would apply in a plaintiff transfer, situations would exist where the plaintiff could "exploit" the rule to the prejudice of the defendant. Or, if transferee law applied, plaintiffs would then only seek a transfer when convenience benefits were more important than loss of favorable law, a deterrence the Court did not wish to encourage. Accordingly, the Court chose to avoid an analysis based on prejudice in favor of one strictly limited to convenience.

In its conclusion, the Court acknowledged that "some may object" to a Pennsylvania court being required to apply a Mississippi statute of limitations to a Pennsylvania cause of action. But it dismissed any apparent inequities by stating it could find no alternative rule that produces a more acceptable result. The Court made it "quite clear" that to have actions pending in both Mississippi and Pennsylvania arising from the same Pennsylvania accident would be the type of unacceptable waste of time, energy and money section 1404(a) was designed to prevent.

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117. *Id.*
118. *Id.*
119. *Id.* at 1282-83.
120. *Id.* at 1283 (citing Note, *Choice of Law in Federal Court After Transfer of Venue*, 63 CORNELL L. REV. 149, 156 (1977)).
121. *Id.* at 1283.
122. The majority expressed preference for the convenience analysis as follows, "Some might think that a plaintiff should pay the price for choosing an inconvenient forum by being put to a choice of law versus forum[,]" but concluded that, "[t]he desire to take a punitive view of the plaintiff's actions should not obscure the systematic costs of litigating in an inconvenient place." *Id.*
123. *Id.* at 1284.
124. *Id.*
125. *Id.* (quoting Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960)). *Continental*, however, would seem distinguishable. It involved damage actions for alleged
support of its ruling, the Court observed that the Pennsylvania court already would have been required to apply Mississippi's statute of limitations to this Pennsylvania cause of action had the defendant requested the transfer, and that Congress granting plaintiffs an equal right to seek a transfer under section 1404(a).\footnote{126}

The majority concluded by discussing what it saw as two potential criticisms of its holding: 1) why make a plaintiff file in the inconvenient forum in the first place, and 2) why not develop more sophisticated federal choice-of-law rules for diversity actions involving transfers.\footnote{127}

As for the first criticism, the Court stated no guarantee exists that a transfer will be granted since the plaintiff must show that the transferee court would be a more convenient forum and that the transfer would be in the interest of justice.\footnote{128} The Court commented that Deere did not contest the transfer in this case,\footnote{129} although that option was available to it and is available to other defendants in future cases. The majority attempted to give a glimmer of hope to defendants that such a transfer may not be granted if contested, but dimmed that hope by this caveat, "Although a court cannot ignore the systematic costs of inconvenience, it may consider the course that the litigation already has taken in determining the interest of justice."\footnote{130}

Finally, the Court dismissed any notion that it should develop federal choice-of-law rules by finding that state conflict-of-law rules, to a large extent, already ensure that the appropriate law will be applied and thus the federal court ought not intervene in this area. In support of this position, the majority commented

unseaworthiness of a barge. Two actions arising from the same incident were filed by two different plaintiffs in two different states; defendant sought a § 1404(a) transfer for convenience. \textit{Continental}, 364 U.S. at 20-21.

\footnote{126. See Ferens, 110 S. Ct. at 1284.}

\footnote{127. Id.}

\footnote{128. Id.}

\footnote{129. Id. Defendant Deere contended it had no reason to object to the transfer since Pennsylvania was obviously more convenient. Rather, Deere's objection concerned which state's law would govern after transfer. Brief of Respondent at 11, Ferens v. John Deere Co., 110 S. Ct. 1274 (1990) (No. 88-1512) (LEXIS, Genfed library, Briefs file).}

\footnote{130. Ferens, 110 S. Ct. at 1284 (emphasis added). However, as noted in Justice Scalia's dissent, what the court seems to be stating implicitly here is that plaintiff must be sure to pick a "really inconvenient" forum to ensure transfer will take place. \textit{Id.} at 1288 (Scalia, J., dissenting).}
that it believed the application of the transferor law would result in the appropriate balance between fairness and simplicity.\textsuperscript{131}

\textbf{B. The Dissent's View}

Justice Scalia wrote the dissenting opinion in which Justices Brennan, Marshall and Blackmun joined. In the concluding paragraph of his opinion Justice Scalia explained that he reached a different result from the majority "largely because we approach the question from different directions."\textsuperscript{132} He went on to state that, for the majority, the central issue was whether the principles of the \textit{Klaon} case hindered the application of section 1404(a).\textsuperscript{133} To the contrary, Scalia analyzed the case in light of the Rules of Decision Act of 1789 and the line of cases applying that statute, including \textit{Erie} and \textit{Klaon}.\textsuperscript{134}

In expressing his belief that the case should be viewed in a broader, historical perspective, Scalia observed that not only does the Rules of Decision Act address the specific subject of which law to apply, while section 1404(a) does not, but also that that statute embodies "a vital expression of the federal system and the concomitant integrity of the separate States."\textsuperscript{135}

At the outset of his dissent Justice Scalia traced the history of the problem of applying state law in federal courts sitting in diversity from the Rules of Decision Act through \textit{Erie} and \textit{Klaon}. \textit{Klaon} saw the twin aims of \textit{Erie} as uniformity within a state and the prevention of forum shopping between state and federal systems.\textsuperscript{136} Then, in \textit{Van Dusen} the Court was asked to decide what state law would apply in federal court upon a defendant-initiated transfer pursuant to section 1404(a).\textsuperscript{137}

According to Justice Scalia, the \textit{Van Dusen} Court reasoned that the transferor law must apply because it was highly unlikely that Congress, when it enacted section 1404(a), intended to provide defendants with a device to manipulate substantive law applied to a transferred case.\textsuperscript{138} Congress did not intend to

\begin{itemize}
\item \textsuperscript{131} Id. at 1284 (citing R. LEFLAR, \textit{AMERICAN CONFLICTS LAW} § 143, at 203 (3d ed. 1977)).
\item \textsuperscript{132} Id. at 1288.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id. at 1285.
\item \textsuperscript{135} Id. at 1288 (quoting the majority's opinion at 1280).
\item \textsuperscript{136} Id. at 1285.
\item \textsuperscript{137} \textit{Id.}; \textit{Van Dusen v. Barrack}, 376 U.S. 612, 626-43 (1964).
\item \textsuperscript{138} \textit{Ferens}, 110 S. Ct. at 1285.
\end{itemize}
deprive plaintiff of any state law advantages from his choice of venue.¹³⁹ To allow that would give the defendant, upon change of venue, a bonus in the form of a change of law.¹⁴⁰

In addition, Justice Scalia noted that the Van Dusen Court departed from the rule of Klaxon so that the policies underlying Klaxon and Erie would not be violated. By utilizing the federal transfer statute, a defendant would be allowed to defeat the plaintiff’s choice of forum, a result the defendant could not have achieved had the plaintiff filed in state court.¹⁴¹

Justice Scalia concluded that neither of the reasons for departing from the principles of Klaxon were present in the plaintiff-initiated transfer in Ferens. He stated:

First, just as it is unlikely that Congress, in enacting § 1404(a), meant to provide the defendant with a vehicle by which to manipulate in his favor the substantive law to be applied in a diversity case, so too is it unlikely that Congress meant to provide the plaintiff with a vehicle by which to appropriate the law of a distant and inconvenient forum in which he does not intend to litigate, and to carry that prize back to the State in which he wishes to try the case. Second, application of the transferor court’s law in this context would encourage forum-shopping between federal and state courts in the same jurisdiction on the basis of differential substantive law.¹⁴²

Justice Scalia criticized the majority’s reliance on the remote possibility that, if a change of law occurred on plaintiff’s transfer, the defendant might be prejudiced.¹⁴³ He pointed out that such a situation would be rare since it would only occur when a plaintiff filed in a forum that was not only less convenient but also where the law was less favorable to plaintiff.¹⁴⁴ He argued that in such a scenario the defendant is only disadvantaged, but not prejudiced, since plaintiff could have filed in the transferee forum in the first place.¹⁴⁵ Instead, he saw prejudice to a defendant occurring “only when the plaintiff is enabled to have his cake and eat it too — to litigate in the more convenient forum

¹³⁹. Id.
¹⁴⁰. Id.
¹⁴¹. Id.
¹⁴². Id. at 1286.
¹⁴³. Id.
¹⁴⁴. Id.
¹⁴⁵. Id. at 1286-87.
that he desires, but with the law of the distant forum that he desires."

Justice Scalia was clearly not impressed with the majority's argument that the interest of the federal courts in reducing costs would be served by application of the transferor law on a plaintiff-initiated transfer request. The majority said a plaintiff would not request transfer if the transferee law applies or that the court would be reluctant to order a transfer *sua sponte* if prejudice would result to a plaintiff. However, in Justice Scalia's view, if the transferor forum had so little connection with the action that the court would have been expected to dismiss on *forum non conveniens* grounds prior to adoption of section 1404(a), then under such circumstances a court would be no less reluctant to transfer despite a change of law. The actual systematic costs which will be incurred, he pointed out, are those that will now result from increased federal diversity suits because the Court has now given its stamp of approval for plaintiffs to seek the law they want through a state's application of conflict-of-law principles, and then bring it back to where they really intend to litigate.

VII. ANALYSIS

In the final analysis, the dissent of Justice Scalia in the *Ferens* case seems the better view. In the interests of convenience the majority of the Court has overlooked the historical spirit and intent of the federal court's role in adjudicating what are essentially state causes of action.

A. Historical Precedent Under *Erie*

At the outset of its opinion the *Ferens* majority stated, "In *Van Dusen v. Barrack*, we held that, following a transfer under § 1404(a) *initiated by a defendant*, the transferee court *must* follow the choice of law rules that prevailed in the transferor court." However, in reality the Court in *Van Dusen* expressly limited its

146. *Id.* at 1287.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 1277 (emphasis added) (citation omitted).
ruling to defendant transfers under facts as contained in that case, leaving open the possibility of a different result under other circumstances. By its simplistic interpretation of *Van Dusen* at the outset of the opinion, the majority in *Ferens* makes clear that it chooses to look at the problem by way of bright line rules and has slighted the cautionary language of *Van Dusen*, which provided that other considerations might govern in a section 1404(a) plaintiff-requested transfer.

Although asserting that its holding is in full accord with *Erie* principles, the majority overlooks the simple fact that the opportunity to transfer venue to another state does not exist in state courts. Therefore, the use of such a procedural device, which is available only in the federal system, must still comply with the nature and spirit of *Erie* and the underlying policies of *Klaxon* of uniformity within a state and avoidance of forum shopping. The majority opinion chooses not to discuss the fact that the plaintiffs' forum shopping in *Ferens* was not the selection

153. Id.
155. The *Erie* court was concerned with the discrimination by noncitizens against citizens which had resulted under the *Swift* doctrine. *Erie R.R. v. Tompkins*, 304 U.S. 64, 74 (1938). *Swift v. Tyson*, 16 Pet. 1 (1842), initially interpreted The Rules of Decision Act as providing that federal courts exercising diversity jurisdiction must apply only the "written laws" of a state and not the unwritten laws of a state declared by its highest court. Federal courts were instead free to determine independently what the common law of a state was or should be. The *Erie* Court found that the effect of that doctrine was to allow rights enjoyed under unwritten general law to vary depending on whether suit were filed in state or federal court. *Erie*, 304 U.S. at 74-75. Now, in *Ferens*, the defendant has been discriminated against because its right to assert the affirmative defense of statute of limitations varies depending on whether the action is filed within the federal or state court system.

The importance of the principle underlying *Erie* would seem to be not whether a different right could be obtained in a Pennsylvania federal court than that which could be obtained in a Pennsylvania state court, but rather that a different right could be obtained through use of the federal courts in a diversity action. A plaintiff has an initial "privilege" or "right" to bring a diversity suit in the forum of his choice and to seek any favorable state law advantages from such selection. However, it should be implicit within that right that plaintiff also intended in good faith to litigate in that forum when he chose it.

The majority in *Ferens*, however, would allow the plaintiff to make use of the federal court system, and specifically § 1404(a), without the implicit requirement that his initial choice of forum be made in good faith.

of one state over another, but rather the selection of a federal court in which to file and then the application of section 1404(a) to accomplish what they could not have accomplished in a state court.

The majority, in its haste for a simple solution for determining what law applies on a plaintiff-initiated section 1404(a) transfer, has overlooked the fact that for 200 years since the enactment of the Rules of Decision Act the federal courts have struggled with their role in adjudicating state causes of action. In Justice Scalia’s view, when a plaintiff intentionally files in one federal court and then initiates a transfer to a more convenient forum where the plaintiff had intended all along to litigate, the law of the transferee court ought to be applied. This result would, in his opinion, be in conformity with this history of federal jurisprudence.

B. Convenience - The Overriding Consideration

The majority opinion seems to indicate that, for transfer under section 1404(a), convenience is the governing consideration. Other matters should not be considered or weighed in a manner which would deter a transfer to a more convenient court. What this ignores is that a transfer, although convenient, should be foregone if there is a finding that prejudice will result to one of the parties.

The broad venue statutes enable a plaintiff to sue corporate defendants in a choice of jurisdictions. Yet by focusing primarily on convenience, the court has removed the counterbalancing factor of section 1404(a) necessary to grant transfer — in the “interest of justice.” If the defendant is large enough to be the target of the broad venue statutes, it should, on balance, have the ability to force the plaintiff to litigate in the initial forum if plaintiff chose to take advantage of those laws. The majority

157. See id. at 1288.
158. Id.
159. See id. at 1282-84.
160. The majority seems undisturbed by the plaintiffs’ filing and transfer maneuver in its analysis of the appropriate “interest of justice.” Indeed, the majority acknowledges that although its holding may seem . . . “to reward the Ferenses for conduct that seems manipulative[,] we nonetheless see no alternative rule that would produce a more acceptable result.” Id. at 1284.
recites that “application of the transferor law results in the appropriate balance between fairness and simplicity.” But fairness to whom and simplicity at what cost? The Court has taken a statute meant to allow transfer for convenience of parties and witnesses, provided it is in the interests of justice to do so, and has transformed it into a sweeping measure to ensure convenience to the courts. The Court may have sacrificed justice for convenience.

C. The Shifting of the Burdens Under the Ferens Rule

In its search for a rule with an easy application, the majority has refused to acknowledge and may not have realized that its approach to transfer may actually increase diversity suits. Plaintiffs can now select a federal court in which to file suit, not for any of the traditional reasons, but for the purpose of capturing a favorable law and bringing it back to the forum where the plaintiff wants to litigate. To conform to the ruling in Ferens, the transferee court must now make an elaborate survey of statutes of limitations, burdens of proof, presumptions, inter alia, of the transferor’s state, which the transferor court would have applied under its conflict-of-law rules had the case remained in that state.

This burden of analysis is what the Court did not want to impose on a transferor court when determining, “in the interest of justice,” whether a transfer should be granted or denied. The majority refused to impose such an analysis upon a transferor court as consuming extensive judicial time and resources. The majority further states that “[b]ecause this difficult task [making a survey of another state’s laws] is contrary to the purpose of the statute, in Van Dusen we made it unnecessary by ruling that a transfer of venue by the defendant does not result in a change of law.” Thus, the difficult task that the Ferens majority sought

161. Id. at 1281.
162. Id. at 1282-83. The majority apparently implies that this survey of laws would be inconvenient for the transferor court and not judicially economical. However, the language of § 1404(a) itself provides that the transfer shall be for purposes of convenience and judicial economy, provided such transfer is in the interests of justice. It does not necessarily follow that deciding whether a transfer is appropriate must be done through the most convenient and least time-consuming or resource-consuming method.
163. Id. at 1283. This language by the Ferens majority further implies that the result
to avoid imposing on transferor courts in a section 1404(a) transfer has not been avoided. Instead, it has simply been imposed on the transferee court. 164

D. Dealing with Choice-of-Law Problems in Federal Venue Transfers

A simple solution to choice-of-law problems in federal venue transfers of diversity actions has not been developed. Some have proposed the development of federal choice-of-law rules. 165 Others have proposed solutions leading to a more uniform application. 166 Any theory should harmonize the desire to grant a change of courtrooms when based on considerations of convenience and

in Van Dusen was at least in part premised upon the fact that any other conclusion would require the transferor court to make an impracticable survey of laws prior to granting a transfer. However, nowhere in the Van Dusen opinion is there any indication that the transferor law governed defendant-initiated transfers under circumstances of that case simply because it would be too difficult to make an assessment of applicable law. The court instead based its result upon considerations that § 1404(a) was not enacted to allow a defendant to manipulate the substantive rules to be applied contrary to a plaintiff’s original forum selection or to allow defendant to use the statute as a forum shopping device so as to obtain a change of law with a § 1404(a) transfer, a result not achievable in state court. Van Dusen v. Barrack, 376 U.S. 612, 633-637 (1964).

Contra to the Ferens majority’s premise, Van Dusen expressly reserved as to other situations (plaintiff-initiated transfers or forum non conveniens situations) where the courts might have to make an assessment of law from other states as part of the necessary considerations to determine whether the applicable law following transfer should be that of the transferor or the transferee court. Id. at 639.

In addition, following the Supreme Court’s decision in Van Dusen the case was remanded and the lower transferor court still had the burden of determining, by looking to the transferee state’s law, whether a consolidation of the cases would be feasible and probable by the transferee court and, if not, whether the transfer for convenience would still be warranted. Id. at 643-44.

164. It would seem that the imposition upon a transferee court of the “difficult task” to survey the transferor court’s applicable law would have a greater chance of being required when the plaintiff seeks a § 1404(a) transfer. This is because there may be a strong suggestion there was some favorable procedural or substantive choice-of-law rule of the transferor court sought to be captured by the plaintiff. The transferee court would still have to expend the necessary time and resources to determine that favorable rule of the transferor court and then to apply it within its own jurisdiction.


166. See Note, Choice of Law in Federal Court After Transfer of Venue, 63 CORNELL L. REV. 149 (1977).
fairness, yet be consistent with the federal judiciary's role in adjudication of state court claims. Guidance to determine what state's law a federal court should apply upon a section 1404(a) transfer can be gleaned by looking to the circumstances of the Van Dusen case and the Court's reasoning therein, combined with the reasoning of Justice Scalia in the Ferens dissent.

1. Defendant-Initiated Transfers

When a defendant seeks a section 1404(a) transfer, Van Dusen provides that the transferor state's law (including its choice-of-law rules) must continue to govern the action. The facts of Van Dusen reveal that the plaintiffs had a good faith intention to pursue their claims in the courts of Pennsylvania and that Pennsylvania had an interest in the litigation. If a transfer was warranted because of convenience, the interest of justice required application of the transferor law on defendant's motion in order to meet Erie principles of uniformity and to prevent forum shopping by the defendant.

On the other hand, if a defendant seeks a section 1404(a) transfer upon the basis that the action was the type which would have traditionally been dismissed on forum non conveniens grounds, it would seem appropriate that the transferee court apply its own law (including its choice-of-law rules), even though the motion is made by the defendant. Congress, in enacting section 1404(a)

168. Id., 376 U.S. at 639. See also Hiram Walker & Sons, Inc. v. Kirk Line, 877 F.2d 1508, 1512 (11th Cir. 1989); KL Group v. Case, Kay & Lynch, 829 F.2d 909, 915 (9th Cir. 1987); James v. Bell Helicopter Co., 715 F.2d 166, 169 (5th Cir. 1983); Schreiber v. Allis-Chalmers Corp., 611 F.2d 790, 792 (10th Cir. 1979); and Burger King Corp. v. Continental Ins. Co., 359 F. Supp. 184, 186-87 (W.D. Pa. 1973). All of these cases held that the law of the transferor court controls when the defendant requests the transfer.
169. Van Dusen, 376 U.S. at 614. In Van Dusen the plaintiffs were Pennsylvania fiduciaries representing estates of Pennsylvania decedents. They had filed in Pennsylvania and were not seeking a transfer. The state of Pennsylvania arguably had an interest in providing its citizens with a forum. Id.
170. On remand of the Van Dusen action, the Federal Court for the Eastern District of Pennsylvania denied a transfer on the basis that since Pennsylvania law would still apply upon transfer to Massachusetts, there was no indication the cases would be consolidated with those pending under Massachusetts law, thereby negating a transfer for convenience. Popkin v. Eastern Air Lines, Inc., 253 F. Supp. 244, 247 (E.D. Pa. 1966).
171. The Van Dusen court left room for such an argument that a defendant could seek dismissal on forum non conveniens grounds when it noted,
was concerned with ameliorating the harshness of dismissal under *forum non conveniens*. Congress did not indicate any intention that the laws of the original forum, which would have dismissed the action, should now remain in a section 1404(a) transfer of an action which, prior to enactment of the statute, would have been dismissed on traditional *forum non conveniens* grounds. Thus, under such circumstances, it seems consistent that a transfer can now be made but that the transferee law should apply. This application would not violate the goals of *Erie* since, if a state court would have determined that the action should be dismissed under the *forum non conveniens* doctrine, plaintiff's refiling in an alternative forum necessarily also would have meant a change of applicable law. There is no risk of forum shopping since the problem of what state's law applies would be identical in both the federal and state court systems.

2. Plaintiff-Initiated Transfers

a. Case Law Prior to Ferens

As for plaintiff-initiated transfer requests, there is a lack of case history directly on point with the circumstances of *Ferens*. The Ferenses and John Deere Company did cite various lower court opinions in their briefs in support of their respective positions. However, a close reading of those opinions and other cases dealing with section 1404(a) plaintiff-requested transfers reveals that those cases are factually distinguishable.

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173. Mississippi, in the case of Shewbrooks v. A.C. & S., Inc., 529 So. 2d 557, 561-64 (Miss. 1988), determined that a *forum non conveniens* dismissal would be inappropriate where the statute of limitations in the alternate forum had expired, absent an agreement by defendant to waive the defense.


175. Under the present court's interpretation of § 1404(a), an action which would have been dismissed by a state court on traditional *forum non conveniens* grounds is now transferred under § 1404(a), with the transferor court's law still controlling the action.

176. Indeed, the *Ferens* majority neither cited to a single lower court case with an analogous factual setting, nor relied upon the legal reasoning of any lower court opinions in support of its holding.

177. See supra notes 78, 106-07, and accompanying text.
Plaintiff transfer requests first arose under circumstances where a defendant sought to dismiss a case either for improper venue or lack of personal jurisdiction. The courts have determined that if both venue and jurisdiction are lacking, a transfer is warranted under section 1406(a), and the transferee law applies since the action could not have been maintained in the transferor forum. Where venue is proper but there is a lack of personal jurisdiction, the courts have had difficulty in determining whether such plaintiff-requested transfers fall within section 1404(a) or section 1406(a). The lower court decisions are, nevertheless, in agreement that, regardless of which party requests the transfer and whether such transfer occurs under section 1404(a) or section 1406(a), application of the transferee law is required since the action could not have been maintained in the original forum due to such lack of personal jurisdiction.

Those cases where venue is proper but the transfer is requested by plaintiff because of questionable personal jurisdiction...

178. A transfer for improper venue falls under 28 U.S.C. § 1406(a) which states:
The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.
The Supreme Court has held that a claim may be transferred under § 1406(a) from a forum where not only was venue improper, but there was also a lack of personal jurisdiction, finding § 1406(a) broad enough to authorize transfer of such cases. Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466-67 (1962). The Court found that the plaintiff should not now lose its cause of action due to the statute of limitations because of a "mere mistake" in thinking defendant could be found in the original jurisdiction. Id. at 466.
179. See, e.g., Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1101-02 (5th Cir. 1981).
181. See Nelson v. International Paint Co., 716 F.2d 640, 643 (9th Cir. 1983); Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1103-07 (5th Cir. 1981); Martin v. Stokes, 623 F.2d 469, 473 (6th Cir. 1980) (court determined defendant-initiated transfer fell within § 1406(a) and stated, in dicta, that for all § 1404(a) transfers the transferor law must apply); and Carson v. U-Haul Co., 434 F.2d 916, 918 (6th Cir. 1970).
182. See Roofing & Sheet Metal Serv. v. La Quinta Motor Inns, 689 F.2d 982, 992 (11th Cir. 1982) (Roofing involved a defendant-initiated transfer where the court set forth in dicta a rule that whenever personal jurisdiction was satisfactory the transferee law must govern in § 1404(a) transfers). See also Davis v. Louisiana State Univ., 876 F.2d 412, 414 (5th Cir. 1989); Nelson v. International Paint Co., 716 F.2d 640, 643 (9th Cir. 1983); Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1110 (5th Cir. 1981); and Martin v. Stokes, 623 F.2d 469, 472-73 (6th Cir. 1980). Contra Kaiser v. Mayo Clinic, 260 F. Supp. 900, 909 (D. Minn. 1966), aff'd, 383 F.2d 653 (8th Cir. 1967).
were further complicated by the issue of whether the statute of limitations had already expired in the transferee forum at the time the case was initially filed in the transferor state. Case law indicates that if the action had been filed in the transferor forum prior to expiration of the statute in the transferee state, the transferee's statute of limitations would be tolled by the filing in the transferor forum.\textsuperscript{183} However, if the transferee state's statute of limitations had expired by the time of filing in the transferor state, the transferor state's statute could not be used since such use might encourage forum shopping.\textsuperscript{184} In addition, transfer to a forum where service could be perfected, while allowing plaintiff to retain the unexpired statute of limitations of the original forum having questionable personal jurisdiction, would not be in the interest of justice.\textsuperscript{185}

These situations were resolved for the most part by the enactment of 28 U.S.C. § 1631.\textsuperscript{186} However, prior to that statute's enactment, the lower courts, in their quest to chart a straight course through these rough waters, set forth in dicta proposed rules of law premised upon scant legal reasoning as to what law should apply in all section 1404(a) transfers, including those initiated by plaintiffs.\textsuperscript{187} Unfortunately this dicta was then relied upon in subsequent cases by the lower courts.\textsuperscript{188}

b. Circumstances Prompting Plaintiff-Initiated Transfers

Three possible situations arise when dealing with a plaintiff-initiated transfer. These are: 1) when the plaintiff has filed in a

\textsuperscript{183} Carson v. U-Haul Co., 434 F.2d 916, 918 (6th Cir. 1970).
\textsuperscript{184} Id.
\textsuperscript{186} 28 U.S.C. § 1631 (1988) provides:

Whenever a civil action is filed in a court ... and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred. (emphasis added)

\textsuperscript{187} See Nelson v. International Paint Co., 716 F.2d 640, 643 (9th Cir. 1983); Roofing & Sheet Metal Serv. v. La Quinta Motor Inns, 689 F.2d 982, 991 n.14 (11th Cir. 1982); and Martin v. Stokes, 623 F.2d 469, 472-73 (6th Cir. 1980).
\textsuperscript{188} See Gonzalez v. Volvo of America Corp., 734 F.2d 1221, 1223 (7th Cir. 1984), vacated and decided on other grounds, 752 F.2d 295 (7th Cir. 1985). See also Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538, 1540 (11th Cir. 1983).
forum with a good faith intention of litigating there at the time of filing, but subsequently seeks a convenience transfer based upon circumstances previously unknown to plaintiff; 2) when the plaintiff has made use of an intentional filing-and-transfer device for purposes of gaining some favorable law and transporting it to the forum where plaintiff actually intends or desires to litigate; and 3) where the plaintiff, in good faith, seeks a transfer to another forum due to a mistake in the original forum selection.

First, if the plaintiff in good faith intended to litigate the claim within the original forum and is, in fact, seeking a transfer for convenience only, section 1404(a) would warrant application of the transferor court’s law to comply with the true spirit and purpose of that statute. The language of section 1404(a), in fact, does not expressly prohibit opportunity to seek a transfer for convenience by a plaintiff.

Second, if the plaintiff does not in good faith plan to litigate in the transferor forum when the action is filed and a section 1404(a) transfer requested, application of the transferee state’s law would appear more appropriate, in the interest of justice and fairness to the defendant. This would prevent a plaintiff from violating the principles of Erie by intentionally seeking to use the federal court system to attain a result which could not be achieved in state court. Accordingly, application of the transferee law in Ferens would be appropriate since, from the record, it appeared plaintiff had no good faith intention to litigate within that forum, but rather would remain there only if forced to do so. This lack of good faith intention to litigate in Mississippi was noted by the Pennsylvania District Court as well as Justice Scalia in his dissent.

189. See e.g., Gonzalez v. Volvo of America Corp., 734 F.2d 1221, 1222-23 (7th Cir. 1984), vacated and decided on other grounds, 752 F.2d 295 (7th Cir. 1985) for an example of facts indicating plaintiff had a good faith intention to litigate in the forum and sought a transfer for convenience only.

190. That court stated:

We believe that, at the very least, some measure of good faith expectation of proceeding in the court in which the complaint is filed is essential to allow Plaintiffs to avail themselves of that forum’s limitation period, and the filing of a complaint which is merely a procedural ploy will not suffice.


191. In his dissent, Justice Scalia commented that to sanction plaintiff’s intended use of the transfer statute would be to provide a "vehicle by which to appropriate the law
A plaintiff's good faith intention to pursue his claim in the transferor forum could be ascertained by looking at such factors as whether plaintiff had initially filed in state court and the case was then removed by defendant; what discovery steps had been taken by plaintiff to evidence an original intention to litigate in the forum; whether a particular point of law in the transferor forum clearly favors the plaintiff; what contacts the plaintiff had with the forum in the context of the litigation; or if any circumstances had changed since the plaintiff initially filed suit in the forum.  

A plaintiff's intentional use of the transferor forum to gain an advantage through transfer has been held to warrant application of the transferee state's law.  

In addition, use of a transferee state's choice-of-law rules in situations where plaintiff has intentionally employed a filing and section 1404(a) transfer device would not run counter to the Court's concerns in *Sun Oil Co. v. Wortman*. The Court in *Sun Oil* held that a state's application of its own procedural choice of law rules, and in particular its statute of limitations, is constitutional, even under circumstances where another state's substantive law would govern the action. Such application is permissible since a state has a valid interest in controlling litigation within its courts. However, application of the transferee law on a plaintiff-initiated section 1404(a) transfer under circumstances of intentional filing and transfer such as in the *Ferens* case would not conflict with the Court's concerns in *Sun Oil Co*. This is because the plaintiffs in the *Ferens* case, from the outset, did not desire to litigate their claim within the transferor forum of a distant and inconvenient forum in which he does not intend to litigate" in order to "obtain the application of a different law within the State where he wishes to litigate."  


195. Id. at 722.  

196. *Sun Oil* provides:  

A State's interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations.
unless forced to do so. 197 Thus, if the plaintiff at the time of initial filing never intended to litigate in the courts of the transferor state, in reality there is no interest of the transferor state to apply its procedural choice of laws to a matter which plaintiff never had a good faith intention to bring before the courts of that state.

Finally, if the plaintiff had a good faith intention to litigate within the forum and filed in a forum with proper jurisdiction and venue, yet merely made a mistake as to the applicable law in the transferor court, application of the transferee law should also be used on transfer. 198 This situation arises most frequently when the plaintiff initially files in a forum where the statute of limitations has run, yet there is another forum which is more convenient, or at least as convenient, as the transferor forum. Lower court decisions prior to Ferens have held that application of the transferee law was warranted provided that the statute of limitations had not expired in the transferee state at the time of filing in the transferor state, 199 and the section 1404(a) transfer was for purposes of convenience. 200 The reasoning for such a result is that the defendant is not prejudiced since the action could have been filed in the transferee court initially. 201 Appli-

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197. Plaintiffs filed their Motion for Change of Venue with the Mississippi federal court approximately two months after the filing of their Complaint. No other action had been taken in the Mississippi federal court other than the filing of defendant's Answer some five days prior to the plaintiffs' Motion. See Joint Appendix at 3, Ferens v. John Deere Co., 110 S. Ct. 1274 (1990) (No. 88-1512) (LEXIS, Genfed library, Briefs file).

198. In support of its rule for application of the transferor law, the Ferens majority relied upon this type of factual setting to support a finding that if the transferee law were to apply, prejudice might result to defendants which would deter a court from transferring. Ferens v. John Deere Co., 110 S. Ct. 1274, 1283 (1990). But, as pointed out by Justice Scalia in his dissent, this reasoning assumes a plaintiff will file in a forum both inconvenient and with unfavorable law, a remote scenario. In addition, even if this were to occur, this would only result in a disadvantage rather than prejudice to the defendant, since the plaintiff could have filed in the transferee forum in the first place. Id. at 1286-87 (Scalia, J., dissenting).


200. Coffey v. Van Dorn Iron Works, 796 F.2d 217, 220 (7th Cir. 1986) (in which the court would not grant a transfer under § 1404(a) merely to save a case "in the interest of justice" without some additional convenience being present).

201. Accord Ferens, 110 S. Ct. at 1286-87 (Scalia, J., dissenting).
cation of the transferee law under these circumstances would also seem warranted as consistent with 28 U.S.C. § 1631 transfers.202

The Court in its quest for bright lines would probably find the foregoing analytical approach to determine the appropriate law too cumbersome. Yet decisions such as these are similar to those which trial judges face every day. Such decisions are no different than the balancing in which a federal district court engages when making the initial decision of whether to grant a transfer. After all, it is not the duty of the court to prove or support a party’s position of necessary good faith or lack thereof. That burden, rather, is upon the litigants who must seek to convince the court of their position in the matter.

E. Possible Future Implications of the Ferens Ruling

The rule of Ferens may cause future problems. Plaintiffs in diversity actions may now choose a federal court over a state court because of the particular choice-of-law rules used by a state which would remain with the action following a section 1404(a) transfer.203 A plaintiff could file in a forum which is “proper,” yet highly inconvenient for prosecution of the case, simply because of that forum’s procedural conflict-of-law rules on presumptions, burdens of proof, competency of witnesses or other evidentiary matters, and then seek section 1404(a) transfer to a forum convenient for all concerned.204 In addition, there is the potential that a plaintiff’s use of section 1404(a) might not be

202. The results of a transfer under § 1631 and a plaintiff-initiated § 1404(a) transfer would seem inapposite. Section 1631 would allow a plaintiff who has chosen a venue which is proper, yet lacks personal jurisdiction over defendant, to obtain a transfer under § 1631 to where the action may have originally been filed and is now time barred, and to have his effective date as the filing in the original forum. Yet, with a § 1404(a) transfer for convenience from a forum mistakenly chosen by plaintiff because the statute of limitations had expired, and who likewise seeks a convenience transfer to a place it could have been filed originally but is now time barred, the § 1404(a) plaintiff is forced to accept the original expired statute of limitations from the transferor forum. Such would be the result under the majority’s ruling in Ferens. See also O’Brien v. Lake Geneva Sugar Shack, Inc., 585 F. Supp. 273, 276-78 (N.D. Ill. 1984).

203. This is an interesting potential consequence of the Ferens holding, particularly in light of the fact that federal courts are already faced with a deluge of diversity actions.

limited solely to obtaining procedural conflict-of-law advantages. Finally, plaintiffs could seek to file stale claims in states providing for any period of limitations longer than that where the cause of action arose, as long as the filing state viewed its statute of limitations as applicable in choice-of-law matters and personal jurisdiction over the defendant could be obtained.

VIII. CONCLUSION

Congress, in enacting 28 U.S.C. § 1404(a), sought to provide the federal courts with an instrument by which a party could

205. See, e.g., Brief of Amicus Curiae, Product Liability Advisory Council, which sets forth the following hypothetical:

To illustrate, assume hypothetically the same facts as in the instant case except that plaintiffs' farm straddled the Pennsylvania-Ohio border and that the accident actually occurred in Ohio. Assume further that the Ohio substantive law gave plaintiffs substantial law advantages in the amount of damages recoverable and the legal theories available. Assume further that Pennsylvania conflict of law rules have rejected the "lex loci delicti" rule in favor of the most significant contacts rule and therefore a district court in Pennsylvania would apply Pennsylvania substantive law. Nevertheless, if Petitioners' contentions here were valid, plaintiffs could avoid Pennsylvania substantive law simply by filing suit in the federal district court of some other state whose substantive law still adheres to the "lex loci delicti" rule and where John Deere does business, thereby compelling application of Ohio substantive law. Having successfully shopped for and engrafted Ohio substantive law to their action, plaintiffs would then transfer the case back to Pennsylvania for trial under the favorable Ohio law!


The State of Minnesota has a limitation period of six years for personal injuries and four years for strict products liability. Minn. Stat. Ann. § 541.05 (West 1988). Minnesota also recognizes that in conflict-of-laws settings, matters of procedure and remedies are governed by the law of the forum state, regardless of whether another state's substantive law may apply. Davis v. Furlong, 328 N.W.2d 150 (Minn. 1983); Mech v. General Casualty Co. of Wisconsin, 410 N.W.2d 317 (Minn. 1987).
transfer litigation within the federal judiciary for purposes of convenience, provided that such transfer was in the interest of justice. However, choice of law following transfer has precipitated problems not anticipated by Congress at the time of the enactment of section 1404(a).

A proper balance must be struck between affording parties a federal forum to avoid local prejudice and the federal system's need for administrative convenience, a balance which is efficient yet does not infringe upon a state's right to effectuate its policies and laws in the adjudication of state claims. This is not an easy task by any standard.

A majority of the Supreme Court, in its decision in *Ferens v. John Deere Co.*, has now solved the mystery of *Van Dusen v. Barrack* in holding that the transferor state's law should apply in all section 1404(a) transfers, whether requested by defendant or plaintiff. However, in its quest for an efficient rule to promote application of section 1404(a) for convenience of the federal courts, the majority has slighted the 200-year history of the federal courts' role in adjudicating state claims involving diversity. The review of that history by Justice Scalia, in his dissent, supports a conclusion contrary to the majority. *Transferee* law should apply to plaintiff-initiated section 1404(a) transfers sought in a forum where plaintiff did not intend to litigate.

Thus, only the future will tell whether the majority's finding, "[i]f we were to rule for Deere in this case [by finding application of the transferee court's law upon plaintiff's transfer] we would accomplish little more than discouraging the occasional motions by plaintiffs to transfer inconvenient cases,"\(^{207}\) will hold true.

\(^{207}\) *Ferens*, 110 S. Ct. at 1281 (emphasis added).
A DIFFERENCE OF OPINION
THE SUPREME COURT RULES ON MILKOVICH v.
LORAIN JOURNAL CO.

William A. Dickhaut

I. INTRODUCTION

In 1974, Bob Woodward and Carl Bernstein, two reporters for the Washington Post, were piecing together a series of stories concerning political wrongdoing in the White House. In August of 1974, Richard M. Nixon became the first president of the United States to resign while still in office. Newspaper reporters all over the country, buoyed by the success of Woodward and Bernstein, sought out and exposed official wrongdoing in an era of unprecedented press freedom. In that same year, J. Theodore "Ted" Diadiun wrote a column in the sports section of the Willoughby, Ohio, News-Herald that Maple Heights wrestling coach Mike Milkovich and school superintendent H. Donald Scott "lied at the hearing"1 that was held in the Franklin County Court of Common Pleas to determine if a restraining order should be granted for parents of the Maple Heights wrestling team against a suspension of the team by the Ohio High School Athletic Association ("OHSAA").

By characterizing the testimony of Milkovich and Scott as "The Big Lie,"2 Diadiun and the News-Herald set in motion over sixteen years of litigation, twelve decisions by the Ohio courts, two denials of certiorari by the United States Supreme Court, and ultimately, the decision of the Supreme Court in Milkovich v. Lorain Journal Co.3 But beyond the sheer volume and complexity

2. The original title of the article, as it appeared in the News-Herald was "Maple beat the law with the 'big lie.'" The article appeared as part of Diadiun's regular "TD Says" column. Scott v. News-Herald, 25 Ohio St. 3d 243, 277, 496 N.E.2d 699, 727 (1986) (including by way of appendix the Diadiun article which originally appeared in News-Herald, Jan. 8, 1975, sports section at 1, col. 1).
of the cases, *Milkovich v. Lorain Journal,*4 along with its companion case *Scott v. News-Herald,*5 has prompted a full reevaluation of the rights and privileges of the press in a free society. The decision of the Supreme Court has far reaching impact in terms of a newspaper columnist's ability to use anything more than verifiable facts in a story.

In its decision, the Supreme Court specifically rejected the assertion that there should be a special exemption from liability for state defamation laws when statements are labeled "opinions."6 This is a clear break from the trend that began with dicta in *Gertz v. Robert Welch, Inc.*,7 and reached its fullest manifestation in *Ollman v. Evans.*8 That line of cases held that opinions published by the news media were constitutionally protected. The decision of the Supreme Court in *Milkovich* brings a halt to this trend. In doing so, the Court also sends a clear signal of the position it will take in the balance between press freedom as guaranteed in the first amendment, and a private citizen's right to redress for defamation.

While the Supreme Court's decision in *Milkovich* narrowly addresses the question of whether opinion is constitutionally protected, the *Milkovich* case ultimately finds its legal underpinnings in a series of cases involving libel suits by public officials against the news media. This note examines these cases on two levels. First, this note examines the development of the law of defamation as it pertains to public officials. Then, it examines the role opinions play in this relationship. Finally, this note will review *Milkovich,* and its impact on the law of defamation in Ohio.

While this note refers to the question of who is a public official as a crucial issue in understanding the law of defamation, neither this note, nor the Supreme Court's ruling in *Milkovich v. Lorain Journal Co.* specifically address the issue of who is a public official. That issue is left for treatment elsewhere.9 This note will confine itself to the issue of whether there is a first amendment privilege for opinions of the press.

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4. *Id.*
6. 110 S. Ct. at 2705.
8. 750 F.2d 970 (D.C. Cir. 1984).
9. See generally Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer*
II. BACKGROUND


It is well settled that the common law recognizes that injury to a person's reputation can be just as damaging as physical injury. For this reason, the common law recognizes the tort of defamation.\(^\text{10}\) Of the two defamation torts of libel and slander, the common law recognized libel, the publication of statements injurious to the reputation of others, as the greater evil. This could be attributed, in part, to the power, impact, and longevity that a printed or recorded defamatory comment had over the slanderous spoken word.\(^\text{11}\) As a reflection of this fear of injury to reputation by publication, the common law created an exception to the general rule that a tort is not actionable unless damages are proven. In the case of libel, damages need not be proven if the injured party can prove that the libel involved the imputation of a criminal offense, a loathsome disease, misdeeds in business, trade, profession or office, or serious sexual misconduct.\(^\text{12}\)

Against this historical background of the recognition of the tort of defamation, the framers of the Constitution recognized that a free press was essential to a free society. The first amendment to the Constitution states "Congress shall make no law . . . abridging the freedom of speech, or of the press".\(^\text{13}\) In so recognizing, the framers of the Constitution not only stated a highly enlightened view of the role of a free press, but also created a legal dichotomy that continues to trouble students of the law. If Congress and the states, by extension of the fourteenth amendment,\(^\text{14}\) could make no laws abridging the freedom of the

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\(^\text{10}\) Id. at § 112.

\(^\text{11}\) Id.

\(^\text{12}\) RESTATMENT (SECOND) OF TORTS § 570 (1977).

\(^\text{13}\) U.S. CONST. amend. I.

\(^\text{14}\) In New York Times v. Sullivan, the appellee, the commissioner of the City of Montgomery, Alabama, argued that the fourteenth amendment was not applicable because, in the words of the Alabama Supreme Court, "The Fourteenth Amendment is directed against State action and not private action." In that case, the commissioner, a private citizen, had sued the New York Times, also considered a private citizen, for libel. Justice
press, how could the reputation of the individual be protected by libelous statements by the press?

This dichotomy is no more apparent than in the case of statements made by the press about the official conduct of public officials. The first, and perhaps most obvious, attempt to silence criticism of the government, the Alien and Sedition Act of 1798, is both then and now recognized as totally out of character with the spirit of the Constitution. This general repudiation of the Alien and Sedition Act put the government on notice about enacting any law that was aimed so directly at the first amendment. Still, prior to the 1960s, public officials had the power of the common law of defamation as a way of retaliating against the press for injury to their reputations. Under the common law, truth was the only defense. Newspapers that published defamatory statements about public officials, and later found their fact finding to be less than complete or unimpeachable could rightly expect to pay a damage award.


Recognizing the chilling effect the law of defamation had over the criticism of public officials, the Supreme Court's decision in New York Times v. Sullivan in 1964 created a unique exception

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Brennan, in his opinion for the Court, disposed of that argument by pointing out that the Alabama courts had applied a state law that, according to the New York Times, violated their constitutional freedoms of speech and press. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

15. Id. at 273-76 (1964). Justice Brennan stated "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." The Act expired by its terms in 1801, but was frequently repudiated. President Thomas Jefferson pardoned all those convicted under the Act, and remitted any fines paid. Senator John Calhoun, reporting to the Senate on February 4, 1836, said that the invalidity of the Act was a matter "'which no one now doubts.'" Id. at 276 (quoting S. REP. WITH BILL No. 122, 24th Cong., 1st Sess. 3 (1836).


17. 376 U.S. 254 (1964). While this case stands as a landmark in terms of constitutional protection of the press, the facts that gave rise to the suit are only tenuously related to that concept. The original plaintiff, L.B. Sullivan, the Montgomery, Alabama, city commissioner, sued the New York Times not for an unflattering news story, but because they had published a full-page advertisement, written, sponsored and paid for by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." The advertisement was designed to raise support for civil rights groups operating in Alabama. Id. at 256. The commissioner took issue with a number of factual errors in the text.
to liability for defamation when the news media criticized the conduct of public officials acting in their official capacity. The Supreme Court concluded that by allowing public officials the right to recover damages for libel in all cases except where the publisher could prove the truth of those statements, the fear of liability on the part of the publisher would lead to self-censorship. Justice Brennan, in his opinion for the Court, called this judicial recognition of the press' need for first amendment protection a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

The Supreme Court therefore created an exception to the common law, saying that, in order for a public official to succeed in an action for libel against the media, that official must prove that the allegedly libelous statement was made with "actual malice." A statement is made with actual malice when it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." Once the Court determined the media should be allowed to write about public officials without the chilling effect of the common law standards of defamation, the only remaining issue was to define the contours of this new privilege. In *Curtis Publishing Co. v. Butts*, the Court expanded the scope of the requirement of "actual malice" to public figures as well as public officials. *Curtis* combined the lawsuit of University of Georgia football coach Wally Butts against *The Saturday Evening Post* with the libel suit by retired Army General Edwin A. Walker against the Associated Press. In the *Butts* case, the magazine alleged the coach had been involved in an attempt to fix the

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According to the Alabama Supreme Court, while the commissioner was not specifically named, the libel referred to him because the advertisement mentioned misdeeds of "police" and "they" (inferring the police), and since he was responsible for supervising the police department, this was an imputation of his actions. *Id.* at 258.

18. *Id.* at 279.
19. *Id.* at 270.
20. *Id.* at 279-80.
21. *Id.* at 280.
outcome of a Georgia-Alabama football game.\textsuperscript{23} In the \textit{Walker} case, the Associated Press had reported that Walker had led a mob against the integration of the University of Mississippi.\textsuperscript{24} While neither of these men was acting as an elected or appointed government official when the alleged libels occurred, the Court found that "the public interest in the circulation of the materials here involved ... is not less than that involved in \textit{New York Times}."\textsuperscript{25} The Court recognized that public figures, like public officials, had thrust themselves into the vortex of a public controversy, and, by extension, had greater access to a public forum by which they could refute libelous statements by the press.\textsuperscript{26}

The next major extension of the \textit{New York Times} standard for libel was the inclusion of private figures involved in a matter of public concern. In \textit{Rosenbloom v. Metromedia, Inc.}\textsuperscript{27} the Supreme Court affirmed the holding of the Third Circuit Court of Appeals when the Third Circuit held that the \textit{New York Times} standard applied to private citizens involved in "an event of public or general interest."\textsuperscript{28} Justice Brennan, again writing for the Court, stated the rationale that "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved."\textsuperscript{29}

\textbf{C. Gertz v. Robert Welch, Inc. and the Evolution of the Opinion Doctrine}

While the decision in \textit{Rosenbloom} was an extension of the \textit{New York Times} standard, it also may have signalled the beginning of the end for the unbridled growth of the \textit{New York Times} actual malice standard. A sharply divided court debated the merits of extending media protection to libel suits by private citizens under these circumstances. This division in the Court would manifest itself in the first major reversal of the trend in

\begin{itemize}
\item \textsuperscript{23} Id. at 135.
\item \textsuperscript{24} Id. at 140.
\item \textsuperscript{25} Id. at 154.
\item \textsuperscript{26} Id. at 155.
\item \textsuperscript{27} 403 U.S. 29 (1971).
\item \textsuperscript{28} Id. at 31-32.
\item \textsuperscript{29} Id. at 43.
\end{itemize}
Gertz v. Robert Welch, Inc.\textsuperscript{30} In Gertz, the Supreme Court specifically rejected a holding that lawyer Elmer Gertz had to meet the \textit{New York Times} standard of actual malice merely because he had agreed to litigate a civil suit that may have been “a matter of public interest”\textsuperscript{31} under \textit{Rosenbloom}. Justice Powell, in his opinion for the Court, emphasized the differences between public figures and officials, and those private individuals who had not consciously thrust themselves into the public eye. These differences included both an implicit willingness on the part of the public figures to suffer the abuse of a sometimes hostile press, as well as the public figure’s greater access to avenues of rebuttal.\textsuperscript{32} Because of these differences, the Court held that the application of the \textit{New York Times} standard to cases involving private citizens, like Elmer Gertz, would abridge the legitimate state interest in providing a legal remedy for those individuals injured by defamatory falsehoods.\textsuperscript{33}

While \textit{Gertz} effectively enclosed the \textit{New York Times} “actual malice” standard, the dicta in \textit{Gertz} gave rise to another line of cases that began to define the role that opinions play in the reportage of public officials by the media. In stating his rationale for excluding private citizens from those plaintiffs who had to prove actual malice in libel suits against the media, Justice Powell said:

\begin{quote}
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 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{34}
\end{quote}

While this comment eloquently states the underpinnings of \textit{Gertz}, it was also widely interpreted as the creation of a first amendment exception for opinions.\textsuperscript{35} Prior to \textit{Gertz}, the common

\textsuperscript{30} 418 U.S. 323 (1974).
\textsuperscript{31} Id. at 330.
\textsuperscript{32} Id. at 344.
\textsuperscript{33} Id. at 345-46.
\textsuperscript{34} Id. at 339-40 (footnote omitted) (quoting \textit{New York Times} v. Sullivan, 376 U.S. 254, 270 (1964)).
law had recognized that an expression of opinion could be actionable if the opinion caused harm to the reputation of another.\textsuperscript{36} This was true even though the truth or falsity of the opinion could not be objectively determined.

The major exception to actionability of opinion was found under the doctrine of "fair comment."\textsuperscript{37} This doctrine granted the press the right to publish opinion if the opinion was on a matter of public concern, the opinion was that of the actual critic, and the opinion was expressed for reasons other than causing injury to the subject of the opinion.\textsuperscript{38} The right to criticize public officials on the Op-Ed page of a daily newspaper exists because of the doctrine of "fair comment". However, the doctrine of "fair comment" is negated by false statements of fact, including the imputation of criminal conduct.\textsuperscript{39}

In addition to the common law, the Court has recognized constitutional protection for allegedly defamatory opinions, provided that the listener understood that there was no actual imputation of criminal conduct. In \textit{Greenbelt Cooperative Publishing Association, Inc., v Bresler}\textsuperscript{40} the Supreme Court ruled that the opinion of a citizen at a hearing which characterized a public official's bargaining position as "blackmail" was not libelous when published because no reader could reasonably understand the comment to be an imputation of the actual crime of blackmail.\textsuperscript{41}

In \textit{Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin},\textsuperscript{42} decided the same day as \textit{Gertz}, the Court recognized that certain statements made in the heat of a labor dispute or a political debate which might ordinarily be considered imputations of fact could reasonably be considered

\begin{itemize}
\item \textsuperscript{36} \textit{Restatement (Second) of Torts} § 566 (1977).
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} 398 U.S. 6 (1970).
\item \textsuperscript{41} In his opinion for the Court, Justice Stewart described the perception of those hearing the alleged libel as follows:
  
  No reader could have thought that either the speakers at the meeting or the newspaper articles reporting their words were charging Bresler with a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.
  
  \textit{Id.} at 14.
\item \textsuperscript{42} 418 U.S. 264 (1974).
\end{itemize}
part of the "uninhibited, robust, and wide-open debate in labor disputes." 43

Another type of exception for opinion can be found in Hustler Magazine, Inc. v. Falwell. 44 Noted evangelist Jerry Falwell sued Hustler magazine for depicting him in a parody of a liquor ad as a drunken hypocrite. 45 Perhaps sensing a libel suit would fail under New York Times and Butts, Falwell also asserted a claim for intentional infliction of emotional distress. But the Court, in an opinion by Chief Justice Rehnquist, stated that an action for intentional infliction of emotional distress by a public figure must also meet the "actual malice" standard. 46 A parody or a satire, no matter how distasteful or vicious, did not rise (or sink) to the level of actual malice.

However, it was the dicta in Gertz, 47 that gave opinions their most imposing constitutional protection. Unfortunately, Gertz failed to create any set of guidelines for determining what an opinion is. As a consequence, the courts have struggled with this dilemma ever since.

D. The Four Factor Opinion Test of Ollman v. Evans

While Gertz was immediately recognized as creating a constitutional exemption for opinion, it took another eleven years before any court developed a criterion for determining what is an opinion which would therefore deserve constitutional protec-

43. Id. at 273, (quoting New York Times v. Sullivan, 376 U.S. 254 (1964)).
45. The November, 1983 issue of Hustler Magazine featured a parody of the then-popular Campari Liqueur advertisement. The Campari ads involved celebrities who, in a quasi-interview style discussed their "first time" tasting Campari. The ads played heavily on the sexual double entendre of the phrase "first time". Hustler turned the double entendre around, suggesting Falwell's "first time" was, in the words of the Court "a drunken incestuous rendezvous with his mother in an outhouse."

The Court also noted, "In small print at the bottom of the page, the ad contains the disclaimer, 'ad parody—not to be taken seriously.' The magazine's table of contents also lists the ad as 'Fiction; Ad and Personality Parody.'" Id. at 48. Compare note 41.
46. Id. at 56.
47. Specifically, Justice Powell's comment, "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[,]" and subsequent comments form the frequently-cited dicta of Gertz as standing for the proposition that opinions are constitutionally protected. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).
tion. An authoritative test for opinion appeared in the form of the four-part test stated in Oilman v. Evans. \textsuperscript{48} Oilman cited "the overwhelming weight of post-Gertz authority" as standing for the proposition that the distinction between fact and opinion is a matter of law. \textsuperscript{49} The court next said that in distinguishing fact and opinion, the court must examine the "totality of circumstances" surrounding the alleged libelous statement. \textsuperscript{50} It then outlined the four factors used for analysis.

The first factor is the common usage or meaning of the specific language of the statement. If the statement has a "precise core meaning" readers are less likely to infer facts than if the statement were indefinite or ambiguous. \textsuperscript{51} The court stated that while accusing someone of committing a crime is a classic example of a statement with a well-defined meaning, \textsuperscript{52} accusing someone of being a "fascist" was not a well-defined term; therefore, it could safely be considered the writer's own opinion. \textsuperscript{53}

Second, the court looked at the statement's verifiability. If the statement cannot be plausibly verified, a reasonable reader would not believe that the statement has specific factual content, and therefore the statement can be considered opinion. \textsuperscript{54} According to the court, the reader cannot rationally view an unverifiable

\textsuperscript{48} 750 F.2d 970 (D.C. Cir. 1984). In this case, syndicated columnists Rowland Evans and Robert Novak were sued by Bertell Oilman, a professor of political science at New York University. While Mr. Oilman was awaiting approval of his appointment as the head of the Government and Politics Department at the University of Maryland, Evans and Novak wrote that Oilman had used his position as a professor at NYU to convert his students to Marxism. \textit{Id.} at 971-72.

This opinion from the D.C. Circuit is also notable because, in forming a plurality, seven of the eleven judges from what is, arguably, the most influential court below the Supreme Court wrote opinions. Judge Starr wrote the opinion of the court. Judge Bork concurred, joined by Judges Wilkey, Ginsburg and MacKinnon. Judge MacKinnon wrote his own concurrence. Judge Robinson, joined by Judge J. Skelly Wright, dissented in part. Judge Wald, joined by Judge Harry T. Edwards and Judge Scalia, dissented in part. Judge Edwards wrote another statement concurring in part and dissenting in part. Judge Scalia wrote another dissent, in which he was joined by Judges Wald and Edwards.

\textsuperscript{49} \textit{Id.} at 978.
\textsuperscript{50} \textit{Id.} at 979.
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.} at 980. (citing Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980)).
\textsuperscript{53} \textit{Id.} (citing Buckley v. Littell, 539 F.2d 882, 895 (2d Cir. 1976)). In \textit{Buckley}, the court held that the term "fascist" was so ill-defined that it would have to develop a "correct" definition prior to deciding the issue of libel. It declined to do this.
\textsuperscript{54} Oilman v. Evans, 750 F.2d at 979.
statement as conveying fact. Thus, under this factor, statements that cannot be verified fall into the category of opinion.

Third, the court considered the full context of the language surrounding the statement. The language of the entire piece could signal readers that one statement, which by itself seems factual, could actually be opinion. The court looked at any cautionary language in the text that might signal the reader that a factual statement is actually an opinion. Although the court recognized Judge Friendly's oft repeated opinion in Cianci v. New Times Publishing Company that "[i]t would be destructive of the law of libel if a writer could escape liability ... simply by using ... the words 'I think,'" the Court nonetheless held cautionary language as an important factor in the totality of the statement.

Finally, the court noted that the statement should be examined in the broader social context into which the statement fits. The court cited the Supreme Court's decision in Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin as standing for the proposition that while calling a co-worker a "traitor" might normally be actionable, in the heat of a labor dispute, this language would pass as opinion.

The importance of the Olman four-factor test cannot be understated, especially as it applies to this case, because it formed the basis for the holding in the Milkovich companion case, Scott

55. Id. at 981.
56. Id. at 982. In addition to stating a workable test for distinguishing fact from opinion, the court warned of the danger in allowing an unverifiable opinion from going to the jury in a defamation case. According to Judge Starr "An obvious potential for quashing or muting First Amendment activity looms large when juries attempt to assess the truth of a statement that admits to no method of verification." Referring back to the alleged libelous statement that an individual is a "fascist," Judge Starr warned "[T]he trier of fact may improperly tend to render a decision based upon approval or disapproval of the contents of the statement, its author, or its subject." Id. at 981. In other words, the juror may treat the comment as a statement of fact because, to his mind, the victim of the alleged libel really is a fascist. For this reason, the court felt that it is better to treat unverifiable facts as opinion and, therefore, not actionable.
57. Id. at 982.
58. Id.
59. 639 F.2d 54 (2d Cir. 1980).
60. Olman v. Evans, 750 F.2d at 983.
61. Id.
63. Olman v. Evans, 750 F.2d at 983.
Through application of the Ollman test, the Ohio Supreme Court determined that Ted Diadiun's column was opinion and therefore constitutionally protected. Scott, in turn, caused the Ohio Court of Appeals to reverse the Supreme Court of Ohio's holding in Milkovich v. News-Herald. This reversal ultimately led to the Supreme Court hearing the case in Milkovich v. Lorain Journal Co.

III. FACTS OF THE CASE

A. The Incident in Question

On February 8, 1974, the Maple Heights High School wrestling team hosted a wrestling meet with nearby Mentor High School. During the meet, a controversial call was made against Maple Heights. Maple Heights wrestling coach Michael Milkovich, Sr. made some motion in response to the call. Depending on which version of the facts is stated, this gesture was either a "shrug" or "ranting from the side of the mat and egging the crowd on against the meet official." Subsequently, a fight broke out involving spectators and team members from both Maple Heights and Mentor. Several people were injured in the disturbance. Also in attendance at the meet were superintendent of Maple Heights Schools H. Donald Scott and Ted Diadiun, sports reporter for the Willoughby News-Herald, a local newspaper.

On February 28, 1974, the Ohio State Athletic Association held a hearing on the disturbance. Both Milkovich and H. Donald Scott testified at the hearing. Following the hearing, the OHSAA placed the entire Maple Heights team on probation. The OHSAA also declared the team ineligible for one year, including the 1975 state tournament. The OHSAA also censured Milkovich for his actions. Ted Diadiun of the News-Herald also attended this hearing.

64. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).
69. Id.
71. Id.
Following the decision of the OHSAA, several parents and wrestlers from the Maple Heights team filed suit in the Court of Common Pleas for Franklin County, seeking a restraining order against the imposition of probation on the team. On November 8, 1974, the court of common pleas held a trial to determine whether the due process rights of the team members had been violated. Reporter Diadiun did not attend this trial.

On January 7, 1975, the Franklin County Court of Common Pleas announced its decision. The court held that the due process rights of the team members had been violated by the OHSAA ruling. Because of this due process violation, Common Pleas Judge Paul Martin reversed the suspension, thus allowing the Maple Heights team to compete in 1975.

B. The Alleged Libel

The following day the Willoughby News-Herald published in its sports section the column by Ted Diadiun that became the subject of this case. In that column, headlined "Maple beat the law with the 'big lie,'" Diadiun asserted that while the OHSAA had been able to see through Milkovich and Scott's version of the events of February 8, 1974, Milkovich and Scott then lied to the court of common pleas to get the suspension reversed. The following passages were alleged to be libelous:

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8. A lesson which, sadly, in view of the events of the past year, is well learned early.

It is simply this: If you get in a jam, lie your way out.

....

The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

....

Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

75. Id., 416 N.E.2d at 664.
But they declined to walk into the hearing and face up to their responsibilities....

Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, to shift the blame of the affair to Mentor.

....

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

....

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.77

C. The Parallel Paths of Milkovich and Scott

Prior to the first trial, the trial court determined that Milkovich was a public figure, therefore he would have to establish actual malice under the New York Times standard. A jury trial was held, and the trial court directed a verdict for the News-Herald on the basis that Milkovich failed to establish malice by clear and convincing evidence.78

On appeal, the court of appeals reversed and remanded, holding that a reasonable jury could have found that the News-Herald could have acted with actual malice.79 The motion by the News-Herald to certify the record was overruled by the Ohio Supreme Court.80 The United States Supreme Court denied certiorari.81

On remand, the trial court granted the News-Herald's motion for summary judgment on the basis that the alleged libel was constitutionally protected opinion.82 The court of appeals affirmed

77. Id. at 277-78, 496 N.E.2d at 727-28.
the decision of the trial court. The appellate court also ruled that Milkovich was a public figure, and that he had failed to prove actual malice under the New York Times standard.83

Ultimately, the Ohio Supreme Court overturned the court of appeals. Citing Judge Friendly’s opinion in Cianci v. New Times Publishing,84 the Ohio Supreme Court held that the column by Diadiun was not constitutionally protected, but was an imputation of criminal activity, the act of perjury before a court.85 In addition, the Ohio Supreme Court also overturned the ruling that Milkovich was a public figure. Citing Gertz v. Robert Welch, Inc., the Ohio Supreme Court ruled that Milkovich “never thrust himself to the forefront of that controversy in order to influence its decision.”86 The cumulative effects of these two rulings was that, on remand, Milkovich, a private citizen, could sue the News-Herald and Diadiun under a common law theory of libel. Milkovich could make his case by proving by a preponderance of the evidence that the News-Herald and Diadiun had negligently published a false defamatory statement about him. Because of the nature of the libel, Milkovich did not even have to prove actual damages. Proof of imputation of a criminal activity, in this case perjury, entitles the injured to collect “presumed damages” without proof of actual damages.87

The case would have ended there, had it not been for the separate lawsuit against the News-Herald by H. Donald Scott, the Maple Heights school superintendent. The trial court dismissed Scott on the newspaper’s motion for summary judgment.88 Scott appealed, and the court of appeals affirmed the ruling of the trial court.89 Finally, on Scott’s last appeal, the Supreme

83. Id. at 293-94, 473 N.E.2d at 1193.
84. 639 F.2d 54 (2d Cir. 1980).
85. The Supreme Court of Ohio stated its opinion:

We find that the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer. Nothing in the article effectively precautions the reader that the author’s statements are merely his considered opinions. The plain import of the author’s assertions is that Milkovich, inter alia, committed the crime of perjury in a court of law.


86. The court said that while Milkovich “may be an individual recognized and admired in his community for his coaching achievements, he does not occupy a position of persuasive power and influence by virtue of those achievements.” Id. at 297, 473 N.E.2d at 1195.

89. Id.
Court of Ohio affirmed, stating that Scott was a public figure, and the column by Diadiun was constitutionally protected opinion. In an opinion written by Justice Lochner, the Ohio Supreme Court leaned extensively on the *Ollman v. Evans* four-factor test to distinguish fact from opinion. The court held that on the first factor, the specific language, Diadiun's column might be actionable. But under the second factor, the court held that Diadiun's comments lacked a plausible method of verification, and therefore a reasonable reader would not believe that they were a statement of fact. Under the third factor, the larger context, the *News-Herald* made it clear that the column was Diadiun's opinion only, captioning the column "TD Says." Finally, under the fourth factor, the broader context of the alleged defamatory remarks, the court ruled that the location of the column on the sports page "a traditional haven for cajoling, invective, and hyperbole" was a clear indication that Diadiun's comments were not intended to be a statement that Scott or Milkovich had committed the crime of perjury.

Subsequently, *Milkovich v. News-Herald* was again remanded to the common pleas court. The *News-Herald* moved for summary judgment, in light of *Scott*. The court of common pleas granted the motion. In the final appearance before an Ohio court, Milkovich appealed the judgment of the court of common pleas. In *Milkovich v. News-Herald* the Ohio Court of Appeals for Lake County ruled that, under the holding of *Scott*, the column written by Diadiun was protected opinion, and therefore enjoys absolute immunity from liability. The Supreme Court of Ohio dismissed Milkovich's appeal for want of a substantial constitutional question.

The Supreme Court of the United States granted certiorari to consider the question raised by *Scott*, as appealed in *Milkovich*; whether there is a constitutionally required "opinion" exception to the defamation laws of Ohio.

90. Id. at 248, 496 N.E.2d at 701.
91. Id. at 254, 496 N.E.2d at 709.
92. 750 F.2d 970 (D.C. Cir. 1984).
94. Id. at 251, 496 N.E.2d at 707.
95. Id. at 252, 496 N.E.2d at 707.
96. Id.
97. Id. at 253, 496 N.E.2d at 708.
98. 46 Ohio App. 3d 20, 545 N.E.2d 1320 (1989).
IV. THE COURT'S REASONING

A. The Opinion of the Court

In a tersely worded six-page opinion, Chief Justice Rehnquist delivered the opinion of the Court. In that opinion, the Court stated that the first amendment did not require that a specific exception for opinions be created to shield those opinions from state laws of defamation. In doing so, the Court specifically rejected the line of cases beginning with *Gertz* and culminating with *Oilman* that sought to protect the opinions of the media from the laws of defamation.

After analyzing the development of the law of defamation from the common law, through *New York Times* and *Gertz* to the present, the Court put to rest the once-popular notion that, under the dicta in *Gertz*, the press enjoyed a constitutional immunity from defamation liability in comments involving opinion. To do this, the Chief Justice looked to the meaning of the *Gertz* dictum:

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 the false statement of fact.

"Read in context..." the Chief Justice said, "... the fair meaning of the passage is to equate the word 'opinion' in the second sentence with the word 'idea' in the first sentence." In making this determination, the Chief Justice held that this language was a reiteration of Justice Holmes' "marketplace of ideas" concept in *Abrams v. United States*. According to the Chief Justice, by making the word "opinion" synonymous with the word "idea,"

101. Milkovich, 110 S. Ct. at 2705.
102. 250 U.S. 616, 630 (1919). In Justice Holmes' famous dissent to the Court's upholding of the Espionage Act, he said:

[When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

*Id.*
the meaning of this statement could not be understood to mean that *Gertz* created a constitutional privilege for opinions. The Chief Justice reasoned "Not only would such an interpretation be contrary to the context of the passage, but it would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact."\(^{103}\)

The Court then went on to explain how opinions can contain assertions of objective fact. To do this, Chief Justice Rehnquist demonstrated how the opinion "In my opinion John Jones is a liar" can be as injurious as the statement of fact "John Jones is a liar." This is true even if the speaker states the facts upon which his opinion is based, but the facts are either incorrect, incomplete, or the speaker's assessment of them is erroneous.\(^{104}\) The Chief Justice concluded this argument by citing with approval Judge Friendly's rationale that a writer should not be able to escape liability for libel simply by using the words "I think."\(^{105}\)

In its appeal, the Lorain Journal Company contended that the first amendment required an inquiry into whether the alleged defamatory statement was fact or opinion. The analysis for this should be the four-factor test as stated in *Ollman v. Evans* and affirmed in *Scott v. News-Herald*. The Court rejected this contention, referring to the *Ollman* test as "a mistaken reliance on the dictum in *Gertz*."\(^{106}\) In doing so, the Court refused to create "an artificial dichotomy between 'opinion' and fact."\(^{107}\)

Chief Justice Rehnquist recapitulated the two types of protection the press currently enjoys from defamation suits by public officials. First, the line of cases exemplified by *Greenbelt Cooperative Publishing, Old Dominion No. 46 National Association of Letter Carriers*, and *Falwell* adequately protect the media from action for defamation when it is clearly understood that the statements are part of "rhetorical hyperbole," political debate, or political satire.\(^{108}\) Second, the *New York Times, Butts, Gertz*

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103. Milkovich, 110 S. Ct. at 2705.
104. Id. at 2706.
105. Id. (quoting Cianci v. New Times Publishing, 639 F.2d 54, 64 (2d Cir. 1980)).
106. Id.
107. Id.
108. Id.
line of cases has created an elevated burden of proof for public officials and public figures, while allowing private citizens to go forward under a common law negligence standard.\textsuperscript{109}

The Court held that these two standards adequately protected the freedom of expression that is guaranteed in the first amendment. A separate constitutional privilege for "opinion" was therefore not required.

In reversing the judgment of the Ohio Court of Appeals, the Court held that the dispositive question is whether a reasonable finder of fact could conclude that Diadiun's column implied an assertion that Milkovich committed perjury. The Court answered this question in the affirmative.\textsuperscript{110}

The Court also held that Diadiun's column was sufficiently factual to be susceptible of being proven true or false. This could be done by comparing Milkovich's testimony to the OHSAA with his testimony before the court of common pleas. The Court cited the language of the Ohio Supreme Court in \textit{Scott}, when they called this comparison "an articulation of an objectively verifiable event."\textsuperscript{111}

In reaching its decision, the Court stated that if the debate of public issues is to remain vital and uninhibited, the media has a strong need for protection under the first amendment.\textsuperscript{112} But this need must be kept in balance with society's interest in preventing and redressing attacks upon the reputation of its citizens. In rejecting the media's request for constitutional protection of opinion, the Court said this case maintains the balance. As Chief Justice Rehnquist stated in the opinion:

The numerous decisions discussed above establishing the First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognize that "[s]ociety has a pervasive and
strong interest in preventing and redressing attacks upon reputation."^{113}

B. The Dissent

Justice Brennan, joined by Justice Marshall, dissented from the opinion of the Court.^{114} The dissent, however, was not based on a disagreement over the need for a specific constitutional exception for opinion. Justice Brennan agreed with the majority opinion that the Constitution already adequately protected the expression of pure opinion.^{115}

The dissent diverged from the majority in the analysis of the statements in Diadiun's column. While Justice Brennan also agreed that opinion may imply an assertion of false and defamatory fact, he stated that it does not necessarily follow that opinion must invariably do so.^{116} Justice Brennan characterized the Diadiun column as "conjecture."^{117} In statements reminiscent of Olmman's "cautionary language," Justice Brennan quoted from the Diadiun column the expressions: it "seemed" that Milkovich's testimony to the OHSAA was untrue, and that "probably" the suspension was a result of the OHSAA's displeasure at the testimony, and Milkovich and Scott "apparently had their version of the incident polished and reconstructed . . . ."^{118}

Justice Brennan also relied on the "context" prong of the Olmman test to find that Diadiun's column was not an imputation of fact. He said that the logo "TD Says," the location on the sports page, and the column format all "signal the reader to anticipate a departure from what is actually known by the author as fact."^{119}

The dissent concluded by saying that conjecture about the activities of public officials, like that found in Diadiun's column, is specifically the type of comment that the Court must strive

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113. Id. (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966)).
114. Id. at 2708.
115. According to Justice Brennan, the Court found that "a protection for statements of pure opinion is dictated by existing First Amendment doctrine." Id.
116. Id. at 2709.
117. Id. at 2710.
118. Id. at 2711.
119. Id. at 2713.
to protect. The search for answers to questions about official and governmental misconduct rarely has the benefit of fact as a basis, so it must start with conjecture.

Ultimately, Justice Brennan points out the irony of the situation. He said that Diadiun was not "guilty" of libel, but he was guilty of not understanding the legal complexities of a motion for a restraining order. Because the common pleas court ruled on the issue of whether there was a denial of due process, Michael Milkovich's version of the incidents of February 8, 1974, were largely irrelevant to the decision of the court of common pleas.

V. ANALYSIS

The decision in Milkovich v. Lorain Journal Co. is important because it is another clear indication of how far the balance has tipped from the "hierarchical preference for first amendment values" as expressed in New York Times v. Sullivan toward "[t]he legitimate state interest underlying the law of libel" as stated in Gertz v. Robert Welch, Inc. By declining to affirm an absolute constitutional immunity for opinion, the Supreme Court has stopped one trend while continuing another.

In this case, the Supreme Court has endeavored to correct several judicial wrongs. First, it notified the Supreme Court of Ohio that its holding in Scott v. News-Herald was in error. In addition to reversing the judgment that there is a constitutional privilege for opinion, under the dicta in Gertz, the Supreme Court also stated that the facts of this case indicate that Diadiun's column was actionable. The court remanded Milkovich to the

120. Justice Brennan cited the Challenger explosion, the possibility that Cuban-Americans arranged for the assassination of President Kennedy, and Kurt Waldheim's Nazi past as areas where conjecture by the press has led to important public discussion. "Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more." Id. at 2714.

121. Justice Brennan stated, "Diadiun, therefore, is guilty. He is guilty of jumping to conclusions, of benightedly assuming that court decisions are always based on merits, and of looking foolish to lawyers. He is not, however, liable for defamation." Id.

122. Elder, supra note 9, at 593.
124. As Chief Justice Rehnquist stated:

As the Ohio Supreme Court itself observed, "the clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after ... having given his solemn oath to tell the truth.'" This is not the sort of loose, figurative
Ohio court for a judgment not inconsistent with the opinion of the Court.\textsuperscript{125}

But in addition to placing \textit{Milkovich} back in the hands of the trier of fact, this decision has a very broad sweep for all of the courts that followed the opinion/fact dichotomy found in \textit{Ollman v. Evans}. \textit{Milkovich} has called to a halt the trend toward an absolute constitutional privilege for opinion. To be sure, the Court recognized that some opinions are not actionable. These opinions include the "rhetorical hyperbole" and political satire found in the \textit{Bresler-Letter Carriers-Falwell} line of cases,\textsuperscript{126} as well as those opinions still privileged under the doctrine of "fair comment."\textsuperscript{127} But because there exists a possibility that opinions can also contain imputations of false defamatory fact, the Court has rejected the idea that all opinions are privileged. Ultimately, the Court seems to be saying that the issue is not whether a statement is fact or opinion, but whether it is actionable or not actionable.

While \textit{Milkovich} has ended the tendency by some courts to treat opinions as constitutionally privileged, the decision continues the trend away from unlimited press freedom. The pendulum has swung back from the activist view of the 1960s and 1970s, when the press was viewed as an ombudsman for the interest of the people in exposing the wrongdoings of the government, to the present view that the press may, in fact, be the greater evil, a loose cannon from which no citizen can seek redress. The opinion of the Court sends a clear message that \textit{Milkovich} comes down against the press and for the rights of citizens to seek redress for defamation.\textsuperscript{128}

The decision of the Court in \textit{Milkovich} can be viewed in two different lights. For the legal scholar, Chief Justice Rehnquist's

\textsuperscript{125} Id. at 2708.
\textsuperscript{126} Id. at 2706.
\textsuperscript{127} \textsc{Restatement (Second) of Torts} \textsection{} 556 (1977).
\textsuperscript{128} \textit{Milkovich}, 110 S. Ct. at 2707-08. Following his detailed analysis of Supreme Court decisions "establishing First Amendment protection for defendants in defamation actions," Chief Justice Rehnquist indicated in his opinion that this case "holds the balance true" by giving those who have been libeled a wider avenue of redress. \textit{Id.}
linguistic dissection of the dicta in Gertz to reach the conclusion that Gertz did not stand for the proposition that there was constitutional immunity for opinion may seem like a very small step. In a sense, the decision was a correction, a cease and desist order to lower courts that they should stop misinterpreting Justice Powell's dicta. Under this view, once the district courts and the states readjust their legal compasses, the business of fairly and properly adjudicating libel cases can go forward.

This decision is also not a major setback for the journalists who cover hard news. For the average hard news story, the facts are often clear. The "who, what, when, where, and why" of daily reportage will not be troubled by Milkovich, because the expression of opinion will not be a relevant issue. But the coverage of fires, floods, and natural disasters rarely generates the "uninhibited, robust, and wide-open" debate Justice Brennan spoke of in New York Times Co. v. Sullivan.129

Similarly, the opinion of the Court points out that the traditional editorial writer will not be harmed by Milkovich. The doctrine of fair comment and the traditional notions of what should appear on the Op-Ed Page protect editorial writers as long as they avoid false imputations of provable fact. As Justice Rehnquist's opinion points out, a comment typically found in an editorial like "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin" is not actionable. However, when that statement of opinion contains an imputation of fact such as "In my opinion Mayor Jones is a liar"130 the editorial writer has crossed the threshold from fair comment to libel.

The area in which Milkovich has its profoundest effect is when the press fulfills its hybrid role as both reporter of fact and conscience of the community. When a journalist must go beyond the "who, what, when, where, and why" facts, and is then forced to make the leap to "I think this official is corrupt" or "It appears to me there has been official misconduct," the ability to bring a story to light exists only if the fear of litigation is well-defined. Unfortunately, rather than helping define the contours, Milkovich makes the issue even murkier. Without an exception for opinion,

a journalist must now be concerned with a myriad of legal issues. Is the opinion an imputation of criminality? Would it pass for opinion under the "Fair Comment Doctrine?" Is the subject of the story a public figure under New York Times or a private figure under Gertz? Prior to Milkovich, a newspaper might be willing to publish a story based on an inference drawn by a journalist because this type of opinion is constitutionally protected. After Milkovich, those stories that are based on inference rather than fact, but do not conform to the New York Times' standard or the Letter Carriers v. Austin standard may tread so dangerously close to liability that the risk is no longer acceptable. As Justice Brennan said in Rosenbloom v. Metromedia, "It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation ... is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from the public cognizance."131

VI. CONCLUSION

The decision in Milkovich has a chilling effect on all those who tread the fine line between writing news and writing opinion. The chill comes not because Milkovich enunciates any draconian rule of law. Far from it. Chief Justice Rehnquist reiterated "the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues."132 The rule of Milkovich is very narrow. There is no per se constitutional protection for opinions.

The real chill comes from the message that the Milkovich decision sends. For courts and lawyers, the meaning of Milkovich is the subject of well-researched briefs, well-spoken oral arguments, and, occasionally, law review articles. Unfortunately, for those who make their living in the media, there is no time to research the ramifications of this holding. Under the pressure of a deadline, the primary message is that if a journalist writes the wrong thing about the wrong person, even if it is an opinion, the author could be liable for defamation. The legal niceties are lost

to the pressure of the deadline. As Michael Gartner, president of NBC News, put it "What this will lead to, once it sinks in in newsrooms and law offices around the country, is mealy-mouthed editorials, wishy-washy sports columns, punch-pulling cartoons, and namby-pamby reviews."  

To the legal community, this looks like a gross overstatement of the holding of *Milkovich*. Perhaps that is the true effect of this decision. Mr. Gartner's comments do not reflect the opinions of the legal community. They reflect the fears and beliefs of the working press, the people who must constantly decide whether to write what is important, or whether to write what is safe. In short, "[the] profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" may be lost to the fear of litigation. As Justice Brennan stated over a quarter of a century earlier, "Whatever is added to the field of libel is taken from the field of free debate."  

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135. *Id.* at 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942)).