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RESTRAINTS: A PROPOSAL FOR A STUDENT CODE OF ETHICS

John S. Bradway*

I. INTRODUCTION

(A) The Concept of Restraint

The world is full of restraints and the reactions of restrained persons. For example, the person who is dedicated to reform at all costs may view a restraint upon his freedom in the manner of the proverbial bull taunted by a red flag in a china shop. Or again, a reformer who abhors all thought of violence may regard a restraint with the disgust some people reserve for well-known four letter words. However, in this article we shall not deal with extremes. Instead, we shall select a specific restraint and endeavor to persuade the reader that it should be viewed not as something to be trampled under foot, or disdainfully ignored, but rather as an opportunity—the silver lining in the traditional cloud, or the light at the end of the tunnel. Our suggested restraint is a Code of Professional Ethics for Law Students. Our objective is to argue that it is not only a benefit to be sought, but also an opportunity which may knock only once.

There are two basic restraints upon the lawyer. One of them is that he possess "a good moral character." The other is that he have "learning." The learning restraint has been given much attention. The restraint with which we concern ourselves, however, is "good

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moral character,” or “professional responsibility.” Although a bit of imagination may be necessary, the reader should eventually conclude that the “restraint” idea is, in essence, to be viewed as an opportunity.

(B) **Defining Our Terms**

Let us define a few of the terms which we shall use. They are used here in a special sense, thus entitling the reader to be informed of their meanings in advance.

**Lawyer:** A lawyer is a person who, under license from the public, makes his living by solving, or trying to solve, the problems of other persons according to law.

**Law student:** A law student is a person who is endeavoring to understand and acquire what it takes to secure the lawyer license.

**Practice of the law:** The practice of the law is a quasi-public monopoly. Any monopoly in a democratic society is an exception. Where equality of opportunity is an accepted community philosophy, the exclusive right to carry on any occupation is not granted

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1. There are two ideas to keep in mind. The lawyer is licensed, and when that license is taken away he ceases to be a lawyer. However, as long as the lawyer is content to settle his own problems, he does not need the license. But when he undertakes to make his living by solving the problems of others, he must be able to demonstrate to his clients the fact that he has more professional responsibility than they do. Otherwise, there would be no reason to turn over the solution to him and thereafter to pay him a fee. The judge is a public official because his compensation comes from the public treasury. The practicing lawyer, other than the lawyer holding a post in the governmental hierarchy, is a quasi-public official, because his remuneration comes from the pockets of his clients. The lawyer is also one who has trained himself to be a very remarkable person. If he has trained himself in the right direction and goes far enough, he may become a very great person.

2. Today's law student is generally a person functioning in a law school. Yesterday this was not so. Originally the law student was an apprentice in the private office of a lawyer. There are those who argue that the training he received there turned out a group of lawyers fully as competent as those who graduate from a modern law school. But the context was different. The law was different. The bar of yesterday was different. Our concern, in a sense, is with tomorrow's law student. Compare the restraints resting upon the law student with those which apply to the lawyer. The law student must obtain a passing grade in his courses. That passing grade may be represented on a numerical scale as 70 or over, or on an alphabetical scale as C minus or over. But the lawyer's standard is quite different. Suppose the student takes a course in Wills. To a grade of 70 he may point with modest pride. Where, however, the lawyer drafts a will which is only 70 per cent binding, there is no occasion for pride. That lawyer faces the threat of disciplinary action for negligence and perhaps a suit for damages. Hyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Lucas v. Hamm, 11 Cal. Rptr. 727 (1st Dist. Ct. App. 1961). See generally Annot., 96 A.L.R.2d 832 (1964).

3. The meaning of a democratic community may be obtained from the reading of such
freely. Rather it must be purchased. The purchase price is not in terms of money but in terms of quality of services. Unless the lawyer has more professional responsibility than does his client there is no reason why the practice of law should not be open to all without examination.

Restraint: The late Henry S. Drinker was so much impressed with the idea of restraint that on the opening page of his book he featured a definition by Lord Moulton. This definition reads: "True civilization is measured by the extent of obedience to the unenforceable."

Responsibility: Responsibility attributed to lawyers is a device designed for the protection of the public. The unrestrained, irresponsible, completely self-centered individual may live his life quietly receiving the respect of his neighbors and friends. But if one puts in his hands a tool, device, or instrument of power, there is reason for the public to view with alarm the possibility that it may be used as a devastating menace to the peace and quiet of the community and its individual members. The license to practice law is such a device. It is a key with which the lawyer may unlock the full power of the state, civil and criminal. How, and against whom it is used is a major public concern.

II. THE CONTEXT

(A) The Law Student and Integrity

Eventually we shall come to specific proposals for a code of ethics documents as the Declaration of Independence for which Thomas Jefferson was mainly responsible, and the Constitution of the United States to which the greatest contribution was made by James Madison. Madison describes his concept of how a democracy should function in The Federalist No. 10 (J. Madison). Jefferson was a law student in Virginia under the distinguished jurist and legal scholar George Wythe. James Madison was self-taught and apparently never practiced law. If competition among lawyers is presently brisk, consider how much it might increase if anyone from the general population were permitted to practice law.

4. Lord Moulton was a British Lord Justice of Appeal in the late nineteenth, early twentieth century. 15 Encyclopedia Britannica 928 (1957).

5. H. Drinker, Legal Ethics 2 (1953) [hereinafter cited as Drinker].

6. The concept of professional responsibility is broken down into two parts: professional competence and professional integrity. Professional competence is further broken down into two sections: competence in terms of information about the law, and competence in terms of skills relating to the discovery and use of rules of law. Professional integrity, on the other hand, means that the lawyer should be so motivated that he sees a duty to function, not with complete freedom or independence, but restrained by four obligations: those to his client, to the court, to the legal profession, and to the community. If the lawyer does not possess sufficient self-restraint for this purpose, external sanctions are available to pressure him into compliance, even to the extreme of depriving him of his license.
relating to the law student. But the provisions of such a code will require explanation. It seems fitting to include the explanation first and the wording of the code second.

The lawyer must pay the price for the retention of his license. Therefore, it is reasonable to expect the law student to learn in advance what will be involved in paying that price. The matter is not one of obtaining something for nothing. Presently, we shall limit our discussion to the problems confronting a law student in his efforts to secure the license in the area of "professional integrity." The word "integrity" is something of a novelty. Traditionally, the phrase used was "good moral character."  

The present proposal is that a set of standards spelling out the integrity expected of a law student is just as reasonable as the adoption of a Code of Professional Responsibility for lawyers by the American Bar Association. The latter does not cover the law student. If the lawyer must live in such a restrained world, there is reason for the law student to learn to adjust himself in advance to a code of integrity which is designed for the scholastic world in which the student functions. This would not take the place of any individual code formulated by each student for himself, but it would give him a set of objective guidelines so that he may, if so motivated, keep himself out of certain kinds of anticipated trouble.

Law students, by reason of their connection with an academic campus, may urge that they should be entitled to "academic freedom" and that such freedom should be an absolute. But the law student does not cease to be a layman or a citizen of his community. He has certain obligations to himself, and at the same time, to his community. Where these obligations conflict, there should be some practical way of resolving the conflict. After all, three years in law

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7. "A lawyer should assist in maintaining the integrity and competence of the legal profession." ABA Code of Professional Responsibility No. 1 (emphasis added) [hereinafter cited as ABA Code of Professional Responsibility]. See id. EC 1-2 & 1-3 (relative to the admission of applicants to the profession).

8. Petition of Moritz, 244 Ind. 374, 192 N.E.2d 458 (1963) (the court refused to admit to the practice of law an unlicensed individual chosen by the electorate). In re Opinion of the Justices, 279 Mass. 607, 180 N.E. 725 (1932) (the authority for making rules in admission cases rests with the court and not with the legislature); State v. Cannon, 206 Wis. 374, 240 N.W. 441 (1932) (the legislature may not interfere in the administration of disciplinary action); e.g., Cal. Bus. & Prof. Code §§ 6060, 6068 & 6076 (West 1974); Cal. Bus. & Prof. Code §§ 6060, 6068 & 6076 (West Supp. 1975); see National Conference of Bar Examiners, The Bar Examiner's Handbook 48 (1968) [hereinafter cited as Examiner's Handbook].
school is not the last joyous fling of independence of the adolescent before the dull monotony of maturity closes in. It is a period in which one should prepare himself to carry his share of responsibility, not merely as a citizen, but as a member of a learned profession. It is true that in the educational field, the higher one climbs the better the view. But there is a corollary: the more respect one feels he should receive, the more should he retain his own self-respect by his conduct.

The modern world features three highly organized groups: Big Business, Big Labor and Big Government, all engaged in a power struggle. This leaves the unorganized community as the innocent bystander. It is consonant with the historical purpose of a learned profession to assume that its justification lies not in its own selfish advancement, but in the protection of the unorganized community during a time of trouble. Thus the law student, in addition to improving his knowledge of the law and his skillfulness in dealing with the law, should not overlook the desirability of improving his own unselfish motivation toward the public interest. Competent lawyers are remarkable people; but properly motivated, a good lawyer can also become a great person.

(B) Historical Note

It is in this type of context that we explore briefly the steps in the historical progress by which integrity became an adjunct of the learned profession of the law.9

In terms of the development and adoption of professional responsibilities, the American Bar has labored through four periods. It did not reach its present status overnight.10

(1) Colonial Period—During the earliest period there were no lawyers at all in the American Colonies. There was a pioneer civili-

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9. ABA Code of Responsibility, supra note 7, Preamble, contains a paragraph which is relevant:

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

zation with a government consisting of the colonial governor and his
council, combining the executive, legislative and judicial functions.
Even when the judicial function began to separate from the execu-
tive and legislative, the courts were staffed by "lay judges" and a
collection of "administrative officials." No lawyers were to be found
anywhere.11

It does not appear that the community fared too badly during this
period in its use of lay judges. In fact, the lay community had not
reached complete agreement relative to the importance of lawyers
even as late as the mid-1900's.12

Of course, there were problems confronting individuals and the
colonies themselves which had to be resolved. There were at least
two groups of persons who were called upon for solutions. The first
group consisted of the administrative staffs of each respective com-
munity. In New England at least, these appeared to be numerous
and capable of controlling events at all hours.13

The other group could be described as "agents." Some of these
were the agents for private business among merchants. Others were
colonial agents who functioned by administering the business of
governing the colony.14

This relationship of agency was commercial in character. It may
be described as that of principal and agent. The principal would be
analogous to today's client, while the agent functioned as the law-
ner. While the agent had great advantages over the principal in
these transactions, the most effective remedy for the principal
against being overreached, cheated and taken advantage of, was not
to return a second time for this type of aid.15

Perhaps the best way to indicate the relevance of these agents to
the topic of this article is to say that they were attorneys-in-fact at
a time when attorneys-at-law were not in operation. But there was
some degree of accountability of the agent to his principal and in
time this was transformed into the basic obligation of the attorney-
at-law to his client.16

14. Benjamin Franklin was the most celebrated of these colonial agents who functioned in
the troubled times preceding the American Revolution. Id. at 121. John Winthrop, Jr., of
Connecticut functioned a century earlier than Franklin and was, like Franklin, not a jack,
but rather a master of all trades. Id. at 125.
16. See generally 1 Chroust, supra note 10, ch. II-IV; Pound, supra note 10, at 129-73; and
As court procedure grew a bit more complicated, a third group of persons developed, consisting of clerks, deputy sheriffs, commissioners and other administrative court officials who made the most of their spare time to offer aid to those inexperienced litigants needing guidance. These persons were known as "pettifoggers." These were forerunners of modern lawyers.

(2) The Emergence of the Sworn Lawyer—The first real lawyers to appear officially in the American Colonies were known as "sworn lawyers." From the mid-1600's to the early 1700's each of the colonies by legislation had made provision for the sworn lawyer. He differed from the agent in various ways. He had the permission of the court to handle cases pending before it. He was officially selected for the post and there were very few of him in the early days. The sworn lawyer was obligated to fulfill a requirement demanding loyalty to the court, partly due to the scarcity of these officers, and partly due to the privilege which each possessed.

For our purposes the most important feature of the sworn lawyer's position was that he was called upon to take an oath. This oath created a second obligation for the lawyer. He owed a duty to his client. But by taking the oath he became an officer of the court. Thus, he started off with a conflict of interest which needed to be resolved from time to time.

The Massachusetts attorneys' oath deserves to be spelled out because it is typical, yet more inclusive than some of the others. It also presents some idea of the various responsibilities which the taker assumes. In those days to violate an oath was a serious matter:

You shall Swear That you will Do no falsehood nor deceit nor shall Consent to any to be done in this Court and if you know of any to be done you shall give knowledge thereof to the Judge of this Court for the time being or some other of his Majestyes Councill or assistants of this Court that it may be reformed. You shall delay no man for Lucre and Malice. You shall increase no fees but be Contented with such fees as are by order of Councill or the Judge of this Court allowed you, in time to come you shall plead no plea nor sue any suits unlaw-

Warren, supra note 10, ch. II-VI.

17. "Pettifogger" is defined as a lawyer who is employed in a small or mean business or who carries a disreputable business by unprincipled or dishonest means. Black's Law Dictionary 1303 (rev. 4th ed. 1968).

18. The form of oath varied somewhat from colony to colony, but most oaths were derived from an Act of Parliament, 4 Hen. 4, c. 18 (1403). See Warren, supra note 10, at 26 et seq. (setting forth the oaths required in the various colonies).
fully to hurt any man but such as shall stand with the Order of the Law and your Conscience. You shall not Wittingly or Willingly sue or procure to be sued any false suit or give Aid or Consent to the same on pain of being expelled from the Court for Ever and further you shall use and Demeane yourselves in the office of Attourneys within the Court according to your Learning and discretion. 19

(3) The Lawyer's Responsibilities—The first responsibility of the lawyer was to his client. The lawyer's second responsibility was to the court. The bar was organized around the local court. The practice of the law as a monopoly centered around the litigation process. It does not appear that the monopoly at this time extended to the two other services rendered by a lawyer: negotiation and counseling. It was not an earth-shaking role, but it was a beginning.

The third responsibility required a longer period to develop. The concept which demanded from the lawyer a responsibility to his profession required almost a century to achieve respectability. During this period lawyers remained organized around their local courts, but the beginnings of progress could be detected. They became interested in learning. They instituted the law office apprenticeship system. Some of the wealthier lawyers traveled to London and secured the training offered by the Inns of Court. 21

By the time of the Revolution, the lawyer class had proven that it deserved to be ranked beside the colonial policymaking classes. In fact, if one wishes to compare the pre-revolutionary period to the pretrial process in litigation, the lawyers contributed more than any other leading colonial group in formulating the issues and providing briefs in support of the patriot position. 21

After the war, the same conditions prevailed. The inevitable result saw lawyers enjoying the most influence in molding the tenets of the new democracy. This period produced three memorable national documents, with the responsibility for the creation of each of them borne by lawyers. 22

19. 1 CHROUST, supra note 10, at 185.
20. WARREN, supra note 10, at 188-94. The Inns of Court consisted of Lincoln's Inn, Gray's Inn, the Inner Temple and the Middle Temple. These bodies served as an early English form of law school in whom was vested the sole authority to grant barrister's licenses. Id. at 27-30.
21. Thomas Jefferson, who had studied law under the colonial scholar and jurist George Wythe, drafted the Declaration of Independence. See generally 2 CHROUST, supra note 10, at 3-5.
22. John Dickinson, a member of the Philadelphia Bar, drafted the Articles of Confederation. In the 1787 Convention in which the text of the Constitution was drafted, no one made
The bar had to make its adjustment from a monarchical to a
democratic form of government. This was a difficult time and many
of the regulations and standards which had gradually been enacted
as the law of the various colonies were swept away by a tide of
democratic sentiment, manifested by the elimination of the Second
United States Bank and all other monopolies, including the practice
of the law. 23

By the 1870's the status of the American Bar had taken a turn
for the better. There was an improvement in legal education. The
lecture method, where the students were largely auditors, was re-
placed by the case method where they became, in some measure,
participants. 24 Even more relevant, especially for the purposes of
this article, was the move toward the organization of bar associa-
tions, national and state. 25 Prior to this time, as we have said, the
American Bar was organized around the local court. Now, under a
bar association, it was also organized independently of the court. It
continued to fulfill its responsibilities to the court, but in addition
it had created an area of activity and control in which it, and not
the court, made the final decisions on matters of policy. In colonial
times one of the major advances had been the rise of the indepen-
dent judicial department separated from the executive and legisla-
tive departments of government. 25 If in a free society an independent
court was a basic necessity, a similarly persuasive argument could
be made in support of an independent bar.

The American Bar Association came into existence in 1878 and
gave the American Bar a rallying point of equal status with that

more important contributions than James Madison, who had studied law privately, but had
never practiced.

The adoption of the Constitution by the state constitutional conventions was greatly aided
by three lawyers, Alexander Hamilton, John Jay and James Madison, who published the
Federalist Papers. See generally Hurst, supra note 10, at 200-05.

23. See 2 Chroust, supra note 10, at 129-72; and Pound, supra note 10, at 221-50.
24. A. Harro, Legal Education in the United States 51 (1953) [hereinafter cited as
Harno].
Blaustein & Porter].
26. The cumulation of this movement was the adoption of Article III of the Constitution
of the United States in 1787. It was Chief Justice John Marshall, writing the opinion for the
Court in the case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), argued by Charles
Lee of Virginia and Levi Lincoln of Massachusetts, who made it clear that, while under the
constitutional doctrine of separation of powers the legislative department had the power of
the purse and the executive the power of the sword, the independent judicial department had
the power of the last word in an argument.
occupied by the Bar of the Supreme Court of the United States.

The American Bar was a voluntary organization contrasting with the court-orientated bars. Its policies were effective upon its membership and not upon non-members. But its members had a responsibility to the Association to assist it in carrying out the objects and purpose for which it was formed. The various state bar associations organized at approximately the same time had comparable objectives. They also were voluntary and did not necessarily include all the lawyers in the jurisdiction.

(4) The Fourth Responsibility—By the end of the nineteenth century, it was obvious that the American lawyer enjoyed a monopoly over the practice of law. In order to enjoy this advantage, he assumed three restraints: responsibility to his client, responsibility to the court, and responsibility to the profession. The Fourth Responsibility was the most imaginative of all. It provided as its beneficiary the public community, that democratic society with republican overtones which had developed from the Constitution of the United States. The formulation and implementation of the Fourth Responsibility did not occur in a single dramatic moment with a flash of lightning, but it is possible to identify some of the more obvious milestones which, when taken together, constitute the enlargement of the lawyer’s obligations.

The first of these steps was the achievement of professional status by the attorney. The second was an actual gesture in the direction

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27. The objects and purposes of the American Bar Association were enumerated in its 1878 constitution as:

(1) To promote the administration of justice and the uniformity of legislation throughout the Union;
(2) To advance the science of jurisprudence;
(3) To uphold the honor of the profession of law; and
(4) To encourage cordial intercourse among the members of the American Bar.

These goals were adopted at the organizational meeting on August 21, 1878, in Saratoga, New York. Blaustein & Porter, supra note 25, at 291-92.

28. Id. at 290.

29. In the various Western European civilizations there were three learned professions. They emerged in the 1100's at the same time that the guilds were being formed. The difference between the two was grounded in the class system of the times. Young men from the gentry chose the Law, Medicine and the Clergy. Young men from the middle class joined guilds. See A. Carr-Saunders & P. Wilson, The Professions (1933). In the classless society established by the Constitution of the United States, the clergy, the physicians, and the lawyers found it necessary to establish as professions on the basis of accomplishment rather than on the historical distinctions such as status at birth.

Roscoe Pound identifies the elements of a profession in a democratic society which are basic for the profession's existence as: (1) there must be a group of persons; (2) they must be
of including the general public among the beneficiaries. The final step in this progress was taken in 1949 when the Constitution of the American Bar Association was amended to add two further objectives: (1) to uphold the Constitution of the United States and maintain representative government; and (2) to apply its knowledge and experience in the field of law for the promotion of the public good.

Before we conclude this historical note, there is one further point to be made. We described the nature of the relationship between the clients and the agents who preceded the sworn lawyers as one of attorney-in-fact. This was the ordinary commercial relationship in the mercantile world of the time. The advent of the sworn lawyer does not seem to have changed this aspect of the attorney-client relationship even though new obligations to the court were created. Thereafter, while individual lawyers could and did establish individual relationships of a more ethical quality with their clients, the obligation to the client remained an essentially commercial type of relationship. However, with the progress of the organized bar to a professional status, the attorney-client relationship also made an important change. It became improved by the addition of equitable factors. It was no longer exclusively common law with the client as the principal, and the lawyer as the agent. Rather, the lawyer became a fiduciary and the client became an equitable beneficiary.

Pursuing a discipline of learning; and (3) they must be motivated by a spirit of public service.

In North America since colonial times, there had been a body of persons calling themselves lawyers. Under Pound's definition they were not yet in a position to claim strict compliance with professional standards. The rise of a body of indigenous American Law—as distinguished from English and Colonial Law—had its beginning with the formation of the Supreme Court under Chief Justice John Jay. Until there were overt declarations and acts committing the bar to name public service as one of its objectives, professional maturity had not yet been reached. Pound, supra note 10, at 4-10.

The slow development of the Bar after 1878 toward professional status is documented in Rogers, Fifty Years of the American Bar Association, 14 A.B.A.J. 521 (1928).

30. In 1920 the American Bar Association became interested in the Legal Aid movement which was designed to provide for the poor the same quality of legal service which was then available to those who could pay for it. R.H. Smith, Justice and the Poor (1919); Smith and Bradway, The Growth of Legal Aid Work in the United States, in U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, BULL. No. 607, at 165 (1936).

31. 74 ABA ANNUAL REP. 497 (1949).

32. BLAUSTEIN & PORTER, supra note 25, at 294.

33. DRINKER, supra note 5, at 89, speaks of the lawyer's fiduciary capacity. In his discussion he cites numerous cases illustrating this quality obligation of the lawyer. There are cases which, in effect, hold that as soon as the relationship between attorney-client has been established, a presumption arises that the lawyer, as the more qualified person in the relationship, has overreached the client and that the burden rests on the lawyer to prove the opposite.
III. IMPLEMENTING THE OBLIGATION OF THE BAR TO THE COMMUNITY

(A) The Code of Professional Responsibility

It is one thing to recognize that an obligation exists. It is quite another step to implement that obligation. Presently we are interested in the progress of the restraints which the lawyer has put upon himself, and with which persons desiring to be admitted to the bar will be expected to conform.

The initial step in restraining lawyers occurred when the first sworn lawyer took his oath in colonial times. This restraint was external and the sanctions employed against a violation depended upon the seriousness of the infraction. The extreme penalty was expulsion (as the word was used) from the bar. Since that time legislatures and courts have found it proper to add additional restraints of a similar nature. Such restraints are as significant as any other law, and violation may be followed by disciplinary action.34

Our immediate concern is with self-restraints of which, for a variety of reasons, the organized bar approves. The most obvious reason is that such rules are regarded as a proper part of its public relations program. Let us spell out briefly the way in which specific rules of ethical conduct evolved from some generalized concept such as "good moral character," to a set of specifications for all to use.

The earliest record presently available of such a list of rules was written by one David Hoffman of the Baltimore Bar in 1836. The University of Maryland had included in its curriculum a course in law and invited Mr. Hoffman to teach the course. As a part of his work he set down some 50 resolutions of conduct in which he felt it was improper for a lawyer to participate.35 Another ethical code


In respect to the fiduciary relation between lawyer and client, see generally ABA Code of Responsibility, supra note 7, No. 4, dealing with the obligation of the lawyer to preserve the confidences and secrets of his client. One should also see id. Nos. 5-7.

34. See the materials on the actions of colonial legislatures collected in 1 Chroust, supra note 10, ch. II-IV; Pound, supra note 10, at 142; and Warren, supra note 10, at 3-15.

35. The first of these resolutions reads:
I will never permit professional zeal to carry me beyond the limits of sobriety and decorum, but bear in mind, with Sir Edward Coke, that 'if a river swell beyond its banks, it loseth its own channel.'
appeared in the mid-1800's in the form of an essay. In 1887 the Alabama State Bar Association formally adopted a Code of Ethics. The Preamble of this code reads:

The purity and efficiency of judicial administration, which, under our system, is largely government itself, depend as much upon the character, conduct, and demeanor of attorneys in this great trust, as upon the fidelity and learning of courts or the honesty and intelligence of juries.

The next milestone in the formulation of an ethical code for lawyers was achieved in 1906 when the American Bar Association convened its annual meeting. The highlight of this convention occurred when the late Roscoe Pound delivered his epochal address, "Causes of Popular Dissatisfaction with the Administration of Justice." A committee was also appointed to consider the advisability and practicability of the Association's adopting a Code of Ethics. The committee reported in 1906 that such a code was desirable. At that point the decision was made to prepare such a code. In 1908 a code consisting of 32 canons was submitted for adoption. Later, the number of canons was increased to 47.

The text of Hoffman's Fifty Resolutions can be found in DRINKER, supra note 5, at 438.

36. The author was George Sharswood, who, among other public responsibilities, served as Chief Justice of the Supreme Court of Pennsylvania. G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1907).

37. This code was written by Thomas Goode Jones and was first adopted on December 14, 1887. DRINKER, supra note 5, at 352 & n.1.

38. Id.


40. This committee, under the leadership of Henry St. George Tucker and including Judge Jones, who had drafted the Alabama Code, note 37 supra, compiled all the existing ethical codes in order to make this determination. DRINKER, supra note 5, at 24. See 31 ABA ANNUAL REP. 680 (1907).

41. Id. at 681.

42. The committee which made the 1908 report interpreted its mission, not to be the writing of an essay in the Sharswood pattern, but rather to emulate Hoffman's model. This approach set down a series of situations which might confront an active lawyer and then attempted to indicate what he might ethically do in a given situation.

43. The Canons may be classified into four groupings: (1) obligations to the court (Canons 1-4, 21, 22, 28, 30, & 31); (2) obligations to the client (Canons 5, 6, 8-16, 19, 21, 22, & 24); (3) obligations to the Bar (Canons 7, 17, 20, 25, 27, & 29); and (4) obligations to others (Canons 18, 23, 26, & 32). See ABA CANONS OF PROFESSIONAL ETHICS [hereinafter cited as ABA CANONS].

While an obligation to the court was mentioned occasionally, it appears that the duty of the lawyer to the public included: (1) the duty to police the bar; (2) the duty to aid in judicial selection; (3) a duty to represent those who cannot afford to pay a fee; (4) a duty not to stir up litigation; and (5) the duty not to promote the unauthorized practice of law.

44. Id., Foreword at ix.
The functions of the committee did not conclude in 1908. In 1913 it was made a standing committee to collect information and to make recommendations for improvement.\textsuperscript{45} In 1919 these duties were confirmed in the By-Laws of the Association.\textsuperscript{46} In 1922 the By-Laws were further amended to include the function of issuing advisory opinions on questions of ethics submitted to it by the members.\textsuperscript{47} Later, these powers were extended to authorize advisory opinions submitted by state and local bar associations.\textsuperscript{48}

Since the enactment of the Code of Ethics and its accompanying advisory machinery, there is now little excuse for a lawyer to commit an unethical act. Of course, he may not realize that a given situation involves ethical problems, but he should be alert to assume that some such problem may be lurking somewhere in many, perhaps most, of the situations in which he finds himself. In such a situation he proceeds on his own at his own risk. The proper procedure is to consult a Bar Association Legal Ethics Committee and to secure and be guided by its advisory opinion.

From our standpoint this practice of spelling out the Canons has had at least one other major consequence. Up to this time the term \textit{good moral character} had been much used in connection with professional conduct. Now it became clear that \textquoteleft\textit{good moral character}\textquoteright\ was a term which might be applied in two senses: a standard for the profession, or as a standard for persons generally. Where the conduct of a lawyer was under consideration, the lay standard proved to be too general. The Canons filled the need for a specialized professional standard. If a lawyer conformed to all of the 47 Canons, he not only possessed \textquoteleft\textit{good moral character},\textquoteright\ but he also had \textit{good professional character}. If he did not conform, a variety of sanctions might be applied, not as penalties in the criminal sense, but for the purpose of protecting the profession from persons who do not \textquoteleft\textit{have what it takes}\textquoteright\ to be a lawyer. Those sanctions varied from mild disapproval to disbarment, depending upon the circumstances of the case, as determined by the Bar Association and the courts.\textsuperscript{49}

In 1964 a committee of the American Bar Association was appointed to examine the existing standards and make recommenda-

\begin{itemize}
\item \textsuperscript{45} 39 ABA Annual Rep. 559 (1914).
\item \textsuperscript{46} 46 ABA Annual Rep. 302 (1921).
\item \textsuperscript{47} 48 ABA Annual Rep. 172 (1922).
\item \textsuperscript{48} 51 ABA Annual Rep. 355 (1926).
\item \textsuperscript{49} Drinker, \textit{supra} note 5, at 33, describes disciplinary proceedings under the 1908 Canons.
\end{itemize}
tions for improvements to the Canons. The committee was to consider, among other items, intervening decisions of the United States Supreme Court with respect to certain Canons, and those cases which specifically related to matters of admission to the bar and discipline of lawyers. The committee concluded that change was overdue.

As a result a new Code of Professional Responsibility was drafted and in 1969 adopted by the American Bar Association. In several ways it differed from the 1908 Code. For our purposes one change is quite significant. Where the 1908 Code had spoken of "good moral character," the 1969 Code referred to "responsibility." The change was from a set of rules appropriate for a general category of persons such as laymen, to a set of situations appropriate to the guidance of the members of a learned profession. The words "good moral character" were replaced with "responsibility." This change reflected the growth of the welfare state and the changes it effected in this system. The growth of the welfare state and the changes it effected in this system are generally beyond the scope of the present article.

Events contributing to the creation of the welfare state include: the Spanish-American War of 1898; the three Presidents: Theodore Roosevelt, Woodrow Wilson and Franklin D. Roosevelt; the Great Depression of 1929; and the development, not of the traditional classes, but of the organized groups of Big Business, Big Government and Big Labor which became engaged in a power struggle with the unorganized part of the community serving as innocent bystander.


53. 90 ABA ANNUAL REP. 221 (1965).

54. The Bar became concerned by the increase in lay agencies engaged in the unauthorized practice of the law. Canon 47 of the 1908 Canons was introduced in this connection and a committee of the American Bar Association led the fight to protect the public from substandard practice. BLAUSTEIN & PORTER, supra note 25, at 26.

55. The courts, especially the Supreme Court of the United States, became involved when President Franklin D. Roosevelt in 1937 introduced the celebrated court-packing plan. See id. at 130.

56. The change in the philosophy of the law as expounded by the Supreme Court beginning about 1937 should be mentioned even though space to explore the field is presently lacking. E.g., West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Bridges v. California, 314 U.S. 252 (1941); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); Polk Co. v. Glover, 305 U.S. 5 (1938); and Palko v. Connecticut, 302 U.S. 319 (1937).

57. The 1908 Canons had 32 canons which later were increased to 47. The 1969 Code has nine.

58. The 1908 Canons had 32 canons which later were increased to 47. The 1969 Code has nine.

59. Canon 1 declares the responsibility of the lawyer to his profession: "A lawyer should assist in maintaining the integrity and competence of the legal profession."

60. Canon 2 declares the responsibility of the lawyer through the profession to the general public: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

61. Canon 3 declares the responsibility of the lawyer through the profession to protect the ...
character" had been used in a conclusionary sense, with the Canons as the measuring rod by which one might proceed to a final judgment of the facts.

It is therefore appropriate to change the definition of "lawyer" and "law student" which we articulated at the beginning of this article. A "lawyer" is a person under license who exercises professional responsibility. Professional responsibility includes two aspects: professional competence and professional integrity. Professional integrity means good faith compliance with the standards set down in the 1969 Code.

A "law student" is a person who meets the requirements of a code of conduct enumerating student responsibility, a set of standards appropriate to the context in which the law student exists and functions.

If we indulge in the presumption that the philosophy of the 1908 Code was borrowed from the domain of Natural Law, we can describe the 1969 Code as being derived from realistically accumulated experience with the events in a rapidly changing world.

(B) The Context in Which the Law Student Functions

It should be kept in mind that the law student does not function in the same context as that of the lawyer. Rather, the student spends his time in the entrance hall accumulating competence, integrity, and to some extent experience in professional matters. Therefore, a student code of ethical responsibilities, while related to the lawyer's integrity code, would not be a carbon copy. The student's ordeal in acquiring enough professional competence to justify

\[ \text{public from substandard legal services rendered by unlicensed laymen: "A lawyer should assist in preventing the unauthorized practice of law."} \]

Canon 4 declares one of the responsibilities of the lawyer to his client: "A lawyer should preserve the confidences and secrets of a client."

Canon 5 declares a further responsibility of the lawyer to his client: "A lawyer should exercise independent professional judgment on behalf of a client."

Canon 6 declares another responsibility of a lawyer to the client: "A lawyer should represent a client competently."

Canon 7 declares a responsibility of the lawyer concurrently to the court and to the client: "A lawyer should represent his client zealously within the bounds of the law."

Canon 8 declares a responsibility of the lawyer concurrently to the court and to the public: "A lawyer should assist in improving the legal system."

Canon 9 declares a responsibility of the lawyer to himself and all parties in interest: "A lawyer should avoid even the appearance of professional impropriety."

If a lawyer conforms to these responsibilities, he is entitled to claim that he has the professional integrity appropriate at the time. But it does not suggest that there may be no future changes and improvements. See ABA Code of Responsibility, supra note 7.
granting him a law school degree and a license to practice is beyond the scope of the present paper. We are concerned only with the matter of his professional integrity.\footnote{55}

Neither do we have space to consider all the factors which enter into the decision of the board of bar examiners. Rather we shall concentrate on a series of cases relating to the beliefs of persons seeking admission. Professional integrity is determined by the student's record and includes inquiry as to whether he has done, espoused or believed in practices which are frowned upon.\footnote{56}

It is in the field of beliefs that much recent judicial case law has been developed and which should be taken into account with the 1969 Code. Character may be easily inferred from the acts of the applicant. Unfortunately, beliefs are much more difficult to determine. Once evidence of an applicant's beliefs are established, courts have disagreed over how to treat any problems arising in regards to them. Analysis of the decisions of the United States Supreme Court reveals definite problems. Cases in which an applicant's records show evidence of former Communist affiliations\footnote{57} indicate a reluctance to answer the questions of the examiners;\footnote{58} or where there was

\footnote{55. For the administrative details see EXAMINER'S HANDBOOK, supra note 8, at 48.}

\footnote{56. If the record reveals the commission of a crime, there is a further question as to the seriousness of the crime. The traditional test centers about the term moral turpitude, which is subject to the criticism that it is too subjective. But Canon 1 of the 1969 Code, under the topic of "Ethical Considerations" EC 1-2 and 1-3, raises the issue of whether the public should be protected from "those not qualified to be lawyers by reason of a deficiency in education, or moral standards or of other relevant factors." And before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character.}

\footnote{57. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). Schware's record contained several items which were questioned. There had been some contact with the Communist Party. The state court had rejected the application, quoting in its opinion a definition of the practice of law as a privilege. See, In re Rouss, 221 N.Y. 81, 116 N.E. 782 (1917). The Court in Schware reversed, declaring the correct term was in the nature of a property right and thus protected by the 14th amendment. An earlier related case, Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866), dealt with a petitioner whose record suggested treasonable activities. Garland had been a member of the Arkansas Bar. During the Civil War he was active in the Confederate Government. His membership in the Bar of the Supreme Court was terminated. At the conclusion of the war in 1865 he received a full pardon. With this in mind he applied for readmission. A federal statute of 1865 required a loyalty oath for all federal officers. But Garland argued that by reason of the pardon the statute should not be applied to him. The Court, by a vote of 5-4, held that the statute was invalid as a bill of attainder and readmitted him.}

\footnote{58. In re Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961). In Anastaplo and Konigsberg the issue was lack of response. The respective applicants had refused to answer questions with respect to their backgrounds. The California court in Konigsberg and the Illinois court in Anastaplo treated the refusal as an admission of bad
a refusal to take the prescribed oath have been found against the applicant. However, in other cases, the Court upheld the applicants who refused to take the prescribed oath, or disclose certain information. Perhaps a change in the procedures which the boards of bar examiners employ might aid them in obtaining more relevant data with less difficulty. It would also provide the applicant with more of an opportunity to prove that he is the sort of person who may be expected to improve rather than degrade the public image of the lawyer. The Supreme Court cases suggest that there are three parties in interest, although the Court treated the matter as if it were between the applicant and the examining board. The third party would be, of course, the general public with its claim to be protected.

A persuasive argument can be made that candor should be one of the elements in professional integrity. To many persons the Watergate crisis presents a community reaction against the policy of allowing governmental officials to "cover up." There is much to be said for a screening process which would convince the applicant that after admission he would have to live his professional life in a goldfish bowl. It would be a healthy state of affairs to require each applicant to begin with a full disclosure of his record. What action to take if the record contains questionable items would, of course, depend on the circumstances of each case. But to permit a "cover-up" is to involve the court in an endless task of deciding exactly how much disclosure is necessary.

conduct. The Supreme Court reversed on the ground that this presumption was unwarranted. On remand the California court held that the applicant should be refused admission because he had obstructed the persons authorized to seek relevant information. Finally, the two cases came before the Supreme Court together and the action of the state courts were approved.

59. *In re* Summers, 325 U.S. 561 (1945). Summers was a Quaker and therefore a conscientious objector. He sought admission to the Bar of Illinois with all credentials save one. Illinois law required applicants for admission to the Bar to take an oath agreeing to serve in the militia in wartime. The law had been enacted in pioneer days when Indian raids were relatively common. The Illinois Supreme Court had informally rejected the application. On appeal to the United States Supreme Court, the Court refused to intervene, explaining the problem as one for the states and not for the federal courts.


61. *In re* Admission of Stolar, 401 U.S. 23 (1971). In both *Baird* and *Stolar*, the Court found nothing improper in the applicants' refusal to disclose the desired information.

(C) The Obligation of the Law Student to "Integrity"

The lawyer has, as we have said, responsibilities to his client, the court, the profession and the community. In drafting a code of ethical conduct for law students, it is convenient to set out somewhere a tentative list of corresponding responsibilities for the student. Following this line of thought we may list four areas in which the student may be said to have responsibilities: to himself, to his law school, to the board of bar examiners, and perhaps most important of all, to his first client.

The obligation of the law student to himself depends upon his mental image of the process of legal education. It may be regarded as a chain with links from the cradle to the grave, with the law school period as one of the links. Whether it is one of the weak links is the matter in issue. If the three years are regarded as a sort of escalator with the instructor doing all the work and the student languidly relaxing (except for an occasional criticism of the quality of the teaching), the link will be weak. A more realistic mental image would be that of a ladder to be climbed by both student and instructor together. The instructor has been up the ladder before, but the student must carry his own share of the load because, after graduation, the student will be on his own. If he relies too much on the instructor, the student will experience a dismal period after graduation when he finds it necessary to make up for lost time. The student should come to think of the instructor as a sort of coach and the classroom activities as drilling periods in preparation for the "Big Game" on Saturday. The student needs imagination, initiative, persistence, and most of all restraint if he expects, during the progress of the "game," to win public approval, rather than disapproval. Self-restraint is essential. One should expect many disagreeable days during this period of practice. The time to prepare for drudgery and frustration is before one plunges in rather than afterwards. A student who cannot solve his own problems is not going to find much comfort in trying to make his living solving the problems of other people according to law.

The responsibility of the law student to his law school is somewhat different. The question is not whether he happens to like or dislike it. If he expects to be a successful lawyer, he must find a way to make himself indifferent to emotional feelings of this type. His main concern is whether or not he is making progress. His grades will tell him what the faculty thinks of his competence and contrast it to that of his classmates. It is important for him to realize that
he is running in competition with them and not with his instructors. To view the faculty as a body with whom the student engages constantly in adverse confrontation is juvenile. Of course the faculty is challenging the student to think for himself and cope with a series of legal problems, but if he cannot get along with the faculty, how is he going to fare when working with his clients, the court, the bar, his adversaries, and everyone else? His client will be paying him to cope.

Many of the grievances of law students arise over their evaluation of the method of instruction. In the past there have been several such methods: apprenticeship, lecture, case method, and seminar method. Each has its own strong and weak points. What works well for student X is unsatisfactory to student Y. There is often much disagreement between one class of students and the next. Some argue that the fault lies in trying to conduct the instruction on a class basis. Their claim is that lawyers are independent and therefore their instruction should be on an individual basis. Unfortunately, this would be prohibitive from a financial point of view. In the present instance it is the integrity of the law student which becomes important. To a large measure the student must learn to grade himself. In practice he will be graded by all the sundry people with whom he comes in contact. Unless he can learn how to make an objective appraisal of himself periodically, law practice will probably be intolerable to him.

There seems to be general agreement that a diploma from a Great Law School is of considerable value to its graduates. They carry the label with them during their entire professional lives. It is therefore relevant to inquire, "How does a law school go about becoming great?" Traditionally, there are three components of greatness: a great faculty, a great student body and a great library. We dare to add a fourth: that there be a spirit of cooperation among the three. The library may be great by itself. The faculty may be great by itself. The student body may be great by itself. But if this is all, the school cannot expect to be rated higher than second class in the opinion of discriminating critics. But if there is a spirit of cooperation, the prestige of the school spreads vicariously to each of the three components. Mutuality rather than isolation is the best policy.

The responsibility of the student toward the board of bar examiners is somewhat different from the relationship between student and law school. Both of them are challenges. But the law school
challenge may be thought of as a quasi-familial one, while in the case of the bar examiners the student officially confronts a group which represents the new family into which he is hoping to be received and accepted. It is one thing to take a law school examination from a professor with whom one has had a continuing contact during the whole course, and quite another to attempt to cope with a test prepared by a total stranger. If today's student recitation is below par, there will be other occasions when a poor impression in the instructor's mind can be changed for the better. The bar examination is a much more impersonal affair. It is a one-shot proposition. It has in it elements of the unexpected. The unexpected will plague the lawyer all through his public career. But in time he will learn how to grapple with it and give a good account of himself. In the bar examination experience, failure means postponing admission for a year or more.

There are two areas for which one can prepare in advance: (1) how to deal with delicate situations, and (2) how to deal with a supporting record. In litigation parties in interest frequently have cases where there are weak points. Many litigants and clients whose cases suffer from this handicap favor a policy of concealment. However, all too often the adversary is aware of these weak points and will himself bring them out. It is often good policy for the party himself to bring them out and explain them on direct examination, rather than have them brought out on cross-examination. This approach may be used to advantage in a bar examination for integrity. The careful lawyer approaching a trial will hesitate to place all his professional eggs in one basket. He will try to persuade the trial judge and jury. But he will also realistically recognize that he may lose. Then he will have to abandon the case or take an appeal. The appeal will not be very promising unless the lawyer has established in the court below a record on which to base his appeal. Therefore, he has two objectives in the trial court: to win and to build a record. Similarly, in the bar examination for integrity there is much reason to try to win. However, in addition, one should build a record on which an appeal may be taken. The building of a record before the bar examiners will be of value not only in coping with the bar examination, but in dealing with all the other examinations which, in later life, must be met and, if possible, won. Before a lawyer is selected for judicial promotion, somebody makes a thorough search of his record for integrity. If the student starts the process of record build-
ing, he is not likely to omit anything which may be to his credit. An indifferent or hostile investigator might miss a great deal.

(D) The Obligation of the Law Student to his First Client

Finally, we come to the responsibility of the student toward his first client. Here, of course, we are not dealing with the period of the bar examination, but rather with the student's future life as a member of the bar. If the element of the unexpected looms large in the confrontation with the board of bar examiners, it looms a great deal larger in the professional life which, like the longest journey, begins with the first client.

An entire law school period of three years might profitably be spent by the student in studying nothing but that momentous first meeting between lawyer and client. Since there are few clients in the law school classroom, there is only a limited amount of experience a student may acquire. But the student need not start entirely from scratch and try to play it all by ear. At least the new lawyer knows that he can develop the interview with his first client along the lines of a tentative blueprint; he knows that somewhere along the line he must obtain from the client, or elsewhere, the facts supporting the client's side of the case. In law school this data is supplied for him: in a casebook, by hypothetical facts, or on the examination question. But with his first client he does not have this advantage. His client may have lied to him. Somewhere along the line he knows there may be occasion to investigate the law, statute and case, to see if there is something relevant. The young lawyer must ultimately make two decisions: (1) what am I going to do for my client, and (2) how am I going to begin the process of doing it?63

This is not a very comforting blueprint. But to have it in mind is better in the field of integrity than telling the client: "Your case lies in a field of law in which no one has yet paid me a fee to learn. Therefore you had better go down the hall and pick some more experienced lawyer."

In other words, in the field of integrity the young lawyer must earn his client's respect and confidence. But this is a difficult task unless and until the lawyer has already achieved self-respect and self-confidence. When armed with a law school diploma and a license to practice, awaiting in his law office the knock of the first client, the lawyer must learn how to convey to this first client some evi-

dence of knowing what law practice is all about, or else the client is likely to conclude that his problem should be entrusted to someone with more experience.

Professional competence is another matter and should be treated separately. If the applicant is able to supply relevant evidence which persuades the board of bar examiners that he has, during his three years in law school, discharged his responsibilities in these four areas, there is a legitimate basis for the examining board to indulge in the presumption that once he is admitted to the bar his conduct will conform to the set of standards established for the guidance of lawyers.64

It would be beneficial at this point to examine the categories of ethical professional conduct required of lawyers. Such exploration should provide a goal toward which the student can direct his efforts. The categories should be imagined as ranging in a spectrum beginning at one end with the "lawyer criminal." Moving across the range we would encounter the "pettifogging shyster," the "neutralist," the "practical idealist," and finally, the "impractical idealist."

The lawyer criminal should be distinguished from the criminal lawyer. The former commits crimes. The latter represents persons who commit crimes. Lawyers are forbidden to engage in crimes involving "moral turpitude." Moral turpitude is one of those terms (like "character") which is subject to individual interpretation. One definition reads:

An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.65

This, of course, means that not all criminal offenses are as bad as some others. But it still leaves unresolved the problems inherent in categorizing specific crimes.66

64. In lay thinking one can refer to the old saying, "Genius is the capacity for taking infinite pains." See 4 T. Carlyle, Life of Fredrick the Great ch. III (1909). Some support for the policy against overlooking apparently minor matters can be found in Matthew 25:14 (King James).


66. Compare Bartos v. United States Dist. Ct., 19 F.2d 722 (8th Cir. 1927), with State v. Bieber, 121 Kan. 536, 247 P. 875 (1926). In each case a lawyer had violated the Volstead Act. In Bartos the court held that this was not moral turpitude. In Bieber the court disbarred the lawyer. While there are cases in which lawyers have committed a wide variety of crimes, there seems no need presently to spell them all out.
But it seems relevant to mention that quite aside from the question as to whether the crime involves "moral turpitude" or not, there is another reason for the reluctance to allow persons who engage in this type of activity to remain members of the bar. This reason has to do with the lawyer himself. The fact that he commits crimes indicates that there is something less than helpful to the profession in his motivation. The presumption may be indulged in that he has too much self-interest in his motivation and not enough idealism.

The *pettifogging shyster* is the next character encountered in our analysis. The esteem he enjoys can be stated succintly:

This "combination of epithets every lawyer and citizen knows belongs to none but unscrupulous practitioners who disgrace their profession by doing mean work, and resort to sharp practices to do it."\(^{67}\)

Two other words can be associated with this class of practitioner: "fraud"\(^{68}\) and "negligence."\(^{69}\)

Aside from the nature of the infraction there is another objection against allowing the pettifogger to remain a member of the bar. It is, again, a matter of motivation. Persons in this category have too much self-interest and too little idealism. While disbarment would seem more appropriate than lesser sanctions, there are only a few cases in which disbarment has been used.

The *neutralist* is a lawyer who does nothing really unprofessional. But neither does he contribute to the public image of the profession. He is only willing to recognize his obligations to the client and the court. The neutralist is content merely with this and is willing to receive vicariously the benefits of the good name of the profession without making creative contributions to that good name. He does not carry his share of the public relations load.

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68. The 1969 Code refers to the matter in DR 1-102(A)(4): "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Perhaps the most serious of these offenses deals with the improper handling of the client's money or property. A special section deals with this matter. ABA CODE OF RESPONSIBILITY, supra note 7, DR 9-102.

69. The 1969 Code deals with the problem of negligence in Canon 6. It commands: "A lawyer should represent a client competently." Alkow v. State Bar, 3 Cal. 3d 924, 479 P.2d 638, 92 Cal. Rptr. 278 (1971). Canon 7 provides: "A lawyer should represent a client zealously within the bounds of the law." The significance of "the bounds of the law" is enumerated in DR 7-102, while DR 7-106 deals with trial conduct. See ABA CODE OF RESPONSIBILITY, supra note 7, No. 7.
There is no reason to argue that such a person deserves disciplinary action. But his professional inactivity is a matter of regret to his more creative colleagues. He cancels out self-interest and idealism. Such a person is not brought before the courts or bar association disciplinary committees, and so leaves no record to which present reference may be made. But when one looks through the published proceedings of bar associations, his name does not appear beside any activity or functions. This category is not the target.

Those persons who enjoy the status of practical idealist, our intended target in the field of integrity, enjoy a position of esteem comparable to that reserved for the top ten per cent of a class, or the law review board of editors in the law school context. These people are named in national, state, and local bar association directories.

The impractical idealist constitutes the opposite extreme to the lawyer criminal on the professional ethical spectrum. He views constructive reform programs as desirable for his participation. But he is not our model because he lacks restraint. Reform is not only desirable, it is necessary. The speed with which it is developed is of major importance. It is not a unilateral crusade. It needs community support. Just because a few leaders see the need does not mean that the majority of the community will immediately agree with them. Certainly, for the leaders, delay is frustrating. But accomplishing progress and maintaining it require the support of the followers. The idealist who goes too fast and too far may give the reform a bad name.

70. In reality there is no occasion to apply disciplinary sanctions to the neutralist, nor does he make a very inviting target.
71. The most prestigious of these publications is the ABA Annual Red Book Directory. The reader would be well advised to glance through its nearly 300 pages in order to get an inclusive view of the multitude of programs of the American Bar Association. A student would have to be a hard person to please if he could not find in this pamphlet one or more programs in which he might desire to participate.
72. Perhaps the most spectacular illustration of too far too fast is the 18th amendment to the United States Constitution, and the accompanying Volstead Act, ch. 85, 41 Stat. 305 (1919). President Hoover called it a “noble experiment.” Letter from Herbert C. Hoover to Senator Borah, February 28, 1928, in J. Bartlett, Familiar Quotations 854 (12th ed. 1949). However, it eventually proved to be a device which helped organized crime to accumulate wealth used in a manner not in the public interest. It is perhaps appropriate at this point to mention the traditional prayer of reformers: “Lord, help me to reform the world.” This is all very well up to this point. But it is made even better by the addition of three words: “... beginning with myself.”
Up to this point we have spelled out the manner in which the obligation of the organized bar to the community has been implemented. In so doing we have laid the foundation for a specific set of Canons of Ethics relating to law students. We now turn to this task.

IV. A PROPOSED CODE OF OPPORTUNITIES FOR LAW STUDENTS

It is desirable to repeat that the present proposal is designed for a special purpose—to encourage the student to see restraint in terms of opportunity. Unless the student has imagination, he will tend to become a neutralist. Unless he has initiative, he will not try to improve matters and will console himself by thinking of his own sufferings and seeking some third persons on which to blame them. Unless he has persistence he will be so overwhelmed by the 90 per cent drudgery in law school and in law practice that he will not react creatively to the other ten per cent of events which are interesting and which confront him from time to time. But most of all he needs restraint so that he may concentrate on learning to think in the manner of above-average lawyers. There are plenty of average lawyers already in the bar. The goal should be to emulate the above-average lawyer, the practical idealist.

There are currently in existence at least two carefully thought-out codes directed toward students. The present proposal is concerned with restraints which the individual student should see as opportunities. Whether or not it is true that opportunity knocks only once, it is clear that when it does knock at the law student’s door, he and only he is in a position to answer.

It should further be remembered that this proposal is not concerned with that side of the student’s program which is directed toward professional competence. Professional integrity is the imme-

Reference should also be made at this point to one of the phenomena of law school activity. While the apprenticeship system of legal education was in effect, there were seldom more than one or two apprentices in the office. This meant that such time as the lawyer could devote to education was limited to one or two persons. The rise of the law school with its classes of many students creates a distinct instructional problem. The instructor must guess at the learning speed to which he should subject the class. If he goes too fast there are many who cannot keep up. If he goes too slow there are many who become bored and frustrated. But if he tries to strike some median speed, he fails to satisfy the two sets of extreme learners. So he ends up pleasing few and hoping that the extremists will drop in at his office to discuss relevant matters.

73. ABA LAW STUDENT DIVISION, A MODEL CODE FOR STUDENT RIGHTS, RESPONSIBILITIES & CONDUCT (1971); ABA LAW STUDENT DIVISION, A PROPOSED MODEL HONOR CODE (1971). However, the code which we propose deals with opportunities rather than a series of commandments.
diate goal. It is not to be attained by mere thinking or saying. It calls for doing acts from which the board of bar examiners may reasonably assume that the applicant possesses a reasonable balance of motivation between self-interest and idealism. This balance is usually spoken of as enlightened self-interest.

Canon 1. A Law Student should budget a reasonable portion of his time to developing a sense of responsibility to himself.

The first step in implementing this Canon is for the student to realize that in law school, as in law practice, time is of the essence. The first day of the first year in law school is none too soon to get started.

The second step is for the student to determine how much time he wastes each day. He should periodically make up a time sheet on himself covering a 24 hour period and retain the records in a file in order to be able to determine whether he is making progress in maximizing his time-saving. He will put down five minutes for this, 30 minutes for that, and probably at the end of the day he will be horrified to discover how little creative work he has done. However, if he has persistence, he may improve himself. 74 He should remember that the practice of law will be even more competitive than law school.

The third step requires the student to reserve a period out of each day and devote some of that time studying to achieve competence and specifically budget the remaining portion to the development of integrity. This is spoken of as learning—the ability to think in an orderly manner.

The fourth step is to decide how to use this allocated time to the best advantage. In this fourth step each student will have to go his own way. By whatever practicable means available, he must determine which aspects of his personality need more attention in his quest to qualify for the ultimate status of practical idealist. In the field of sports the professional does not leave such matters to speculation. He finds out where his physical life needs improvement and he engages in persistent effort aimed at building up his batting,

74. Those who keep such records indicate that while a football game may easily cover a period of three hours, the actual time spent in plays may be less than ten minutes. In determining the amount of fee a lawyer should charge his client, time spent is one of the important factors. ABA Code of Responsibility, supra note 7, EC 2-17. See Annot., 70 A.L.R.2d 962 (1960) (covering disciplinary action for improper fees).
throwing, or base stealing effectiveness. The law student is similarly concerned with the development of his motivation.

Benjamin Franklin in his *Autobiography* tells us that he made a chart of certain characteristics which he deemed necessary for a man of his day. He then proceeded to grade himself, and kept a record to check on improvement. For the law student to learn this and other desirable habits and skills is merely common sense. The practice of the law is highly competitive. If the individual student can devise his own "head start" program and stick with it, he will discover in time that the acquisition of a collection of sound professional habits will prove invaluable to him. The acquisition of the habit may take time and effort, but in due course the habit will take over and the student will be surprised at how much progress he has been making. It is not too much harder to build a sound habit rather than an unsound one, and a sound one will not later need to be unlearned.

Canon 2. A Law Student should assist his law school in implementing its program of building integrity in its student body.

The initial relationship between the student and the law school is established with the payment of tuition fees. But common sense will suggest that once this chore is finished, each student will take advantage of all the opportunities afforded.

One advantage of the law school is the law library. The first year student might, on his first day, enter the library and estimate how many volumes it contains. He might then figure out how many of these books he can expect to read in the next three years. On graduation he might pay another visit to the library and check on the number of books he has not read. He should remember that the body of the law is not only growing, but it will change some more by the time he gets into practice.

Another matter should be attended to relative to time budgeting. The student should determine how much time he will spend on law and how much on skills related to the law. He should make a list of those skills and make specific efforts to acquire as many of them as he can. It is likely that the body of law will increase and change more rapidly than will the body of skills. He should keep records of

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75. It might be a useful project for a law student fraternity to work out a table of sound professional habits to be used by the average law student. Of course, all the tables, schedules and records will be of value only if the individual student begins and stays with it.
the manner in which he has attained skills and the progress he makes in acquiring them.

The student should also give attention to the class sessions in order to determine what opportunities they can offer him in acquiring positive habits. Take, for example, the matter of class recitations. Under the lecture method of teaching law, all the student has to do is to sit there and take notes. Under the case method he has an opportunity to express his own views. Frequent absence from class, or development of the habit of responding with the phrase "not prepared," does not hurt the feelings of the instructor nearly so much as they create a blank on the student's own objective record.

The point is that the student should be concerned with making a record to which he may point with pride under any and all circumstances. By doing so, he discharges his responsibility to the school. As stated earlier, it is customary to describe a great law school as one which combines four elements: a great faculty, a great library, a great student body, and most importantly, cooperation among the first three. A graduate of a law school will often display his diploma on the wall of his office. If the public rates the school as great, the graduate benefits vicariously. The quality of the law school is a part of his record.

76. A person may be the best listener in the world, but the lawyer whose competence is limited to listening is in even lower esteem than Shakespeare's lawyer who was "unfeed," and whose breath, in consequence, of no great importance. W. SHAKESPEARE, KING LEAR act I, scene IV, line 142 (1605). The lawyer who cannot talk is in as bad a plight as the lawyer who has no client to bring him problems and to pay his fees. For a discussion of the advantages and disadvantages of the case method see HARNO, supra note 24, at 51. In fact, the entire book should be required reading for first year students. It will tell them what the law schools are trying to do with them, to them and (believe it or not) for them.

77. If the instructor kept tab on absences, documented instances of non-preparation, and graded recitations and counted these materials as part of the final examination and sent the record on to the board of bar examiners, the result would not be good public relations for the law student. If such a record was made available to prospective employers of law students, a number might remain unemployed.

There is still another check-point. There are many reasons why the student will be well advised to pay occasional visits to the professor in his private office. Whether he likes or dislikes the professor is a matter of no importance. But an occasional visit will create more of a meeting of the minds than does the average classroom dialogue. Sooner or later the instructor will be asked by third parties to evaluate the student for his activities outside of the law school. The student who neglects to provide the instructor with several occasions to grade him outside of the examination belongs in the neutralist category and not in that of the practical idealist.

Even if the student has little to say, a visit is valuable. He may, for example, say: "Professor, I did not understand a word you said in your last lecture. Would you mind going over it again?" However, a more courteous beginning would be expected from an applicant seeking admission to a learned profession.
Canon 3. A Law Student should assist the Board of Bar Examiners in carrying out its task of screening applicants for admission to the Bar in the area of Professional Integrity.

The most important part of this proposal is to encourage the student to marshal a record which he may, at the proper time, submit to the board of bar examiners as evidence that he has developed habits from which the board may draw the presumption that, if granted a license, the student will use it with integrity and restraint. The policy of giving the board as little as possible to judge is not the best policy. If the board gets the idea that the student has something to conceal, it may institute an investigation in depth which can sometimes be embarrassing to the applicant. The board does not expect that the applicant's record will be spotless, but it does appreciate good faith efforts by applicants to aid in avoiding unnecessary investigations. There are times when cooperation is the best policy. We have already spoken of the responsibility of the trial lawyer which requires him to build a record to be used on appeal. That record, of course, has to do with a lawsuit while we presently are speaking of integrity. The point involves the value in building a relevant record. It is this type of record which the student should gather and submit to the board. In fact, if the student can develop the habit of conforming to the responsibilities which press upon the law student, it is no great flight of the imagination to assume that he will be responsible in the manner expected of a lawyer. That, for our present purposes, amounts to integrity—conformity to professional standards.

Canon 4. A Law Student should budget a portion of his time in preparation for the challenge posed by his first client.

One of the advantages to the law office apprentice system of teaching law was that there were clients about all the time. Since it was an age before stenographers and draftsmen were customary,

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78. The 1908 ABA Canons, supra note 43, No. 8, touches on this point:
The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance.

But this is directed only to clients' problems settled by litigation. When one includes the many cases determined by advice, counseling and out-of-court negotiation, the problem looms larger. The lawyer should serve his client with the integrity of professional quality, but he should be careful not to put too much reliance on a client who is very much a party in interest.
the apprentice did the tedious work of writing documents, pleadings and letters. This approach resulted in the creation of lawyers grounded in the necessary skills by the time they were licensed. If such a lawyer then accepted an apprentice for his office he could, in turn, offer first hand instruction. In other words, what seemed a restraint was, upon reflection, actually an opportunity. The present day law student will be well advised to assume that there is a client peering over his shoulder 24 hours a day. Then, when a real client shows up, the student’s reaction will not be one of total shock.

(C) Placing the Proposals into Operation

There is no need for extensive approval of this proposed code before trying it out. A single student reading the plan may be interested in seeing how it would work in practice and could discover the inevitable faults which must be eradicated before it can meet with general acceptance. He should then inform the law school authorities of his intentions. He may receive some useful guidance from this source. It would also be desirable for this single student to communicate with his state’s board of bar examiners, explain what he has in mind and ask the board whether it would be willing to accept material which he proposes to send them. After this is done it is merely a matter for the student to select one or more projects which he thinks will be helpful to himself and for which it is feasible to keep records. These materials should, perhaps, be made available to the law school before being transmitted to the board of bar examiners.

(D) An Illustration of how the Plan Might Work

We shall present this illustration in the form of three dialogues. In the first step the Dean of a hypothetical law school is explaining the matter to the first year class as a part of the orientation program. In the second step a hypothetical student is conferring with his faculty advisor with respect to the selection of a suitable project. In the third step we shall assume that a committee of the Bar Examiners is engaged in an oral examination of applicants supplementing the regular written examination which deals with professional competence. The subject of this specific oral examination is professional integrity or good moral character. In our dialogue a student is appearing before the committee.

(1) The First Step—Perhaps the most realistic way to summarize the present proposal is to assume that the first year class of our
model law school is gathered for one of a series of orientation talks at the beginning of the semester. They are here to listen to the Dean. This is what he might say to them. We assume of course that the Code of Student Ethics as proposed in this article has been accepted by the Board of Examiners.

The Dean: "Ladies and gentlemen: I welcome the incoming class to law school. You are entitled to hear from me a few words as to what legal education is all about and what will be expected of you in the coming three years.

"Legal education is a life-long task. The law school interlude is a link in the chain, and a chain is, obviously, no stronger than its weakest link. You are about to undergo a transformation from the educated layman who graduated from college, to the mature lawyer performing one of three functions as a means of making a living: as a legal scholar, as a client-server with a single client, as a client-server with multiple clients.

"At the end of the next three years, I hope all of you will take a bar examination. If you succeed in this you will enter an examination period which runs 24 hours a day, seven days a week until the day you retire from practice.

"The law school will examine you on your work in the various law courses which you take. The Board of Bar Examiners will examine you to determine whether you 'have what it takes' to be granted a license to practice law. Now is the time to begin preparation for three examinations: by the law school, by the Bar and by the public from which you will be making your living.

"The Board of Bar Examiners will be interested in something called responsibility. If you have 'responsibility' of a professional quality, you take the next step into law practice. This period is one of being in training like a football squad preparing during the week for the big game on Saturday.

"The idea of responsibility breaks down into two narrower concepts. One is designated 'competence,' the other is designated 'integrity.' Competence means that when a client comes to you with a problem to be solved according to law, you will be able to solve it in conformity with the standards expected of a lawyer. Integrity means that you have developed restraint so that you are fit to be entrusted to use the power granted by a law license in a manner which is consonant not merely in the interest of your client, but also in the interest of the courts, the legal profession and the entire community."
"Training for professional competence will consume much of your time and effort during the next three years. But our interest at this meeting is to acquaint you with the matter of professional integrity, which is just as important to a member of a profession as is his competence in solving problems.

"I have said that in law school you are going to go through a transformation. You come to us thinking the way in which educated persons in the community think. When you graduate you will have added a new dimension to your thinking. You will not lose your ability to think like an educated layman. In addition, you will be able to think within the restraints which are required of a member of a profession.

"This transition may be described briefly. Your college training has enabled you to think in the manner of a principal. Here you learn to think after the manner of an agent. You come to us thinking about the world in what we may call a generalized fashion. Upon graduation from law school you will also have taken your first step in specialized thinking. Each of you comes to us with an individual load of personal problems. On graduation you will also have some ideas about the problems of other people and how best to solve them. Unless you can successfully take on this extra load you will not be able to make a living. You come to us with some idea for the solutions to your own problems. Upon graduation you will then have some ideas about the solutions which may satisfy your future clients. This transition is from subjective to objective thinking. All in all, the next three years will be quite an experience for you as it has been to all lawyers, including myself.

"When the Board of Bar Examiners tests you for the necessary professional competence, it will give you a series of questions to answer in writing. Your answers will be graded, and success or failure depends upon those written questions and those written answers.

"When the time comes to test your integrity, the Bar Examiners will want you to prepare a record for them to examine. They supply the questions and you supply the answers. In the past they looked for opinion evidence which tended to show conduct which was below standard. Since the adoption of the new Code, they have been looking for facts on which to base their conclusions. Where they previously sought evidence demonstrating the lack of good moral character, they will now be looking for evidence of self-responsibility.
You ask: Suppose I do not want to answer generally as to relevant questions? This refusal will mean you may not get your license. There are some situations in which the courts have excused the student from answering certain questions or from drawing inferences from his silence, but these are exceptions. In other words, the examination, both for competence and for integrity, is in the nature of an adversary confrontation where the immediate reaction of the student is to protect himself by cover-up. Here the burden of proof rests on you. 79

"We have in this school a new plan regarding the exam for integrity. It is based not on seeing the student at his worst, but rather at his best. It is designed to give the Bar Examiners two contrasting views of the student and thus enable them to make a more balanced judgment as to the manner in which he may be expected to use the power granted to the lawyer. They will be looking for evidence of future likelihood of responsible behavior. The plan calls for imagination, initiative, persistence, and of course, restraint. If you want to take part in the plan we want you to do the following things. First, purchase a diary and make daily entries in it. At the end of each academic year, make this diary available to me so that I may forward it to the Board of Bar Examiners for their periodic inspection of your progress and so that I will have in my files written evidence of how you function at your best. Develop your own record for submission to the Board.

"Relative to the data to include in your diary, remember a few things. In the commercial field the establishment of a good credit rating is no mystery. If you go into a new community, one of the first steps you should take might well be to go to the local bank and apply for a loan. Then scrupulously repay the loan when and as due. Similarly, you may establish a credit account with one or more stores. Again, you should scrupulously pay what you owe. The initial account may be somewhat difficult to secure. But shortly there will be an objective record of your responsibility in the commercial field. Whether or not you want to go on indefinitely dealing in

79. There is considerable authority supporting the proposition that the burden of proof rests on the applicant, but this doctrine also provides a "due process" right in aid of the applicant. Greene v. Committee of Bar Exam'rs, 4 Cal. 3d 189, 480 P.2d 976, 93 Cal. Rptr. 24 (1971); Bernstein v. Committee of Bar Exam'rs, 69 Cal. 2d 90, 443 P.2d 570, 70 Cal. Rptr. 106 (1968). But see Hallinan v. Committee of Bar Exam'rs, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966). See also Annot., 39 A.L.R.3d 719 (1971); Annot., 17 L. Ed. 2d 1155 (1967); and Annot., 2 A.L.R.3d 724 (1966).
credit is, of course, a matter of personal preference. But the idea of gaining a good objective reputation is one which should not be overlooked.

"In the professional field, a record of your professional integrity may be made by happenchance or by intelligent planning. There is no need for me to stress the value of intelligent planning. The members of the Board of Bar Examiners may not know you personally, but if you for a period of three years have supplied them with relevant data about yourself which they are able to verify, you come to the bar examination as a familiar person. You have a presumption working in your favor.

"Before I conclude, there is one thing more. What sort of data should you include in your diary? The first consideration is whether the data you include, in your judgment, will add something to your image in the minds of the Bar Examiners. Next, the data should show specifically that, while you recognize that prior to admission to the Bar you cannot demonstrate responsibility to the goals of the practicing lawyer, you do understand what responsibility entails and you are prepared to use your pre-admission period to increase your sense of responsibility. Since it will take some of your precious time to establish, a reputation for integrity should overlap with your efforts to establish a reputation for professional competence. Finally, the activities selected in your program should be those which you, in your own mind, believe will make you a more adequate lawyer when the time comes. A lawyer cannot expect to know everything, but one thing he needs very much to know is his own weaknesses, the areas of his own incompetence. There is nothing wrong with having deficiencies. We cannot all be perfect. What is wrong is failing to recognize them and doing something constructive about them.

"I suggest that you discuss the selection of one or more of these activities with your faculty adviser and start at once. For some of you three years may loom as a long time; but for others the time will flash by and you will wonder where it has gone.

"This is enough for one orientation meeting. In your study to build a dependable record for competence, the members of the faculty will be glad to help you—not to do your work for you, but to help you do it yourself. But in the matter of integrity, the responsibility from beginning to end is yours alone. After all, a lawyer, even as a member of a law partnership, has obligations which relate specifically to himself. I welcome you to a period of training at the end of which you will be taking your places in the inspiring task of
administering to the community justice-according-to-law. Good luck and good hunting."

(2) The Second Step—This stage begins with the student seeking out his faculty adviser in the latter's office. There are not too many examples of this type of student-faculty cooperation in published form. The cooperation process outside of the classroom is a well-recognized campus phenomenon beneficial to both parties. The interview may proceed somewhat as follows:

Student: "Professor, I am one of your first year students. The Dean has been telling us about the need to begin preparing for the bar examination. He explained that this examination will test our responsibility; on the one hand to competence, on the other to integrity. He says the faculty will help out on the competence side; but that the integrity side is a trail which the student must travel largely alone. In particular, he told us we must each pick some project upon which we can report to the Board and from which they may be able to draw presumptions as to the quality of our professional integrity. I did not understand all he said, but I did get the idea that if I had a conference with you, you could help me pick a topic, and aim me in the right direction."

Professor: "I am glad that you have come to me so promptly to talk about your part in the new program and clarify the Bar Examiners' requirement that you prove to them that you possess 'good moral character.' In the past this side of the bar examination has not received as much attention as the side devoted to demonstrating your professional competence. Perhaps this is because in the colonial days, when the apprenticeship method of teaching law was generally accepted as the best method available, there were only one or two apprentices in a law office at a time and the lawyer had more time to devote to each individual. In today's large law school classes, something of this personal relationship between instructor and student has been lost. This is certainly to be regretted by the law faculty, and perhaps by the students. It is most difficult in the classroom and from the anonymous examination for the instructor to form much of an opinion as to the student's own sense of professional responsibility.

"The plan which the dean has outlined to your class is an effort

80. One of the most useful examples appears in S. Thurman, E. Phillips & E. Cheatham, Cases and Materials on the Legal Profession 476 (1970).
to recover some of the lost ground. It proceeds on the theory that an applicant’s character is demonstrated not merely by what he does at his worst, but by what he does at his best. It deliberately invites the applicant to demonstrate what he can do at his best.”

Student: “But what can I do at this stage of my education? I cannot hope to compete with experienced lawyers, and the curriculum committee will not allow me to take more than a certain number of courses in any one year.”

Professor: “That is exactly the point. This experiment is something which you do on your own, not something you are taught to do. You must: decide where your interests lie in proving Professional Responsibility; select a particular project or projects on which to work in your spare time; and keep a record of what you do in the form of a diary and a report to the Board of Bar Examiners. In each of these steps you are the person making the decisions. The only point at which others may make decisions in this experiment is with respect to whether your project is acceptable to the Board. So when you have made your selection of a topic, you are to write to the Board, advise them what you plan to do and why you plan to do it, and ask them to indicate that they regard your plan as relevant. You cannot afford to spend your limited time on a project which in the end turns out to be unacceptable to the Board.”

Student: “But how do I get started? Will you assign me a topic?”

Professor: “No. That is your responsibility. I can go no further than to give you a list of categories for possible projects which I think the Board might regard as relevant. But you make the decisions. A lawyer who cannot make decisions for himself is not likely to be of much value to his client.”

Student: “All right. What are the possible categories?”

Professor: “Remember that you are not trying to prove that you have never done anything which later on you wish you had not done. What you are trying to do is to demonstrate that the form of professional responsibility which has been designated as ‘integrity’ is a topic which you not only take seriously, but so seriously that you are prepared to do something constructive about it. The Board will not indulge presumptions in your favor unless and until you give them some material to use as a starting point. Letters of recommendation are all very well and good as opinions, but not as facts. This

81. The ABA Code of Responsibility, supra note 7, No. 5, provides: “A lawyer should exercise independent professional judgment on behalf of a client.”
project is something you must do for yourself; something on which you have spent time and thought; something which can be proven by a diary and by a final report of progress.

"There are three general categories of topics from which you may make a selection: the field of law; the field of professional skills; and the field of facts—the area which concentrates on understanding a client’s problem and submitting that problem to the test of litigation in the form of evidence.

"If you pick a topic from the field of law, you should select a portion of that field which is not covered by a course offered in law school. There are a number of fields of law not in the law school curriculum and not used as a basis for bar examination questions. This project is not designed to prove your familiarity with a part of the competence side of the bar examination, but on the integrity side. You are doing pioneer work.

"If you pick a topic in the field of facts, you should not be content with 'processed facts' such as you get from reading the opinions of appellate courts. In fact, it will be desirable for you to pick facts which are not easily obtained from reading books from the law library. There are many sources of important facts beyond the printed page.

"If you pick a topic in the field of skills, remember that the two basic skills which you develop in law school are analysis and reasoning. Sit down some time and make your own list of the skills you think you are going to need if you are to become a successful lawyer. Select from them those which seem to you to be the most challenging, the most troublesome, the most complex. You will have to learn them sometime and there is no better time to get started than right now.

"The project calls upon you not only to learn more about the process of decision making. It also expects of you some imagination, persistence, and perhaps most of all, restraint.

"From time to time I will be pleased if you will drop in to see me. We can talk about what you are doing. But remember, you will be doing the talking and I will be doing the listening. It is your integrity that is being illustrated.

"Make your selection and secure the approval of the Board of Bar Examiners. Keep your diary and gradually formulate your report. I wish that an opportunity of this sort had been made available to me when I was a law student. You have my best wishes for success."
RESTRAINTS

(3) The Third Step—The third step occurs at a hearing called by the Board of Bar Examiners to provide an oral examination of the candidates in the matter of their professional integrity. At this meeting there should be present: the examiners or a committee of the Board; representatives appearing on behalf of the law schools, the organized Bar, and the courts of the state; and also one or more representatives of the general public, preferably representing all economic classes.

The Chairman: "Mr. Applicant, this meeting of the Board and interested third parties has been called to inquire into the extent of your professional integrity, or your ability to discharge professional responsibility. The burden rests on you to persuade us that you possess this quality to such a degree that we will be justified in issuing to you a license to use the immense powers of the state for the benefit of the public and not in a manner of disservice. We approved your project, and we have your diary and your report. Today we want to learn something else about you. We know you can read and write, but here we want you to convince us that you can speak in your own behalf under pressure. We will allow you a period of five minutes for this, just as we give the same opportunity to all the other applicants."

Student: "Ladies and gentlemen, the topic I chose in preparation for this part of the Bar Examination was in the field of facts. I kept in mind the matter of raw, unprocessed facts because I realized that when I meet my first client, the raw fact will be one of the early topics of conversation.

"Up to now my law school training has dealt with processed facts, which appear in printer's ink on the pages of books, examination papers and the like. There were the hypothetical facts given me in class on which to make a recitation, but these had been processed by the instructor before he turned me loose on them.

"I wanted to see raw facts with legal implications as they might look to laymen—to my first client. I could, of course, have taken just any layman. I could have accompanied him through a series of experiences, learning what he had to say about them, but I thought it would be more instructive to associate with some non-lawyer who had received disciplinary training in another occupation, but who, in the course of his work, would record his impressions. My theory was that if I went along with him and we both saw and heard the same events, I could then compare my perception of the facts to his.
One of my classmates in college had chosen a career of working as a newspaper reporter. I asked whether, as he went around on his various assignments, he would allow me to accompany him to listen and take notes. Thereafter I could secure a copy of his story as it appeared in the daily press and contrast his version with my impressions. From this I expected to learn something which would be professionally useful and yet be interesting. He obligingly agreed and, as I reported in my diary, we went around together to a great variety of events, some of which could well have been the starting point for the services of a lawyer, either by way of litigation, negotiation or advice and counseling.

“Time was a serious concern. My law school studies kept me particularly busy in the beginning. However, I managed to solve that problem by a rather simple device of self-discipline. At the end of each day, I compiled a checklist for that particular 24 hour period and noted next to each item performed the time in minutes and hours which I had spent on it. Then I reviewed the schedule with a view to determining how much time I had wasted. At first I was horrified at how little of the day I had spent in creative work. But as time went on I managed to get matters under control and find ways to shave off a minute here and a minute there.

“Altogether the experience was well worth the time spent. I learned that the printed page was not the only way in which a lawyer comes in touch with facts. I learned that often situations which at first looked dull and uninteresting could blossom into first class crises. I got an idea how people, prospective parties in interest as clients and witnesses, might be expected to react. I learned some preliminary details which would stand me in good stead later on when I might be involved in direct or cross-examination. Most of all I learned that, for the practicing lawyer, the rule of law, even the correct rule of law, is only one of the factors to be kept in mind.

“In my first year in law school when I was acquiring some of the mythology of the legal profession, some one said to me: ‘The practice of law sharpens the mind by narrowing it.’ This frightened me. I did not want a narrow mind.”

V. A Final Note

If you, as reader, had sat on that committee and heard the above statement, would you have tended to vote favorably on the applicant’s request?
"COMPLICATED ISSUES" V. THE RIGHT TO A JURY TRIAL: A PROCEDURAL REMNANT IN KENTUCKY LAW RAISES CONSTITUTIONAL PROBLEMS

Phyllis A. Sower*

I. INTRODUCTION

When the states adopted modern rules of civil procedure, the object was to reduce the complexity and ambiguity which characterized traditional code pleading. Although most states, including Kentucky, used the Federal Rules as a model, some traces of the old code-based system survived. In many cases these fragments were preserved in an effort to maintain some continuity with the past, especially where a change would dramatically upset previous practice.

One such procedural remnant persists in Rule 39.01(3) of the Kentucky Rules of Civil Procedure. Like its federal counterpart, this rule provides that all issues triable of right by a jury shall be decided by a jury where proper demand has been made, except where (1) the parties or their attorneys consent to trial by the court alone; or (2) the court finds that no right to a jury trial exists on some or all of the issues. In Kentucky, a third exception has been added, whereby the trial judge may dispense with a jury in any case where "peculiar questions," "complicated accounts," or "great detail of facts" are involved, and where he finds that a jury cannot intelligently try the case.

* B.A., Magna Cum Laude, Western Kentucky University; J.D., University of Kentucky.
3. See note 17 infra.
   (a) By Jury. When trial by jury has been demanded as provided for in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.
5. Ky. R. Civ. P. 39.01 provides that the trial of all issues so demanded shall be by jury unless:
Soon after the Kentucky Rules were adopted, a leading authority on Kentucky civil practice observed that Rule 39.01(3) gives rise to a problem relative to the right to trial by jury. Although the writer who made this observation did not identify it, the problem with Rule 39.01(3) is whether it runs afoul of the right to a jury trial as guaranteed under the federal and state constitutions.

The seventh amendment to the United States Constitution, as well as section 7 of the Kentucky Constitution, preserves the right to trial by jury as it existed at common law. Rule 39.01(3) is not, however, subject to federal constitutional review, since the seventh amendment right to a jury trial in civil cases has not yet been made applicable to the states through the fourteenth amendment. Nevertheless, the federal and state rights are similar in several respects. Both, for example, guarantee the right of trial by jury as it existed in 1791. In Johnson v. Holbrook the Kentucky Court of Appeals consciously adopted the federal approach and cited a federal case in support of its construction of section 7. In view of the strong federal policy in favor of jury trials, and of the predictions of some

1. Richardson, Trial Juries and the New Rules—Right to Trial by Jury, 47 Ky. L.J. 185 (1959) [hereinafter cited as Richardson].
2. Id. at 193.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

4. E.g., Commercial Union Assur. Co. v. Howard, 256 Ky. 363, 76 S.W.2d 246 (1934); Richardson, supra note 6, at 185. Section 7 of the Kentucky Constitution provides: “The ancient mode of trial by jury shall be held sacred and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.” KY. CONST. § 7. Section 7 is identical to its predecessor, section 8 of article 13 of the Kentucky Constitution of 1850. The right to a jury trial was similarly preserved in previous constitutions though there were slight variations in language. See KY. CONST. art. X, § 6 (1799); KY. CONST. art. XII, § 6 (1792).


7. Id. at 608 (Ky. 1957).
8. Id. at 611, citing United States v. Mesna, 11 F.R.D. 86 (D. Minn. 1950).
authorities, there exists a reasonable possibility that the seventh amendment will be absorbed by the fourteenth.

In analyzing the constitutionality of Rule 39.01(3), the crucial question is whether it was customary at common law, in 1791, for a court, in its discretion, to deny a jury trial because the action involved peculiar questions, complicated accounts, or great detail of fact, where proper jury demand had been made. Before this question can be answered, it is essential to examine the origin and application of Rule 39.01(3).

II. DEVELOPMENT OF THE EXCEPTION

Rule 39.01(3) is a condensation of section 10(4) of the now-obsolete Civil Code of Practice. The Kentucky Civil Code Committee, created by the General Assembly in 1950 for the purpose of drafting new rules of procedure to replace the Civil Code, incorporated section 10(4) into Rule 39.01 as part of an effort to retain some provisions of the old system.

The Civil Code provided for two kinds of actions: ordinary and equitable. Ordinary or legal causes of action, under the Civil Code and the present Civil Rules, are triable before a jury; equitable causes of action are triable by the judge without a jury. The procedural distinctions between ordinary and equitable actions were abolished by the provisions in the Civil Code and the Civil Rules providing for one “form” of action, yet the substantive differences remained. The substantive effect of designating an action as “ordinary” or “equitable” was that jury trial was granted as a matter of

95-102 infra. It should also be remembered that the Kentucky Rules of Civil Procedure are substantially the same as the Federal Rules of Civil Procedure. Sims, supra note 2, at 8.

15. The theory that the fourteenth amendment was intended to incorporate the entire Federal Bill of Rights was strongly supported by Mr. Justice Harlan and Mr. Justice Black. See Adamson v. California, 332 U.S. 46, 71-72 (1947) (dissenting opinion); Twining v. New Jersey, 211 U.S. 78, 117 (1908) (Harlan, J., dissenting). See also Hill v. McKeithen, 345 F. Supp. 1025, 1034 (E.D. La.), aff’d, 409 U.S. 943 (1972); Ochoa v. American Oil Co., 338 F. Supp. 914, 923 (S.D. Tex. 1972); BRENNAN, supra note 8.


17. Interview with the Hon. Ben Fowler, Staff Member of the Kentucky Civil Code Committee, in Frankfort, Ky., June 26, 1975.


20. 302 S.W.2d at 608; Brock v. Farmer, 291 S.W.2d 531 (Ky. 1956).
right as to the former but not as to the latter. Thus, the transfer of a case from the ordinary docket to the equity docket had the practical effect of denying a jury trial in the action.

Section 10 of the Civil Code originally had three provisions concerning the transfer of actions from the ordinary docket to the equity docket or vice versa. The first provided that a defendant, by motion made at the time of his answer, may cause the transfer of an equitable action to the ordinary docket if it should have been brought as an ordinary action. The second subsection provided for the alternate situation where an ordinary action may be transferred to the equity docket on motion of the defendant if it should have been initiated in equity. The third provision permitted the court to transfer an action from one docket to the other on its own motion.

By act of 1890, the General Assembly amended section 10 of the Civil Code by the addition of subsection 4, which provided:

The court may, in its discretion, on motion of either party, or without motion, order the transfer of an action from the ordinary to the equity docket, or from a court to purely common law of a court of purely equity jurisdiction, whenever the court, before which the action is pending, shall be of the opinion that such transfer is necessary because of the peculiar questions involved, or because the case involves accounts so complicated, or such great detail of facts, as to render it impracticable for a jury to intelligently try the case.

As can be seen, the current rule and the old code section are in principle the same: a jury trial may be denied where the court is of the opinion that, due to peculiar questions, complicated accounts or great detail of fact, it is impracticable for a jury to try the case.

21. B.F.M. Building, Inc. v. Trice, 464 S.W.2d 617 (Ky. 1971); Johnson v. Holbrook, 302 S.W.2d 608 (Ky. 1957); Reiger v. Schulte & Eicher, 151 Ky. 129, 151 S.W. 395 (1912). Reiger was distinguished on other grounds in Scott v. Kirtley, 166 Ky. 727, 179 S.W. 825 (1915).


23. This section was codified as Ky. Civ. Code Ann. tit. II, § 10 (Carroll 1932).

24. Id. § 10(1).

25. Id. § 10(2).

26. Id. § 10(3).


28. Id. (emphasis added). This statute was codified as Ky. Civ. Code Ann. § 10(4) (Carroll 1932).
intelligently. Therefore, the authorities applicable to an analysis of the obsolete Civil Code section should be similarly applicable to an analysis of the current rule.\textsuperscript{29}

Although Rule 39.01(3) can be easily traced to its prototype in section 10(4) of the Civil Code, it is extremely difficult to ascertain the origins of subsection 4 itself. Neither the Senate nor House Journals provide any insight into the reasons for its enactment.\textsuperscript{30} Furthermore, an examination of the Rules of Civil Procedure for the various other states reveals that this rule is one peculiar to Kentucky, though the underlying principle has been discussed in the case law of a few other jurisdictions.\textsuperscript{31}

Prior to the enactment of subsection 4 of section 10, the Kentucky Court of Appeals spoke of the concurrent jurisdiction of courts of law and courts of equity relative to matters of account.\textsuperscript{32} This construction meant that a matter of account was cognizable in an ordinary court of law as an action of account, and in an equity court as a bill in equity for an accounting. Equity jurisdiction was exercised when the remedy at law was inadequate;\textsuperscript{33} an "adequate" remedy at law is one that is "speedy, efficient and complete."\textsuperscript{34} It became settled that equity would entertain a bill for an accounting in matters of account too complicated to be dealt with expeditiously and completely at law,\textsuperscript{35} as, for example

where a contractor had constructed various works for a railroad company under different contracts and had given different forms of security to a third person for money advanced to enable him to perform the different contracts, and the railroad company admitted that it had not separated the payments made by it under the different

\begin{footnotes}
\item[29] Brandenburg v. Burns, 451 S.W.2d 413, 415 (Ky. 1970).
\item[30] See Ky. S. Jour. 389, 391, 1418 & 1478 (1889); Ky. H.R. Jour. 486, 1564, 1693 & 1795 (1889).
\item[32] Milliken's Ex'r x v. Enterprise Mach. & Garage Co., 206 Ky. 78, 266 S.W. 878 (1924); Power v. Reeder, 39 Ky. (9 Dana) 6 (1839); Breckenridge v. Brooks, 9 Ky. (2 A. Mar.) 335 (1819).
\item[33] O'Connor & McCulloch v. Henderson Br. Co., 95 Ky. 633, 27 S.W. 251, rehearing denied, 96 Ky. 89, 27 S.W. 983 (1894); W. Stafford, A HANDBOOK OF EQUITY 429-33 (1934) [hereinafter cited as Stafford].
\item[34] DeFuniak, supra note 19, § 25.
\item[35] See Power v. Reeder, 39 Ky. (9 Dana) 6 (1839); Neal v. Keel's Ex'rs, 20 Ky. (4 T.B. Mon.) 162 (1826); Stafford, supra note 33, at 431; DeFuniak, supra note 19, § 103 n.2; H. McClintock, HANDBOOK OF EQUITY § 202 (2d ed. 1948).
\end{footnotes}
contracts, or where it appeared that two accountants had been unable to state the account after three weeks of work nor the defendant and his clerks after several months of work.\textsuperscript{36}

The remedy at law was deemed inadequate in complicated accounting cases because the remedy was too protracted and cumbersome for a jury to handle effectively. An accurate result might not be obtained due to the assumed incompetence of a jury and the absence of discovery methods at law.\textsuperscript{37}

Thus, it was customary at common law to transfer an accounting action from the ordinary docket to the equity docket under the theory that the accounts were too complicated to afford an adequate remedy at law. This principle was well established in English law,\textsuperscript{38} and the Kentucky Court of Appeals relied upon this English precedent.\textsuperscript{39} Some 20 years before the enactment of subsection 4, Mr. Justice Story warned of the expansion of equity jurisdiction from accounting cases involving a fiduciary relation or mutuality of accounts, into those areas where the form of the account was purely legal, and the underlying obligations did not involve equitable matters.\textsuperscript{40}

Apparently, subsection 4 formalized what was already the practice in Kentucky courts. In \textit{O'Connor & McCulloch v. Henderson Bridge Co.},\textsuperscript{41} the Kentucky Court of Appeals, referring specifically to subsection 4, said:

> If the court was, at the date of that statute, without authority to transfer an action from the ordinary to the equity docket under circumstances and for causes therein recited, it is still powerless in that respect, for the right of trial by jury can not be impaired or modified by legislative enactment.\textsuperscript{42}

Thus, there exists a constitutional basis for the denial of a jury trial where complicated accounts render it impracticable for a jury intelligently to try the case. However, Rule 39.01(3) and subsection 4 are much broader in that they also permit the denial of a jury trial

\textsuperscript{36} See id. § 2.


\textsuperscript{40} 1 Story, supra note 37, § 442, at 461.

\textsuperscript{41} 95 Ky. 633, 27 S.W. 251 (1894).

\textsuperscript{42} \textit{Id.} at 642, 27 S.W. at 253.
where the court finds that the case involves "peculiar questions" or "great detail of fact." Yet, the court has insisted that under subsection 4, as well as under Rule 39.01(3), there has been no such enlargement of the right to trial by jury under the subsection or the rule. 43

III. HOW THE EXCEPTION WAS APPLIED

An examination of the kinds of cases in which the rule and the subsection were applied to deny a jury trial is essential to the resolution of the constitutional issue raised. If Rule 39.01(3) and subsection 4, despite their broad language, have been applied only in cases involving "complicated accounts," then the constitutional challenge would be reduced to what is essentially an argument that Rule 39.01(3) should be redrafted.

(A) Establishment of the Standard

The court handed down a standard for the application of subsection 4 in O'Connor & McCulloch v. Henderson Bridge Co., 44 a case decided just four years after subsection 4 was enacted and wherein the court first faced a constitutional challenge to that provision. Under this standard, subsection 4 was applicable in an accounting case when "the accounts are all on one side, but there are circumstances of great complication or difficulties in the way of adequate relief at law." 45 This standard suggests a two-step determination: whether the action is one for an accounting, and whether the remedy at law is inadequate in view of the circumstances of great complication. However, the court made no such determination with respect to the particular action presented in O'Connor. Even so, the court cannot be reproached for saying one thing and doing another, since the facts reveal that in this case only the question of accounts remained to be settled. O'Connor had been twice tried, once by jury and once by transfer to the equity docket, before concluding arguments had been made. The appeal sought reversal on the ground that the transfer had denied plaintiffs the right to trial by jury. 46 The basis of recovery had been found in the first trial to be fixed in

43. See Brock v. Farmer, 291 S.W.2d 531, 534 (Ky. 1956); Manion v. Manion, 120 Ky. 1, 6, 85 S.W. 197, 198 (1905).
44. 95 Ky. 633, 27 S.W. 251, rehearing denied, 96 Ky. 89, 27 S.W. 983 (1894).
45. Id. at 643, 27 S.W. at 253, citing J. POMEROY, EQUITY JURISPRUDENCE § 1241 (2d ed. 1892) (emphasis added) [hereinafter cited as POMEROY].
46. 95 Ky. at 639, 27 S.W. at 252.
the contract, so there remained no legal issue as to whether the plaintiffs were entitled to recover, but only a determination of the amounts recoverable.\(^{47}\) As discussed earlier,\(^{48}\) a transfer to equity (a de facto denial of a jury trial) in complicated cases of account was within the realm of the court's authority, and customary at common law before the enactment of subsection 4.\(^{49}\)

A problem lurking in the \textit{O'Connor} analysis revolves around the failure of the court to resolve fully the constitutional issue which had been raised. The court based the constitutionality of subsection 4 on an analysis of accounts, concluding that, since the court previously had the authority to transfer a case from the ordinary to the equity docket where it involved complicated accounts, subsection 4 was constitutional. Nowhere in its analysis did the court speak of "great detail of fact" or "peculiar questions."\(^{50}\) In fact, there was no basis at common law for denial of a jury trial on these grounds.\(^{51}\)

From the standpoint of what was actually said in \textit{O'Connor}, the standard developed by the court is a narrow one. It limits the application of the principle embodied in subsection 4 and rule 39.01(3) to complicated cases of account. However, in many subsequent decisions, the court has not confined itself to this limited standard of application.\(^{52}\)

\textbf{(B) Decisions Disregarding the Established Standard}

The most obvious examples of the broad application of the principle favoring transfer are those cases in which the court admits that an action, claim or issue is legal rather than equitable, but goes on to apply subsection or Rule 39.01(3) in denying a jury trial. For example, \textit{Hoaglin v. Carr's Administratrix}\(^{53}\) involved a venture to

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48. \textit{See text accompanying notes 35-42 supra.}
49. In a few cases the jury trial was denied on the ground that peculiar questions were involved. Usually, "peculiar questions" was not the sole basis for the determination. Normally, one of the other two circumstances of Rule 39.01(3) or subsection 4 was involved. See, \textit{e.g.}, Manion v. Manion, 120 Ky. 1, 85 S.W. 197 (1905).
50. 95 Ky. at 641-42, 27 S.W. at 253.
52. \textit{E.g.}, Reusch v. Hemmer, 236 Ky. 546, 33 S.W.2d 618 (1930); \textit{but see} Insurance Co. of N. Am. v. Creech Drug Store, 256 Ky. 56, 75 S.W.2d 552 (1934), \textit{rev'd on other grounds}, 264 Ky. 364, 94 S.W.2d 654 (1936). In this case the court reversed the trial court for improperly applying subsection 4.
53. 294 S.W.2d 935 (Ky. 1956).
\end{footnotesize}
develop thoroughbred weanlings for sale at yearling markets. Carr sued Hoaglin for profits, originally alleging an oral contract, but later amending his complaint to allege a partnership. Hoaglin denied liability, counterclaimed for damages based on breach of contract, and demanded a jury trial. The case was transferred to a master commissioner, who determined that the arrangement was one of a profit sharing employment contract and that Carr was entitled to recovery on a quantum meruit basis. Hoaglin's counterclaim was dismissed. On appeal, Hoaglin's main argument was that he was entitled to a jury trial. Concluding that it was not error to deny Hoaglin a jury trial, the court said:

[T]he action proved to be one legal rather than equitable in nature, and therefore was one in which Hoaglin was entitled to demand a jury trial . . . nevertheless it is our opinion that as the case developed, the issues and facts became so complicated that it would have been impracticable for a jury to intelligently try the case.55

In Reusch v. Hemmer,56 the court admitted that a counterclaim for damages raised common law issues, but upheld a transfer of the entire action to equity because the issues "were so numerous and complicated" in view of the more than 100 items for which damages were claimed.57 Reusch is representative of cases involving a mixture of equitable and legal claims in which a jury trial was denied as to the legal issues on the authority of subsection 4 or Rule 39.01(3).58

Neither subsection 4 nor Rule 39.01(3) contains a reference to "complicated issues." However, in a number of cases, the court has spoken of complicated issues as a basis for denial of a jury trial under the subsection or the rule. For instance, Coy v. King59 was reversed for the trial court's failure to effect a transfer to the equity

54. Id. at 936.
55. Id. (emphasis added). In Brandenburg v. Burns, 451 S.W.2d 413, 415 (Ky. 1970), the court attempted to explain Hoaglin by describing it as an exceptional situation where "pretrial proceedings, or the actual trial of a case, may develop issues which should be resolved by the judge rather than the jury." The court admitted, however, that the commissioner's report developed issues which should have been tried by the jury.
56. 236 Ky. 546, 33 S.W.2d 618 (1930).
57. Id. at 548, 33 S.W.2d at 619.
59. 199 Ky. 65, 250 S.W. 503 (1923). Accord, Turner-Elkhorn Coal Co. v. Smith, 247 Ky. 112, 56 S.W.2d 545 (1933), rev'd on other grounds, 270 Ky. 466, 109 S.W.2d 1212 (1937); this case was reversed for failure to make a transfer under § 10(4) of the old Civil Code. See also Philadelphia Veneer & Lumber Co. v. Garrison, 160 Ky. 329, 169 S.W. 714 (1914).
docket of a contract action by a tenant farmer against his landlord. The court noted that subsection 4 "was intended to embrace and regulate cases similar to the one we have under consideration, where there is a multiplicity of issues." The landlord had failed to make a motion for a transfer into equity until after the case had been once tried, yet the court went so far as to hold that the transfer could be made at any time after the great complication becomes evident.

Legal counterclaims, as well as claims for balances due, were frequently involved in actions on contracts, and tried without a jury by virtue of subsection 4 or rule 39.01(3). The application of this principle was exemplified in a recent case, City of Shively v. Hyde. The city had engaged contractors for the installation of a sewer system. When the construction was finished, the city alleged that the work was defective and withheld payments, claiming damages. Consequently, the sewer contractors sued the city for a declaration and judgment as to the balance due under the contract and for the arbitration remedy provided in the contract. The city then counterclaimed for damages. On appeal one of the city's contentions of error concerned the failure of the trial court to transfer the action for trial by jury under Rule 39.01(3). Despite the legal counterclaim and the legal nature of the claim for balances due, this argument was disposed of and the lack of transfer upheld by a brief reference to great detail of facts and complicated issues.

The manner in which Rule 39.01(3) was applied in McGuire v. Hammond is an example of misuse rather than unconstitutional application. The case involved a suit by taxpayers to recoup alleged

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60. 199 Ky. at 66, 250 S.W. at 504 (emphasis added). But see Wilhoit v. Cundiff, 291 Ky. 99, 163 S.W.2d 280 (1942) (transfer to equity denied because the pleadings presented no complicated issues).

61. 199 Ky. at 65, 250 S.W. at 503. This is another troublesome and possibly unconstitutional aspect in the application of subsection 4 and Rule 39.01(3). At common law, courts had no authority to stop the progress of a suit in order to change from a tribunal at law to one of equity, or vice versa. 1 Story, supra note 37, § 442, at 461-62. In such cases the court has ruled inconsistently. On the one hand, it has insisted that the applicability of the subsection or the rule be determined exclusively by the pleadings. See, e.g., Wilhoit v. Cundiff, 291 Ky. 199, 163 S.W.2d 280 (1942). On the other hand, the court has upheld a transfer to equity made while a jury trial was in progress. Akers v. Stamper, 410 S.W.2d 710 (Ky. 1967). It has also been held that such a transfer can be made at any time as was done in Coy. See, e.g., Philadelphia Veneer & Lumber Co. v. Garrison, 160 Ky. 329, 169 S.W. 714 (1914).

62. 438 S.W.2d 512 (Ky. 1969).

63. Id. at 515.

64. 405 S.W.2d 191 (Ky. 1966); see also, e.g., Prussian Nat'l Ins. Co. v. Terrell, 142 Ky. 732, 135 S.W. 416 (1911).
illegal expenditures of school funds by the board of education. The trial judge denied the demand for a jury trial "because of the long period of time anticipated necessary to hear the case, and the many and complicated issues of fact involved." The Court of Appeals upheld the denial of a jury trial, saying that "[i]n a very definite sense this case may be designated as one involving complicated accounts and claimed violations of the fiduciary duties of appellant." The facts in this case indicate that the action was hardly one for an accounting; in reality it involved numerous charges of illegal expenditures. The existence of the fiduciary relationship could support the finding of equity jurisdiction. Thus, it was not necessary or appropriate to use Rule 39.01(3) in this situation. Perhaps the real reasons for the denial of a jury trial in this case were accurately stated by the trial court, and those reasons are without constitutional basis.

IV. THE KENTUCKY CONSTITUTIONAL GUARANTEE VS. RULE 39.01(3)

(A) Constitutionality—An Overview

Rule 39.01(3) violates the right to a trial by jury as guaranteed in section 7 of the Kentucky Constitution in two respects. First, it broadens the range of application beyond cases of account, and second, it is used to deny a jury trial where there are mixed issues of law and fact.

In the first situation the rule is unconstitutional to the extent that the court has applied the principle of complication to deny jury trials in cases other than those involving complicated accounts. Those applications which violate the constitution include the denial of a jury trial on the basis of peculiar questions or great detail of fact. In the situation where the court itself admits that an issue is one at law and properly triable by a jury, yet upholds the denial of a jury trial, a violation of section 7 has occurred. Furthermore, the court has utilized language in support of the application of subsection 4 and Rule 39.01(3) that cannot be found in either provision, such as "complicated issues." Historically, the jury is the finder

65. 405 S.W.2d at 193.
66. 405 S.W.2d at 194.
68. See Hoaglin v. Carr's Adm'rx, 294 S.W.2d 935 (Ky. 1956); Coy v. King, 199 Ky. 65, 250 S.W.2d 503 (1923).
of fact. Many cases involved claims for damages which normally are a matter for common law process. The length of time necessary to try a case and the sheer volume of the items involved cannot convert a legal issue into an equitable one. Cases involving claims to recover balances due under a contract are also matters properly triable by jury.

Second, the rule is unconstitutional to the extent that it may be applied to deny a jury trial on legal issues and counterclaims where the case involved both legal and equitable claims. It has been long established in Kentucky that where legal and equitable issues are involved in a single action and a timely demand is made for a jury trial, the legal issues must be tried by a jury.

(B) Past Challenges to Constitutionality

The constitutionality of the provisions in subsection 4 or Rule 39.01(3) which permit the denial of a jury trial was squarely before the Kentucky Court of Appeals in O'Connor & McCulloch v. Henderson Bridge Co. The court considered the question of constitutionality at length. It determined that the transfer under subsection 4 was constitutional because of authority enjoyed by the courts prior to the enactment of the subsection which would allow them to exercise equitable jurisdiction in actions for an accounting in which there are circumstances of great complication. Unfortunately, no subsequent case has analyzed the constitutional question to the extent of O'Connor.

In Wilson v. Carrollton Tobacco Warehouse Co., suit was brought in equity to recover amounts paid by mistake in the course

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71. Brandenburg v. Burns, 451 S.W.2d 413 (Ky. 1970); see Stafford, supra note 33, at 431-33.
72. See, e.g., Brandenburg v. Burns, 451 S.W.2d 413 (Ky. 1970); Scott v. Kirtley, 166 Ky. 727, 179 S.W. 825 (1915); McClintock 1936, supra note 37, at 347.
74. 95 Ky. 633, 27 S.W. 251, rehearing denied, 96 Ky. 89, 27 S.W. 983 (1894).
75. See text accompanying notes 41-47 supra.
76. In Commercial Union Assur. Co. v. Howard, 256 Ky. 363, 76 S.W.2d 246 (1934), the Court of Appeals restated the bulk of the O'Connor analysis, concluding that subsection 4 is "consonant" with section 7. Id. at 367, 76 S.W.2d at 248.
77. 182 Ky. 433, 206 S.W. 618 (1918).
of tobacco deliveries and the awarding of sales commissions. The case was transferred to the ordinary docket because of a legal counterclaim. It was then transferred back to the equity docket on the basis of subsection 4. The Court of Appeals observed that the transfer back to equity was not error if the Code provision is constitutional. The court quickly dispensed with this issue, holding that the action was one for an accounting, and that the complication involved in the case rendered it cognizable in equity. This holding demonstrates not only the typically brief consideration given this constitutional issue, but also the improper application of subsection 4 to deny a jury trial on a legal counterclaim.

More recently, the court sidestepped the constitutional question regarding Rule 39.01(3) in McGuire v. Hammond, a taxpayer's suit to recoup alleged illegal expenditures. The appellants cited federal and state authorities in attacking the constitutionality of the rule. The court stated: “We have no quarrel with those authorities. However, it is our view that by reason of the complicated issues involved. . . , this action is one properly cognizable in equity rather than at common law.”

(C) Constitutionality Under Existing Case Law

There exists authority of the court's own making for declaring Rule 39.01(3) unconstitutional in cases which deny a jury trial where no complicated account is involved. If the court would concretely resolve this constitutional issue, it would put to rest years of conflicting opinions.

In Carder & Vallandingham v. Weisengburg, decided just three years after the enactment of subsection 4, the enforcement of a lien depended upon the legal issue of whether any amount was due for repairing a mill. The court held that if an equitable right depends

78. Id.
79. Asher v. Golden, 232 Ky. 1, 22 S.W.2d 411 (1930), stands in noticeable contrast and demonstrates the proper application of the complicated accounts circumstance of subsection 4. The transfer to equity was upheld “on the accounting feature,” but the case was remanded for the requested jury trial on the issue of whether the contract had been terminated.
80. 405 S.W.2d 191 (Ky. 1966).
81. Id.
82. Id. at 194.
83. In 1884, one judge flatly stated that a court of equity is not authorized to take jurisdiction and try a case in equity because the accounts sued upon are confused or complicated. Cincinnati S. Ry. Co. v. Cummings, 13 Ky. Op. 126, 136 (Kenton County Chan. Ct. 1884).
84. 95 Ky. 135, 23 S.W. 964 (1933).
upon a legal issue, then a jury trial must be had as a matter of right where timely demand has been made, unless the action is purely equitable. 85 The court noted: "The right of the trial by jury, as secured to the citizen under the constitution of the state, cannot be taken away, or placed at the discretion of the Chancellor, by converting a legal right into an equitable one." 86

_Shatz v. American Surety Co. of New York_ 87 involved an employer who had sued a former employee and the surety to recover money allegedly misappropriated. The court found that the resulting complications originated in the plaintiff's method of proving his case and were not "inherent" in the cause of action. 88 The suit was not transferable to equity:

The fact that a great mass of evidence or a great number of witnesses is necessary to prove a legal issue does not necessarily convert the suit into one of an equitable nature. . . . 89

. . . While plaintiff's pleading stated that his proof would require extensive explanations of accounts, neither those pleadings (nor the proof on the trial) changed this suit to one of an equitable nature within the meaning of Section 10(4) of the Civil Code of Practice. 90

The thrust of the _Carder_ and _Shatz_ opinions is that the application of the complicated accounts feature of subsection 4 requires an analysis of whether the action is truly one for accounting. Rule 39.01(3) and subsection 4 are unconstitutional when applied to actions not truly for an accounting, wherein the remedy at law is inadequate because the accounts are so complicated that a jury cannot intelligently try the case.

(D) _Does the Rule Serve a Useful Purpose?_

One reason for the exercise of equity jurisdiction in the complicated accounting cases such as those covered by Rule 39.01(3) was that the remedy at law was often inadequate due to the fact that discovery was difficult if not impossible to obtain. 91 However, the

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85. It should be remembered that an accounting is not "purely equitable" because courts of law and equity had concurrent jurisdiction in matters of account. See text accompanying notes 32 & 33 supra.
86. 95 Ky. at 138, 23 S.W. at 964. Accord, Brandenburg v. Burns, 451 S.W.2d 413 (Ky. 1970); Scott v. Kirtley, 166 Ky. 727, 179 S.W. 825 (1915); Tapp v. Poindexter, 128 S.W. 594 (Ky. 1910); Turner v. Johnson, 35 S.W. 923 (Ky. 1896).
87. 295 S.W.2d 809 (Ky. 1956).
88. 405 S.W.2d 191 (Ky. 1966).
89. 295 S.W.2d at 812.
90. 1 STORY, supra note 37, § 443, at 462-63.
present Kentucky Rules of Civil Procedure permit liberal discovery, thus eliminating the problem of inadequate remedies at law.

Another reason for the exercise of equity jurisdiction was the presumed incompetence of a jury to handle such drawn-out and complicated matters. As early as 1883, this notion was rejected by the New York Court of Appeals, which held that the necessity of resorting to equity because of the complicated character of the accounts is "now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury." In Kentucky, Civil Rule 53 provides for the appointment of a master to assist the jury.

There remains yet another justification for arguing that Rule 39.01(3) is unnecessary. Paragraph 2 of Rule 39.01 provides that a court may deny a jury trial where it "finds that a right of trial by jury of some or all of the issues does not exist under the Constitution or Statutes of Kentucky." This provision is broad enough to include a case of accounting at common law where the legal remedy is inadequate.

V. THE FEDERAL GUARANTEE OF A JURY TRIAL

The United States Supreme Court has noted that there is a strong federal policy in favor of jury trials. This policy is of historic and continuing strength.

The seventh amendment was adopted in 1791. The thrust of the amendment was the preservation of the right to a civil jury as it existed under English common law at that date. In 1791 common law and equity jurisdictions were separate. Each had its own unique trier of fact: at common law, the jury; and at equity, the chancellor. The procedural union of law and equity, achieved in the federal courts by the adoption of the Federal Rules of Civil Procedure in 1938, created a problem in determining which fact-finding method was proper in a given case, since both legal and equitable issues and remedies can be sought in one lawsuit.

91. Hoffman v. Dow Chem. Co., 413 S.W.2d 332 (Ky. 1967); Grauman, Deposition and Discovery, 47 Ky. L.J. 175 (1959); See Ky. R. Civ. P. 26.01 & Compiler's Note.
92. See text accompanying note 43 supra.
Regardless of the confusion which existed previously, the meaning of the seventh amendment was clarified in 1959 by the United States Supreme Court in *Beacon Theatres v. Westover*. The Court upheld the right to a jury trial where a counterclaim for treble damages had been filed under the anti-trust laws in response to the original complaint which had demanded, in part, equitable relief. Under *Beacon Theatres* any legal issue for which a jury trial is properly and timely demanded must be submitted to a jury. As long as a legal issue is involved, there arises a controlling right to a jury trial, and it does not matter that the equitable issues outweigh the legal issues, in the absence of the "most imperative circumstances."  

*Dairy Queen, Inc. v. Wood* strengthened the holding in *Beacon Theatres* and is particularly relevant here because the complaint asked for an accounting to determine amounts due under a contract allegedly breached, as well as for temporary and permanent injunctions to restrain the use of the "Dairy Queen" trademark and franchise. The Court held that a jury trial was to be permitted as a matter of right on a claim for a money judgment, irrespective of the equitable wording of the complaint. As the Court noted, "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." *Dairy Queen* also held that a jury trial cannot be denied on any legal issue by characterizing it as "incidental" to equitable issues.  

It is recognized in both *Dairy Queen* and *Beacon Theatres* that the test for equity jurisdiction is whether there exists an adequate remedy at law. Under *Dairy Queen* an action for an accounting may still result in equity jurisdiction:  

The necessary prerequisite to the right to maintain a suit for an

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100. 359 U.S. at 510-11; 369 U.S. at 472-73; Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486, 491 (5th Cir. 1961).
102. Id. at 477-79. The district court in Harkness v. Sweeney Indep. School Dist., 278 F. Supp. 622, 636 n.4 (S.D. Tex. 1965), viewed the Dairy Queen action as a purely equitable one for an accounting and that the Supreme Court had stripped it of its equitable character because of the claim for money damages.
103. 369 U.S. at 477-78.
104. Id. at 473.
equitable accounting, like all other equitable remedies, is, as we pointed out in *Beacon Theatres, the absence of an adequate remedy at law*. Consequently, in order to maintain such a suit on a cause of action cognizable at law as this one is, the plaintiff must be able to show that the "accounts between the parties" are of such a "complicated nature" that only a court of equity can satisfactorily unravel them.\(^{105}\)

However, both decisions indicate that the remedy at law is now more "adequate" than it had been previously. In *Beacon Theatres* the Court noted specifically that the scope of equity was necessarily affected by the Declaratory Judgment Act\(^ {106}\) and the Federal Rules:

> Inadequacy of remedy and irreparable harm are practical terms, however. As such their existence today must be determined, not by precedents decided under discarded procedures, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules.\(^ {107}\)

In *Dairy Queen* the Court commented upon the broad discovery rules now available, and concluded:

> In view of the powers given to District Courts by Federal Rule of Civil Procedure 53(b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met.\(^ {108}\)

These excerpts from *Beacon Theatres* and *Dairy Queen* strongly suggest that the right to a jury trial in federal courts is not merely preserved, but expanded. It was noted in *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*\(^ {109}\) that *Beacon Theatres* will result in a sharp reduction in the number of cases tried without a jury.

*Bradshaw v. Thompson*\(^ {110}\) exemplifies the anticipated effect of liberal discovery rules on the scope of equity jurisdiction. An agency contract existed between the parties for the sale and care of walking horses. The horses were shipped to defendant Thompson in Tennessee; he then disposed of the horses in various unrecorded

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105. *Id.* at 478 (emphasis added) (footnotes omitted).
107. 359 U.S. at 507.
108. 369 U.S. at 478 (footnotes omitted).
109. 294 F.2d 486, 491 n.12 (5th Cir. 1961).
transactions. Plaintiff was unable to ascertain what had happened to his horses. He sued defendant alleging fraud, conspiracy, breach of contract, and breach of fiduciary relationship, and asked for a jury trial. He later amended his complaint by dropping the jury request and including a prayer for an equitable accounting. The defendant demanded a jury trial. The Sixth Circuit Court of Appeals relied upon Dairy Queen in determining that a money judgment was sought for damages for breach, compensatory damages, lost profits, and punitive damages. These claims were found to be unquestionably legal. An accounting, the court held, is an extraordinary remedy, available only when the remedy at law is inadequate. The court determined that in this situation the remedy at law was adequate because plaintiff obtained, by virtue of the broad discovery rules now available, all the information he could have obtained in an equitable accounting.

The seventh amendment guarantee was extended to shareholder derivative suits in Ross v. Bernhard. The Court in Ross stated explicitly that the seventh amendment question depends upon the nature of the issue to be tried, not the character of the overall action. Three guidelines were advanced for determining the nature of the issue: (1) the pre-merger custom; (2) the remedy sought; and (3) the practical abilities and limitations of juries. The court discussed at some length the first two guidelines, but was curiously silent on the third. Perhaps, as has been suggested by a lower federal court, it is a questionable practice for a court to inquire into the practical limitations and abilities of juries in determining the existence of a right to jury trial. It is noteworthy that federal courts have consistently refused to find sufficient complexity to justify equity jurisdiction in cases of patent infringement, antitrust litigation, and in this instance, derivative litigation, where compli-

111. Id. at 78.
112. Id. at 79.
114. 396 U.S. at 538.
115. Id. at 538 n.10.
118. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover,
cated commercial issues arise. It is also noteworthy that federal juries have successfully coped with patent cases since 1790.119

The Supreme Court’s silence on the question of the practical abilities and limitations of juries may indicate an abdication to congressional intent, as was suggested in Katchen v. Landy.120 In Katchen the Court implemented the intent of Congress which considered trial by jury to be inadequate in bankruptcy proceedings. The Court found that the statutory scheme was intended to provide a prompt trial without a jury and that the equitable purposes of the Bankruptcy Act involved neither Beacon Theatres nor Dairy Queen.121

In Katchen the Supreme Court refrained from extending the seventh amendment guarantee to bankruptcy proceedings. It has also been reluctant to implement fully the Dairy Queen concept of a legal claim, which states that a "claim for a money judgment is a claim wholly legal in its nature however the complaint is construed."122 In Curtis v. Loether123 the Court said: "We need not, and do not, go so far as to say that any award of monetary relief must necessarily be 'legal' relief."124

VI. THE CONSTITUTIONALITY OF RULES 39.01(3) UNDER THE SEVENTH AMENDMENT.

The seventh amendment guarantees the right to trial by jury as it existed in 1791 and in light of present day procedures and remedies. Section 7 of the Kentucky Constitution guarantees a jury trial in civil actions in light of what was customary at common law. As a result, the federal guarantee demands a jury trial in a greater number and variety of cases than the state guarantee. Clearly, Rule 39.01(3) has been shown to be unconstitutional under section 7 of the Kentucky Constitution to the extent that it permits the denial of a jury trial on the basis of peculiar questions, great detail of fact, or on any basis other than complicated accounts, since there was no

359 U.S. 500 (1959); Thermo-Stitch, Inc. v. Chemi-Chord Processing Corp., 294 F.2d 486 (5th Cir. 1961).
120. 382 U.S. 323 (1966).
121. Id. at 339.
122. 389 U.S. at 477.
basis at common law for equity jurisdiction in such circumstances. Likewise, the rule is similarly unconstitutional as to those circumstances under the seventh amendment of the Federal Constitution. Mr. Justice Holmes once said that the "mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction."[125]

The rule is unconstitutional in its entirety to the extent that its application results in the denial of a jury trial on a legal claim. Dairy Queen and Beacon Theatres involved a mixture of legal and equitable claims; the clear command of the two decisions is that any legal claim for which a jury trial is timely and properly demanded must be tried by jury in the absence of imperative circumstances. As the two cases indicate, a showing of such circumstances will indeed be rare.

Though the inadequacy of a jury trial in complicated accounting cases may still result in equity jurisdiction under Dairy Queen, the opinion makes clear there will rarely be such a case.[126] The liberality with which Rule 39.01(3) permits the trial judge to deny a jury trial in his discretion if the case involves complicated accounts, can hardly stand under the seventh amendment guarantee as construed in Beacon Theatres, Dairy Queen and their progeny.

However, there does exist some federal precedent for the denial of a jury trial in complicated cases of account. In Kirby v. Lake Shore & Michigan Southern R.R.,[127] suit was brought to set aside settlements between a firm and a railroad corporation. Plaintiff sought to obtain a reaccounting on the ground that representations made by the railroad regarding rights were false, and to obtain the difference between the drawbacks paid to the firm and those to which it was entitled. The Court held that the complicated nature of the accounts was sufficient for equity jurisdiction because "[i]t would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties."[128]

Kirby was not completely overruled by Dairy Queen. However, the scope of the Dairy Queen exception which permits an equitable accounting because of complicated accounts is tightly confined. Its strictures are two-fold: (1) the case in which the legal issues are too

126. See text accompanying note 108 supra.
127. 120 U.S. 130 (1877).
128. Id. at 134.
complicated for the jury to handle will be an exceptional one; and (2) it will be rare that such an exceptional case will justify denial of jury trial because, under Rule 53(b), a master can always be appointed to assist the jury.129

Lower federal court decisions reflect the stringent limitations of Dairy Queen. In Tights, Inc. v. Stanley,130 the court pointed out that equity jurisdiction may be invoked only because of the complexity of accounting damages, not because of the complexity of issues of liability. The Tights court concluded that assuming resort to an equitable accounting could be had because of the complexity in the issues of liability, it could not be justified in this case under Dairy Queen:

If the scope of "equitable accounting" is to be expanded to encompass cases felt to be too complex or esoteric for trial to a jury, we think that expansion must come from the Supreme Court. We do not construe any language in the Dairy Queen opinion to sanction this further limitation of the right to jury trial.131

In Ochoa v. American Oil Co.,132 the court succinctly described the federal stance on the argument that complexity is a justification for equity jurisdiction, leaving little doubt that the summary and casual past applications of Rule 39.01(3) cannot stand against the federal guarantee of the right to a civil jury trial. The court stated:

In an extraordinary case, the complexity of issues may be so great that only a court of equity may unravel them, thus implying an inadequate remedy at law. It is easier to state this principle than to hypothesize a case in which it would apply.133

VII. Conclusion

Rule 39.01(3) and its predecessor, subsection 4 of the Civil Code, have been applied to deny a jury trial in actions not truly for an equitable accounting on such grounds as "great detail of fact," "peculiar questions," and other similarly worded justifications. These theories have been used to deny a jury trial on legal issues where legal and equitable issues have been mixed in a single action. The application of the rule in these circumstances is unconstitutional under section 7 of the Kentucky Constitution, and should be

129. 369 U.S. at 477-78.
130. 441 F.2d 336 (4th Cir.), cert. denied, 404 U.S. 582 (1971).
131. 441 F.2d at 341 (footnotes omitted).
133. Id. at 921-22.
so declared in order to preserve the right to a civil jury as it existed at common law. At common law, it was customary to deny a jury trial in an accounting action on the ground that the accounts are too complicated for a jury to handle intelligently.\textsuperscript{134} Thus, a constitutional basis exists for this application of the rule, at least as long as Kentucky courts continue to look only to historical precedent.

If the seventh amendment were applicable, Rule 39.01(3) would be declared unconstitutional in its entirety when challenged. In addition to being unconstitutional to the extent that it permits denial of jury trial because of great detail of fact, peculiar questions and other bases not truly justifying a transfer to equity, Rule 39.01(3) would also be unconstitutional under the seventh amendment to the extent that it operates to deny a jury trial on any legal issue in the absence of imperative circumstances. The United States Supreme Court has been explicit and unwavering in so holding, in contrast to conflicting Kentucky case law. Some cases staunchly uphold the right to jury trial on legal issues, while others fail to apply the principle at all. Furthermore, while an equitable accounting is not precluded in federal courts, the transfer of an accounting action to equity is almost impossible to justify under \textit{Dairy Queen, Inc. v. Wood}.\textsuperscript{135} The extent and liberality with which rule 39.01(3) has been applied in the past would surely fail to meet the constitutional demands of the seventh amendment.

Rule 39.01(3) should be declared unconstitutional since both as written and applied it sweeps more broadly than the common law rule which permits a transfer to equity only where complicated accounts are involved. Though the complicated accounts application is constitutional in Kentucky, the courts should consider the desirability of adopting the federal standard found in the seventh amendment.

The Kentucky and Federal Rules of Civil Procedure have the same origins. Interpretations by the federal courts have found that the federal rules reduce the need for an accounting in equity, since such devices as discovery and the appointment of masters eliminate most of the real or imagined injustice which could occur in a jury trial. Since the seventh amendment and section 7 of the Kentucky Constitution are so similar, adoption of such a standard would not be such a radical step. Adoption of the federal standard would elimi-

\textsuperscript{134} See, e.g., \textit{Power v. Reeder}, 39 Ky. (9 Dana) 6 (1839).
\textsuperscript{135} 369 U.S. 469 (1962).
nate the temptation of any of the parties to engage in forum shopping in the hope of obtaining a transfer to federal court where the right to a jury trial is a constitutional guarantee.\textsuperscript{136}

As can be seen, flaws exist in Rule 39.01(3) which render it unconstitutional by either a state or federal standard. Until this problem is resolved, the right to a jury trial in Kentucky, where cases involve complicated issues of fact, will likely remain an uncertain one.

COMMENTS

ILLEGITIMATE INTESTATE SUCCESSION RIGHTS IN KENTUCKY: "WHY BRANDS THEY US WITH BASE? WITH BASENESS? BASTARDY? BASE, BASE?"*

I. INTRODUCTION

In recent years the Supreme Court of the United States has established a trend by striking down a number of statutory schemes which adversely affected the rights of illegitimate children.1 In one area, however, that of intestate succession, discriminatory laws have been upheld.2 Prior to 1968, no case analyzed the disabilities imposed on illegitimate children in the equal protection framework.3 Then, in 1968, the Court reviewed two cases dealing with wrongful death statutes which involved illegitimates.4 While a review of these cases indicates that it is less than clear which standard of review was used, the Court found the statutory schemes a denial of equal protection. However, the Court then decided Labine v. Vincent,5 which held that it is within the power of the state to pass intestate succession laws discriminating against illegitimate children without fear of judicial intervention on the basis of the equal protection clause.

The resulting dichotomy between Levy/Glona and Labine as to what the equal protection rights of illegitimates actually are, has

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created problems for state courts in attempting to rationalize the conflicting results of these two positions. The impact on Kentucky's intestacy scheme is typical of this problem. In *Pendleton v. Pendleton*, the Kentucky Court of Appeals indicated dissatisfaction with the *Labine* result, but nevertheless applied it. The court recognized that any problems regarding illegitimates' intestate inheritance rights must be resolved by the legislature.\(^7\)

The furor caused by *Labine* can be attributed to its failure to consider the state's statutory scheme constitutional on the merits of equal protection. Merely saying that it was constitutional without proper analysis fails to address itself to the underlying philosophical objections. This projects an element of urgency for the Kentucky legislature to deal with the fairness of Kentucky's intestate succession laws.

II. AN EQUAL PROTECTION FRAMEWORK

*No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.*

The fourteenth amendment was ratified in 1868.\(^8\) The immediate purpose of the amendment was to make possible the congressional enactment of Reconstruction measures.\(^9\) In the beginning years, it was thought that application of the fourteenth amendment beyond the "civil rights" enumerated in the Civil Rights Act of 1866 was not permissible.\(^11\) However, by 1886, it was clear that the Supreme Court intended to expand the application of the amendment to correspond with changes in the social order.\(^12\) The basic tenets of the equal protection clause require that legislation operate equally upon all members of a similarly situated class with respect to the purpose of the legislation.\(^13\) Unequal laws are not forbidden\(^14\) so long as the differences between the classifications "are pertinent to the subject

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6. 531 S.W.2d 507 (Ky. 1975).
7. Id. at 510-11.
9. See generally Gunther, supra note 3.
with respect to which the classification is made.'" Therefore, the fourteenth amendment prohibits classifications which result from arbitrary legislative objectives.\textsuperscript{16}

By the early 1960's, judicial intervention under the equal protection doctrine was mostly limited to racial discrimination cases.\textsuperscript{17} The Warren Court expanded the use of the doctrine to other areas by creating a two-tier approach. In some situations the "traditional" equal protection analysis prevailed,\textsuperscript{18} while in others, a new "invidious classification" equal protection was invoked.\textsuperscript{19}

Under the "traditional" or "low scrutiny" equal protection analysis, a statutory classification will be upheld if it is rationally related to a legitimate state interest,\textsuperscript{20} and will be invalidated only if the classification is wholly unrelated to that interest.\textsuperscript{21} The principles by which the classification is tested were set forth in \textit{Lindsley v. Natural Carbonic Gas Co.:}\textsuperscript{22}

1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.\textsuperscript{23}

Historically, traditional equal protection was applied when any of the economic or social regulations of a state were under examination.\textsuperscript{24} The traditional standard in effect grants a presumption fa-

\textsuperscript{15. Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 583 (1935).}
\textsuperscript{16. F.S. Royster Guana Co. v. Virginia, 253 U.S. 412 (1920).}
\textsuperscript{17. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896).}
\textsuperscript{18. See, e.g., McDonald v. Board of Elec. Comm’rs, 394 U.S. 802 (1969).}
\textsuperscript{19. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969).}
\textsuperscript{22. 220 U.S. 61 (1911).}
\textsuperscript{23. Id. at 78-79.}
\textsuperscript{24. Dandridge v. Williams, 397 U.S. 471 (1970); Borden’s Farm Prods. Co. v. Ten Eyck,
voring the state legislative scheme, thus minimizing the degree of scrutiny to which the Supreme Court exposes it.25

The "strict scrutiny" or "invidious classification" test, as formulated by the Warren Court, recognizes that some societal interests may exist which merit special protection. These societal interests are divided into two general categories: "fundamental interests,"26 and "suspect classifications."27 The interest of the state must be balanced against that of the individual to determine if the state interest is compelling enough to justify the invasion of the individual interest.28 Legislation so challenged is effectively presumed to be unconstitutional. The state interest must be demonstrated as compelling, and not merely valid, before the sought-for classification can be imposed.29 As a means for overcoming this presumption, the purpose and intent of the legislation may be examined. However, the chances of overcoming legislation in this "suspect category" are minimal.30 The Burger Court has largely abandoned the Warren Court's two-tier approach to equal protection by adopting an intermediary level of review.31 This new "middle level" approach has not been formally named as such by the Court, but Justice Rehnquist did refer to it as a "hybrid" standard in his dissent in Weber v. Aetna Casualty & Surety Co.32 Other courts have recognized the existence of this new standard of review. The United States Court of Appeals for the Second Circuit observed in Boraas v. Village of Belle Terre33 that

we believe that we are no longer limited to the either-or choice between the compelling state interest test and the minimal scrutiny

29. See id. at 638.
30. See generally, Equal Protection, supra note 8.
31. See generally Gunther, supra note 3.
32. 406 U.S. 164, 181 (1972) (dissenting opinion):
The Court in today's opinion, recognizing that two different standards have been applied in equal protection cases, apparently formulates a hybrid standard which is the basis of decision here.
permitted by the *Lindsley-McGowan* formula . . . . [T]he Supreme Court appears to have moved from this dichotomy, sometimes described as a "two-tiered" formula, toward a more flexible and equitable approach . . . .

This middle level standard developed as a result of the inability of courts to apply the two-tiered equal protection analysis to various legislative classifications under attack. The Supreme Court of late has been reluctant to expand the list of fundamental interests and suspect classifications, yet the Court has been willing to intervene in cases where traditional review would have occasioned no intervention. The effect is a new interventionist stance minus strict scrutiny. This milder form of scrutiny would still be more activist than the Warren Court's application of old equal protection formulas, but it would be considerably less demanding than "strict scrutiny" equal protection. The standard to be applied in review requires an examination of the propriety and rationality of the legislative means to the statutory ends. There is no constitutional presumption favoring either the validity or invalidity of a given classification. The review should be conducted in a spirit of neutrality. The court involved should determine whether the legislative classification has in fact a substantial relation to a valid purpose. This procedure inevitably involves a balancing of interests by the court in which "the nature of the classification under attack, the rights adversely affected, and the governmental interest in support of it" must be analyzed.

34. 476 F.2d at 814 (footnotes omitted).
36. Social and economic regulations under traditional review are generally upheld. See text accompanying note 25 supra.
38. An examination of the cases in which this middle level model was invoked establishes this "means to an end" scrutiny. See *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (whether there is some ground of difference which rationally explains the different treatment); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (whether there is an appropriate governmental interest suitably furthered by the different treatment); *Reed v. Reed*, 404 U.S. 71, 75 (1971) (whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective).
40. 476 F.2d at 815 n.8.
III. ILLEGITIMACY AND EQUAL PROTECTION

The equal protection "level" into which illegitimacy falls has been unclear. The early illegitimacy cases to reach the Supreme Court used, for the most part, the Warren Court's two-tiered equal protection analysis, while the later illegitimacy cases were wholly decided with the Burger Court's balancing approach. It is necessary to examine the cases involving illegitimate children to determine which equal protection standard is to be applied in future cases.

In Levy v. Louisiana\textsuperscript{41} a statutory provision was held unconstitutional because it denied illegitimate children the right to recover for damages resulting from the wrongful death of the mother. While recognizing this right in other children, the Court reasoned:

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.\textsuperscript{42}

In the companion case of Glona v. American Guarantee & Liability Insurance Co.,\textsuperscript{43} the Court invalidated a provision of the wrongful death statute which denied the plaintiff recovery for the wrongful death of her illegitimate son:

Yet we see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the "sin," which is, we are told, the historic reason for the creation of the disability.\textsuperscript{44}

While both of these cases were decided using an equal protection standard, neither opinion explicitly stated which equal protection level of review was applied. The Court merely invalidated the classifications because they bore no rational relation to the purpose of the legislation. This analysis suggests the traditional equal protection

\textsuperscript{41} 391 U.S. 68 (1968).
\textsuperscript{42} Id. at 72 (footnotes omitted).
\textsuperscript{43} 391 U.S. 73 (1968).
\textsuperscript{44} Id. at 75.
formula. However, the Court did not apply the tenets of that standard completely. Rather than rest the burden on the parties attacking the statute as unconstitutional, the Court placed the burden on the state, requiring it to justify the scheme. This procedure is also used in reviewing classifications the Court deems "suspect." Yet, the Court has clearly not conferred on illegitimacy "suspect" classification status. Perhaps the rationale may be best explained in light of the emergence of the new middle level standard. The Court did not completely abandon the Warren Court's two-tiered standards, but did begin to formulate a new balancing of interests approach.

Three years after the Levy and Glona decisions, the Court upheld a provision of the Louisiana probate code which bars an illegitimate child from sharing equally with legitimate children in the estate of an intestate father. Labine v. Vincent came as a shock to those courts and commentators who had argued that Levy and Glona marked the beginning of a movement to eliminate the disabilities imposed on illegitimate children by law. The Labine result clearly establishes that the Court will not elevate classifications based on illegitimacy to "strict scrutiny" inquiry. Had this been done, the result would have been different. Strict scrutiny analysis would have required the state to carry the burden to show a "compelling state interest" for the statutory scheme, and there would have been a presumption of its unconstitutionality. Yet it does not appear that Labine was decided by using a traditional equal protection analysis. Utilizing that standard, the Court would have inquired whether there is some reasonable basis for the discriminatory scheme. The basis for the holding in Labine reveals no equal protec-

49. See, e.g., In re Estate of Jensen, 162 N.W.2d 861, 878 (N.D. 1968):
Applying the reasoning in Levy, as no action, conduct, or demeanor of the illegitimate children in the instant case is relevant to their status of illegitimacy, we conclude that the classification for purposes of inheritance . . . which results in illegitimate children being disinherited while their legitimate brothers and sisters inherit, is unreasonable.
50. See generally, Equal Protection, supra note 10.
tion analysis at all. The dissent, written by Justice Brennan and joined by Justices Douglas, White and Marshall, pointed out:

For reasons not articulated, the Court refuses to consider in this case whether there is any reason at all, or any basis whatever, for the difference in treatment that Louisiana accords to publicly acknowledged illegitimates and to legitimate children. Rather, the Court simply asserts that "the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that state."

The majority opinion was saying in effect that the equal protection clause is inapplicable to subjects regulated by the states. Such an extraordinary proposition, remarked Justice Brennan, "would reverse a century of constitutional adjudication under the Equal Protection and Due Process Clauses."

The majority opinion did vaguely discuss the equal protection problem in dictum. In a one-sentence footnote, the Court stated:

Even if we were to apply the "rational basis" test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State.

However, the Court did not elaborate on this concept since it based its approach on a states' rights analysis.

In Weber v. Aetna Casualty & Surety Co., decided less than a year after Labine, the Court again invalidated a statutory scheme discriminating against illegitimate children. Under this scheme, unacknowledged illegitimate dependents were permitted to recover workmen's compensation benefits only if the maximum benefits allotted were not exhausted by the legitimate children. The Court attempted to distinguish Labine by stating that "[t]hat decision reflected, in major part, the traditional deference to a State's pre-

51. 401 U.S. at 537:
   But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules.
52. Id. at 548 (citing the majority opinion).
53. Id. at 549.
54. Id. at 536 n.6.
56. Id. at 170.
rogative to regulate the disposition at death of property within its borders," thus justifying a standard of non-review. In Weber, the Court was faced with the seemingly contradictory results of Levy, Glona and Labine. Perhaps as a reaction to the wide criticism of the murky standards of review in these decisions, the Court attempted to fashion a more concrete basis on which to build its analysis:

The essential inquiry . . . is inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

The Court undertook a thorough examination of the legislative objective in order to determine whether the discriminatory classification supported that objective. After considering the state interests, the Court concluded that "the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where — as in this case — the classification is justified by no legitimate state interest, compelling or otherwise." Clearly the Court is using the middle level balancing approach. The old Warren Court two-tiered equal protection formula is not part of the inquiry as set forth by the Court.

Relying on the middle level test of Weber, the Court invalidated another statutory scheme discriminating against illegitimates in Gomez v. Perez. A Texas statute denying illegitimate children the right of support from the father, while granting that right to legitimate children, was held to violate the equal protection clause of the fourteenth amendment. The Court reasoned that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust."

The discriminatory classification of illegitimates clearly has no rela-

57. Cf. Illegitimate Children, supra note 45, at 278.
58. See id. at 277.
60. Id. at 176 (footnotes omitted).
62. 409 U.S. 535, 538 (1973) (per curiam). Referring to Levy and Weber, the Court stated: "Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."
tionship to the need for support. The means employed were wholly unrelated to the end to be achieved.

In the same term the Court branded New Jersey’s “Assistance to Families of the Working Poor” program a violation of the equal protection clause in *New Jersey Welfare Rights Organization v. Cahill*. The program indirectly discriminated against illegitimates by assisting only those families comprised of ceremonially married parents with legitimate or adopted children. The prior holdings in *Levy, Weber* and *Gomez* led the Court to conclude that “there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate.” Again, the means employed by the state were held not to further the end.

The most recent case dealing with discrimination based on illegitimacy before the Supreme Court was *Jimenez v. Weinberger*. The Social Security Act provisions on child benefits provided that dependents of a disabled wage earner would be eligible to receive support from the government. However, only those dependents who are legitimate or legitimated children were eligible for relief, while those illegitimate children born after the onset of a claimant’s disability were excluded. The Court refused to adopt the appellant’s argument that illegitimacy is a “suspect classification,” and invoked the middle level standard of review used in *Weber*. The governmental interest sought to be furthered was the prevention of “spurious claims.” Recognizing that this is a valid state interest, the Court found that the classification did not further the state’s interest in preventing spurious claims.

IV. ILLEGITIMACY IN THE AFTERMATH OF *Labine*

The previously discussed cases illustrate a trend toward removing the disabilities imposed on illegitimate children, with *Labine* being

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68. Id. at 620.
71. Under 42 U.S.C. § 416(h)(2) (1970), state intestacy laws are used to determine whether an applicant is the child of an insured individual for purposes of eligibility.
72. Jimenez v. Weinberger, 417 U.S. 628, 636 (1974). “Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency . . . .”
the sole departure. It is significant, however, that the Court had not fully formulated its "balancing" approach application in equal protection cases until the end of the 1971 term, after Labine was decided. Weber was one of the first cases setting forth the new approach—weighing state interests against the corresponding infringement on personal rights. Were the facts of Labine to be presented again, using the equal protection analysis as formulated in Weber, a different holding would result. The only justification for Labine centers on the state interest of promoting the welfare of the family and of protecting the state right to control the disposition of property within its borders. However, since Labine, the test has not been one purely of protecting states' rights but rather one which balances state interests against individual rights. If another case were to come before the Court with a similar fact situation as Labine, it would be necessary to examine carefully the quantum of evidence that would be advanced for upholding the state interest. The most fruitful analysis of the state interest would involve a determination of whether the employment of the statutory scheme significantly advances the state interest. If, after careful consideration, it is found that the removal of the scheme would reduce the state interest by a nominal amount or not reduce the state interest at all, then the weight of the state interest as balanced against the weight of the individual interest is constitutionally insufficient. It is unlikely that Labine would pass muster. 73

Should a Labine-type case be decided in the future, Labine would naturally stand as precedent. Based on the subsequent developments in this area of equal protection, it is unlikely that Labine would survive. Therefore, one of two approaches could be utilized to remove the Labine obstacle: a direct frontal attack by the judiciary which would reverse Labine; or a legislative enactment which would recognize the impropriety of the Labine rationale in the context of illegitimates and their inability to inherit from the father. In light of the traditional reluctance of the Supreme Court to overrule itself, the latter approach would seem the most feasible.

Unfortunately, at this time neither the Supreme Court nor many of the states have undertaken steps to overcome the effect of Labine. This is not to say that many states are satisfied with Labine. At

At least one court has attempted to use an age-old judicial expediency and "distinguish" a Labine-type case from Labine.\textsuperscript{74} The problem presented by this technique is the resulting abuse in the interpretation of the facts or the law. In one such case, \textit{Green v. Woodward},\textsuperscript{75} the issue was whether the equal protection clause of the fourteenth amendment requires that the word "children" in Ohio's descent and distribution statute be read to include all illegitimates since some illegitimates are included. The statute under attack provided for illegitimate children to inherit from and through the mother, but was silent on the question of whether illegitimates could inherit from and through the father.\textsuperscript{76} The \textit{Green} court based its decision on a determination that there was an "intra-class" discrimination among illegitimates.\textsuperscript{77} It pointed out that the Louisiana statute involved in \textit{Labine} was substantially different from the Ohio statute because Louisiana provided that illegitimates could inherit from neither the father nor the mother. It is patently obvious that this analysis is improper and illogical for the reason that the Ohio scheme actually deals with the members of only one class, namely all illegitimates. It is not acceptable to create a "class" for purposes of distinguishing \textit{Labine}.\textsuperscript{78} A careful reading and an intelligent understanding of the statute would not support the court's conclusion. It is interesting to note that once a court has distinguished \textit{Labine} so as to avoid its constitutional imperative (thereby freeing itself to proceed with the process of weighing state interests against individual interests), it is unlikely that a state may find the individual interest paramount in this area.\textsuperscript{79}

Another approach in dealing with the problem presented by \textit{Labine} involves the court figuratively "wringing its hands." It would be admitted that \textit{Labine} is controlling, but the court would

\textsuperscript{74} Id.
\textsuperscript{77} Id. at 112, 318 N.E.2d at 405.
\textsuperscript{78} See 44 U. Cin. L. Rev. 415 (1975).
\textsuperscript{79} In \textit{Green} the court examined the reasons given by some courts for not treating illegitimate children the same as legitimate children in descent and distribution statutes:

\begin{itemize}
  \item[(1)] that devolution of property rests within the discretion of a state;
  \item[(2)] that since illegitimate children may be left property by will, or be legitimated through proper proceedings, they are not completely discriminated against;
  \item[(3)] that proof of paternity is difficult;
  \item[(4)] that spurious and fraudulent claims might be brought.
\end{itemize}

40 Ohio App. 2d at 114, 318 N.E.2d at 406. None of these interests were found by the court to be substantial.
then proceed to articulate what it perceives to be wrong with the case. An example would be Pendleton v. Pendleton where the Kentucky Court of Appeals states:

We are equipped with neither a crystal ball nor the type of scales on which it is evident that a right must be weighed in order to determine whether it is heavy enough to register under the 14th Amendment. Nor are we willing to undertake the sophistry of distinguishing Labine v. Vincent . . . . Suffice it to say that it has not been overruled by the court that has the exclusive power to overrule it, and we think that as long as it remains the law it governs this case.

It is apparent that the Kentucky judiciary is unwilling to distinguish, and yet unable to disregard Labine, thus perpetuating the problem of illegitimates' inheritance rights in the Commonwealth. Therefore, it would be appropriate for the legislative branch to address itself to a problem that the judiciary considers insoluble.

V. INTESTATE SUCCESSION IN KENTUCKY

Kentucky's descent and distribution statute creates a classification whereby only legitimate children may inherit from and through the father's estate. A child is legitimate only if born of parents who are married at the time of its birth. Legitimacy is also conferred where the parents marry after the birth and the father recognizes the child as his own either before or after the marriage, or where the child is born of an illegal or void marriage so long as incest was not involved. All other children are deemed illegitimate and may inherit only from and through the mother.

The question arises whether this statute serves the objectives of the Kentucky legislature and whether its discriminatory scheme furthers any legitimate state interest. It is almost impossible to discover any specific legislative objectives by examining the wording of the statute. One is left either with speculating as to what the specific objectives are, or examining the objectives most often invoked by other state legislatures.

Perhaps the major argument against allowing an illegitimate child to inherit from its father is the uncertainty of proving patern-
As difficult as it may be for some, or even most illegitimates to overcome this burden of proof, those that may be able to sustain the burden should not be precluded from recovery. The Supreme Court of the United States spoke of this problem in *Gomez*:

> We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise inviduous discrimination.

Obviously, acknowledged illegitimate children have overcome this barrier. Acknowledgment may take the form of an admission in an appropriate proceeding before a probate court, or it may be a less formal acknowledgment to persons that are merely present during admission. Certainly, the first form of acknowledgment should carry great weight in the ascertainment of paternity, and the second form should carry at least some weight. While many states recognize an illegitimate child’s right to inherit if an acknowledgment is made, Kentucky does not.

A holding from a paternity suit for purposes of support should also be highly influential for purposes of inheritance. While the assertion can be made that a court determination of paternity may not absolutely prove who the father is, the purpose of the proceeding, nevertheless, is to examine the facts and to determine the truth of the issue involved, the issue of paternity. Several states have provided that if the paternity of the child is established by law during the lifetime of the father, the child will be treated as if he were the legitimate child of his father for purposes of inheritance. Kentucky does not have such a provision.

While acknowledgement of paternity and paternity proceedings may not affect all illegitimate children, they may aid some in over-

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90. IND. STAT. ANN. § 29-1-2-7 (Burns 1972); IOWA CODE ANN. § 633.222 (1964); KAN. STAT. ANN. § 59-501 (1964); WIS. STAT. ANN. § 852.05 (1971).
coming their burden of proof for establishing legitimacy. Of course, a problem exists for the illegitimate child if no such acknowledge-
ment or proceeding has occurred. At least one state has attempted to alleviate this by requiring the director of welfare to take appropri-
ate steps to determine the paternity of the child.91 Once the burden of proof is sustained and the identity of a child's father is estab-
lished, the concern over spurious claims will be satisfied.92

The historical doctrine against allowing an illegitimate child to inherit from his father was aimed at discouraging promiscuity and the likelihood of illegitimate births.93 The regulation of certain sexual activity as a proper governmental interest is not questioned.94 However, given this proper state interest, a connection must be shown between the parental conduct and the legal status of illegiti-
mates.95 The Supreme Court of the United States observed in Weber

that there is no connection:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an un-
just—way of deterring the parent.96

Statistics of the number of illegitimate births indicate a steady rise rather than a decline.97 Therefore, it cannot be said that this discrimi-

nation against illegitimates has in fact served as a deterrent.

A closely related argument maintains that by legally sanctioning the status of illegitimates, the family unit will be destroyed.98 There is no doubt that the family is the basic social unit in American

91. MINN. STAT. ANN. § 257.33 (1971).
92. 40 Ohio App. 2d at 116, 318 N.E.2d at 407.
93. Krause, supra note 86, at 491.
94. Id.
95. See id. at 492.
97. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, table 77, at
57 (96th ed. 1975). The statistics indicate that the percentage of illegitimate births has risen steadily since 1950. In 1973, the last year reported, over 407,300 illegitimate children were born, representing 13 per cent of all births.
98. Illegitimacy, supra note 61, at 506.
The question becomes one of whether the discrimination against illegitimates over inheritance rights protects the stability of marriage. It has already been advanced in the "promiscuity" argument that the penalty for nonconformance to social mores be directed at the one who is responsible for the activity rather than the one being discriminated against. Since the father is in a position to choose whether to bestow upon the child inheritance rights by his will, or to legitimize the child according to the statutory provisions, it must be decided whether the father's inaction is a reasonable basis upon which a state may base a classification. First, it must be determined what his inaction indicates. Whether to make or not to make a will lies within the discretion of every individual. There is no legal obligation demanding such action. That a person chooses not to make a will has no bearing on whether a child is legitimate or illegitimate; rather, it is determinative of other characteristics such as oversight or deliberate intention. Moreover, failure to make a will does not indicate the deceased's intention as to how his property should be distributed. Therefore, the intent to confer legitimacy or nonlegitimacy cannot be related to the nonmaking of the will. If the state presumes that the decedent did not leave a will in order to insure against providing for his illegitimate child, then the state could just as easily presume that he also intended not to provide for his legitimate children. Since the failure to make a will is not indicative of the decedent's intent, it is not reasonable to classify children by his omission. In intestacy statutes, the state substitutes its presumed intention for the absent intention of the deceased. If legitimate and illegitimate children are dissimilarly situated, then perhaps the discrimination is valid. But they are similarly situated in the sense that biologically they are the children of the father. The state recognizes this relationship by requiring fathers to support all of their children, whether they be legitimate or illegitimate. It does not follow that death should destroy this relationship as to some children (illegitimates), and yet continue it with other children (legitimates). Since all of the children of a decedent are similarly situated, it is not reasonable to require the positive act of making a will to provide for illegitimates when no act is required to provide for legitimate children. If the discrimination

against an illegitimate child rests with the father's failure to legitimate the child, the state should be required to provide the father with a method more effective than the probate vehicle.

None of the interests set forth above creates a rational relationship justifying the discriminatory scheme in the Kentucky intestate statute. It has been suggested that the real state interest is in perpetuating the common law prejudice against illegitimates of bygone centuries. This can hardly be a permissible justification against the equal protection clause of the fourteenth amendment.

VI. Conclusion

In view of the arbitrary and restrictive nature of the Kentucky intestate succession statute as it relates to illegitimate children, a revision is clearly in order. Kentucky is one of only four states which have expressly provided by statute that illegitimate children may not inherit from the father. At least 17 states allow acknowledged illegitimate children to inherit equally from their fathers. Three states treat all illegitimate children the same as legitimates, regardless of an acknowledgment, for purposes of inheritance. Section 391.090 of the Kentucky Revised Statutes should be broadened to provide for appropriate acknowledgment procedures in order to elevate the status of a father's recognized child to legitimacy. Certainly the state's interest in preventing fraudulent claims on the deceased's estate would be dispelled by an expressed acknowledgment. Section 391.090 should also be expanded to allow an unacknowledged illegitimate child to establish that he is the child of his father by clear and convincing proof. By requiring the illegitimate child to sustain a high degree of proof, the state's interest in preventing fraudulent claims will be satisfied. The proposed revisions herein suggested are embodied in the Uniform Probate Code.

Section 2-109 sets forth the relevant provisions on children inheriting through intestate succession:

If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,
(2) . . . [A] person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(ii) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subparagraph (ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child. 107

In a 1917 Kentucky case, Bates v. Meade, 108 the court commented on Kentucky's statute of legitimization:

The legislature of this state at a very early day in its history recognized the wisdom and propriety of changing the harsh common law rule—of once a bastard always a bastard—by statutory enactment, and so in 1796 it was declared . . . that "Where a man, having by a woman one or more children, shall afterwards inter-marry with such woman, such child or children, if recognized by him, shall be thereby legitimated. The issue also in marriage deemed null in law, shall, nevertheless, be legitimate." 109

Although the statute in force today is worded differently, the substance is identical to the 1796 statute. 110 Yet, since 1796, many of the barriers against illegitimate children have been removed. In light of this trend, the Kentucky legislature should remove the disability of the illegitimate child to inherit from his father.

Lisa L. Grosse

107. Id.
108. 174 Ky. 545, 192 S.W. 666 (1917).
109. Id. at 550, 192 S.W. at 668.
THE POLYGRAPH AND EVIDENCE RULE MAKING — A PROPOSAL FOR RESTRAINT IN OHIO

I. INTRODUCTION

The Supreme Court of Ohio recently announced the appointment of an Evidence Rules Advisory Committee to propose uniform rules of evidence for the Courts of Ohio. Among other topics, the committee will consider the use of testimony based on the results of scientific tests. Possibly the most hotly debated type of scientific evidence is that which concerns the polygraph, or lie detector.

Courts have traditionally ruled that unless stipulated in advance by the parties, polygraph evidence is inadmissible at trial. This rule of exclusion most commonly rests on a finding that polygraph results lack probative value as evidence because lie detector testing has not achieved such a degree of accuracy as to warrant general scientific acceptance. For nearly 50 years this view was universally accepted.

2. The committee is certain to be influenced by the Federal Rules of Evidence, which were adopted shortly before the committee was formed. Federal Rule 702 specifically deals with testimony by experts. See text accompanying note 81 infra. See also Uniform Rule of Evidence 702 (1974).
3. The polygraph is simply a collection of instruments designed to record selected physiological activities of the subject. The conventional polygraph consists of three units which trace pulse, blood pressure, respiration, and resistance of the skin to electrical current. J. Reid & F. Inbau, Truth and Deception 213, 272 (1966).
   The use of the polygraph to detect deceit proceeds on the theory that the human body responds involuntarily to the stress caused by lying. A series of "yes" or "no" questions is asked, after which the examiner compares the target questions to the results of controlled "probable lie" and "probable truth" responses. The degree to which stress increases or diminishes furnishes the basis to conclude that a particular answer was deceptive. See C. Zimmer- man, The Polygraph in Court 17-18 (1972). It is universally agreed that the polygraph will only indicate the likelihood of a conscious lie. "Clearly, nothing in the entire technique can show the underlying empirical truth... but only whether the person examined himself believed his answers." C. McCormick, Evidence § 207, at 505 (2d ed. 1972).
applied, but finally two pioneering courts abandoned traditional apprehensions and permitted juries to consider polygraphic findings. These landmark decisions quickly spawned a trend which was followed by several lower courts, debated by at least one legislature and hailed by the commentators.

The Federal Rules of Evidence do not deal specifically with the polygraph apart from scientific evidence generally. Unfettered discretion rests in the courts to determine by conventional rules whether expert testimony based on scientific testing is admissible. In the case of breathalizers, radar and other devices, such generality is appropriate; however, it will not insure continued exclusion of the polygraph. Because lie detectors present dangers which are unique in the field of scientific testing, a special provision for exclusion must be incorporated into Ohio's rules of evidence.

II. THE TRADITIONAL RULE

The prevailing rule against admissibility of expert testimony based on polygraph results was first announced in Frye v. United States, decided by the Court of Appeals of the District of Columbia in 1923. In his trial for murder, the defendant sought to call an expert witness who had conducted a "systolic blood pressure deception test" on him. The expert offered to show that (1) a change in
subject’s emotions would manifest itself through nervous impulses and a corresponding change in blood pressure; (2) conscious deception or falsehood accompanied by fear of detection would cause such an emotional change; and (3) the results of a test conducted on the defendant indicated no incriminating change in blood pressure when he was asked questions determinative of guilt or innocence.\(^\text{13}\)

The defense based its offer of proof on existing rules governing the admissibility of expert testimony.\(^\text{14}\) In rejecting the argument that the trial court erred in refusing to hear the expert, Judge Van Orsdel set forth the classic rationale for excluding polygraph evidence:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained \textit{general acceptance in the particular field in which it belongs}.\(^\text{15}\)

We think the systolic pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.\(^\text{16}\)

Through subsequent interpretation, Judge Van Orsdel’s words hardened into precedent which required exclusion of all polygraph results. Commonly called the “general scientific acceptance” test, the rule has gained universal approval in this country\(^\text{17}\) both in civil and criminal\(^\text{18}\) cases. It has been cited by countless courts in criminal matters, both where the proceedings were heard solely by a judge, and where there was a jury.\(^\text{18}\) The rule has been applied whether polygraph results were sought to be introduced by the

\(^{13}\) Id. at 1014.

\(^{14}\) Id.

\(^{15}\) Id. (emphasis added).


\(^{19}\) E.g., California Ins. Co. v. Allen, 235 F.2d 178 (5th Cir. 1956).
prosecution as evidence of guilt,\textsuperscript{20} by the defense to show innocence,\textsuperscript{21} or by either party to impeach or verify the testimony of witnesses.\textsuperscript{22}

The Supreme Court of Ohio has never ruled directly on the use of polygraph test results at trial.\textsuperscript{23} Precedent for exclusion has been furnished by the several courts of appeal which have been called upon to consider the problem. With few exceptions, each has adopted the general scientific acceptance test or an equivalent rule of exclusion.

\textit{Parker v. Friendt}\textsuperscript{24} was the first Ohio appellate case to deal with polygraph evidence. Decided in 1954, it concerned a civil action on a cognovit note. The defendant sought to introduce polygraph test results to corroborate her claim that she signed the note under the mistaken belief that it was a receipt. The Court of Appeals for Cuyahoga County upheld the trial court's refusal to admit such evidence, placing great emphasis on the many variables which might affect the accuracy of test results.\textsuperscript{25} Without citing \textit{Frye} the court rejected the proffered testimony for want of a showing that the polygraph had achieved general scientific recognition and public acceptance. In not foreclosing the use of polygraph evidence when future developments so warrant, the court stated that:

\begin{quote}
[T]he results of tests made on an apparatus called the polygraph, and known as a lie detector, are inadmissible in evidence during the trial of a cause in a court of law in the present state of development and operation, general scientific recognition and public acceptance.\textsuperscript{26}
\end{quote}

Subsequent Ohio cases followed the holding in \textit{Parker}, either by referring to the then-current reputation of lie detectors in the scientific community,\textsuperscript{27} or by accepting exclusion as a universal rule.\textsuperscript{28} Until recently, all Ohio courts reached the same conclusion and refused to admit polygraph results at trial.

\begin{footnotesize}
25. \textit{Id.} at 337, 118 N.E.2d at 221.
\end{footnotesize}
III. A NEW APPROACH

The decision in Frye\textsuperscript{29} was not by its terms limited to evidence of scientific deception tests. The rule it created has been widely acknowledged as the standard governing admissibility of all types of scientific evidence.\textsuperscript{30} As it has evolved, however, the "general scientific acceptance" test has been used to impose more harsh restraints on the polygraph than upon other forms of scientific testing.

As early as 1951, alcoholic breath tests were considered admissible even in the presence of substantial disagreement over their accuracy.\textsuperscript{31} After it can be said that there is scientific acceptance of the underlying theories, any contest as to credibility goes to the weight of the evidence rather than to its admissibility.\textsuperscript{32} The criterion is thus more akin to the question of probative value than that of absolute scientific certainty.\textsuperscript{33}

In Ohio, expert testimony based on scientific findings is admissible upon consideration of its probative value.\textsuperscript{34} The issue is whether an expert's opinion in his particular field of expertise will aid the trier of fact in a proper determination of the particular litigation.\textsuperscript{35} Thus, handwriting experts have been allowed to testify as

\begin{itemize}
\item \textsuperscript{29} See text accompanying note 15 supra.
\item \textsuperscript{30} See generally Boyce, Judicial Recognition of Scientific Evidence in Criminal Cases, 8 Utah L. Rev. 313 (1963).
\item \textsuperscript{31} McKay v. State, 155 Tex. Crim. 416, 235 S.W.2d 173 (1951).
\item \textsuperscript{32} Id. at 419, 235 S.W.2d at 175. Accord, State v. Olivas, 77 Ariz. 118, 267 P.2d 893 (1954).
\item \textsuperscript{33} Several writers at the time of the Frye decision assumed that the scientific acceptance test would be interpreted in such a manner as regards polygraph evidence. See McCormick, Deception-Tests and the Law of Evidence, 15 Cal. L. Rev. 484 (1927):
\begin{quote}
[N]o capacity for anything like a hundred per cent correctness of results is required. The emotional curve is to be admitted merely as circumstantial evidence of a truthful intent or the reverse. If the test results are shown by scientific experience to render the inferences of consciousness of falsity or truth substantially more probable, then the courts should accept the evidence, though the possibility of error in the inference be recognized.
\end{quote}
\item \textsuperscript{34} Id. at 500. See also Note, 24 Colum. L. Rev. 429, 430 (1924).
\item \textsuperscript{35} E.g., State v. Holt, 17 Ohio St. 2d 81, 85, 246 N.E.2d 365, 368 (1969), where expert testimony regarding neutron activation analysis was held inadmissible when identification between strands of hair was speculative rather than probable. See also Burchett v. State, 35 Ohio App. 463, 470-71, 172 N.E. 555, 557 (1930).
\item \textsuperscript{35} McKay Mach. Co. v. Rodman, 11 Ohio St. 2d 77, 228 N.E.2d 304 (1967):
\begin{quote}
No one can validly contend that an expert in a particular field that is beyond the experience, knowledge or comprehension of a layman should be silenced where such knowledge is vital to a proper determination of litigation. Rather, this court has continuously held that in all proceedings involving matters of a scientific, mechanical, professional, or other like nature, requiring special study, experience or observation not within the knowledge of laymen in general, expert opinion testimony is admissible to aid the court or the jury in arriving at a correct determination of the litigated issue.
\end{quote}
\end{itemize}
to the authenticity of signatures and documents without proof of any scientific certainty in their conclusions. Similarly, testimony of a ballistics expert was received when that science was in the early stages of development, and evidence supported by trace metal detection techniques was admitted despite the relative novelty of that science.

Had the polygraph been treated consistently with other types of scientific evidence, it would have gained judicial acceptance long ago. It is indisputable that its results possess probative value as evidence, and that the weight of scientific opinion heavily endorses its reliability. Yet despite the highly developed state of this art, by far the majority of courts in Ohio and elsewhere continue to invoke the Frye standard as the means to justify exclusion. The resulting decisions simply refuse to admit that the polygraph has gained general scientific acceptance. Without voicing any distinction between lie detectors and other types of scientific devices, these courts have created an interesting paradox—"general scientific acceptance" means something more when applied to the polygraph than it does in other scientific fields.

Recognizing this anomaly, some courts have begun to treat polygraph evidence more like other forms of expert scientific testimony. Applying the Frye doctrine literally, they have adopted probative value as the guide in determining when polygraphic evidence is admissible. This new approach is sometimes called the "logical relevance" test and first found expression in two federal district court cases decided in 1972.

39. A lack of standardization in the qualification of individual examiners has contributed to the reluctance of courts to admit polygraph evidence at trial. Comment, The Emergence of the Polygraph at Trial, 73 Colum. L. Rev. 1120, 1124 (1973). To remedy the disparity of competence between individual examiners, proposals have been made that polygraph examiners meet certain uniform qualifications such as a college degree, at least six months of individualized training with a qualified examiner, and instruction in the related areas of physiology and psychology. J. Reid & F. Inbau, Truth and Deception 234 (1966).
40. The polygraph's reliability in detecting deceit is normally placed at above 90 per cent. See State v. Hancock, 71 Ohio Op. 2d 458, 460 (C.P. 1974). One authority places its "known" rate of error at nearly one per cent. J. Reid & F. Inbau, Truth and Deception 234 (1966).
41. See id.
43. See State v. Alderete, 186 N.M. 176, 179, 521 P.2d 138, 140 (Ct. App. 1974) (Wood, C.J., concurring). Chief Judge Wood stated in his concurring opinion that Frye should be interpreted as requiring merely that polygraph results achieve probative value prior to admission. Id. at 179, 521 P.2d at 141.
The first of these cases was *United States v. Ridling,* handed down by a district court in Michigan. The indictment charged the defendant with perjury in an earlier grand jury appearance. At his trial the defendant offered the testimony of polygraph experts who had previously examined him. An evidentiary hearing was ordered which resulted in the admission of the expert testimony. In its opinion the court said:

The acceptance of the basic theory is a part of the process of making the evidence relevant. The care used in the conduct of the test is another. The skill and qualification of the person interpreting the test and offering the evidence in the form of an opinion is important, and, of course, the relationship of that opinion to the issues in the case, its probability of helping the jury, as balanced against any possible prejudicial effect of its use or misuse, must be considered.  

The court went on to hold that the basic theory of the polygraph was sound and that the evidence was directly relevant to the issues. Relevancy was held to depend on whether the state of the science is such that the opinion of experts will assist the trier of fact in understanding the evidence. The court suggested that any prejudicial effect could be eliminated by thorough cross-examination or court appointment of a non-biased expert to corroborate or refute the results previously obtained.

Four days after the *Ridling* decision was announced, another federal district court reached a similar result. In *United States v. Zeiger* the district court for the District of Columbia found polygraph evidence admissible by applying *Frye's* "general scientific acceptance" test. In defining the scientific acceptance criterion, the court stated:

For the purpose here at issue, *Frye* requires such acceptance and recognition "as would justify the courts in admitting expert testimony" deduced from a polygraph examination. The general criterion required for the admission of evidence is its relevance or tendency to prove a material fact. "[I]f evidence is logically probative, it should be received unless there is some distinct ground for refusing to hear it." And so *Frye* has been interpreted to demand general acceptance

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45. Id. at 94-95.
46. Id. at 95.
47. Id.
48. Id. at 96-97.
among the experts that current polygraph technique possesses a degree of reliability which satisfies the courts of its probative value.\textsuperscript{50}

Zeiger was later reversed in a short per curiam opinion by the court of appeals;\textsuperscript{51} however, the lower court opinion, together with Ridling, has formed the basis for a trend which is gaining increased acceptance.\textsuperscript{52} Early support came from lower courts, such as those in California,\textsuperscript{53} Florida,\textsuperscript{54} Michigan\textsuperscript{55} and New York.\textsuperscript{56} More significantly, the Court of Appeals of New Mexico has granted the courts in that state discretion to admit unstipulated polygraph evidence at trial.\textsuperscript{57}

Recently, an Ohio court joined the ranks of those allowing courtroom use of the results of polygraph tests. In State v. Hancock,\textsuperscript{58} the Court of Common Pleas for Hamilton County, in an extensive opinion, said that the polygraph technique had advanced to the point where its scientific acceptance could no longer be denied. Because of the probative value of such evidence, the court admitted the polygraph testimony offered by the defendant in a prosecution for rape. The First District Court of Appeals of Ohio, however, refused to overturn the conviction on appeal,\textsuperscript{59} but offered dicta on the subject of the admissibility of polygraph evidence:

The trial court’s rather anomalous result was justified on the grounds that certain polygraph tests administered to the defendants previous to the test admitted on trial (concerning which earlier tests the defendants were told they had “passed”) so conditioned them psychologi-

\textsuperscript{50} 350 F. Supp. at 687-88 (footnotes omitted).

\textsuperscript{51} United States v. Zeiger, 475 F.2d 1280 (D.C. Cir. 1972).


\textsuperscript{53} People v. Cutter, No. A176965 (Super. Ct., Los Angeles County, Cal., Nov. 6, 1972), reported in 12 CRIM. L. REP. 2133 (1972).

\textsuperscript{54} State v. Curtis, No. 70-5585 (Cir. Ct., Dade County, Fla., Jan. 31, 1973).


Scientific recognition of polygraphic tests has now arrived. A proper foundation for the testimony must first be established. The polygraphist must be qualified as an examiner. The proposed test must be accepted in his profession. The proposed test must show that it has a reasonable measure of precision in its indications. When this foundation is laid, the admission in evidence of a polygraphic test is within the discretion of the trial court. 86 N.M. at 178, 521 P.2d at 140.


cally that the later tests were reduced in credibility. While not an issue directly raised within the instant appeal, this Court nevertheless considers it appropriate to indicate its concurrence with the decisions of [other Ohio courts of appeal] which expressly [reject] the result and reasoning of the lower court to the effect that the results of a polygraph examination are, when objected to, and except under appropriate circumstances for the limited purpose of impeachment, inadmissible in evidence. We consider the issue to be settled by recent and well reasoned authority in this State contra to the position of the trial court here. In our judgment, if the rule is to change, it should do so pursuant to direction of the Supreme Court, and/or as a result of the adoption of uniform rules of evidence. 60

In actuality, those courts which have admitted polygraph evidence have adhered to judicial precedent, not deviated from it. While polygraph evidence has been excluded in the past for failure to achieve general scientific acceptance, the possibility of admission when this criterion is met has not been foreclosed. Since “general scientific acceptance” means recognition of probative value, and since the law must be given a timely, logical and consistent application, the polygraph has met the requirements for admission.

If technology is to be the guide, the probative value of lie detector evidence is certain to increase. Future developments in polygraph techniques should further the movement toward admission. If there are reasons why the polygraph should not be used at trial, the fault with the new trend does not lie with those courts which have adopted the modern position. Rather, the fault lies with the judiciary as a whole for failing to voice the distinction between the polygraph and other types of scientific achievements, and for failing to devise modern rules of law founded upon those distinctions which deal squarely and separately with the polygraph problem.

IV. REASONS AGAINST ADMISSION

The main function of the jury in any trial, civil or criminal, is judging credibility. In disposing of a case, the jury must decide whom to believe. When stories conflict, it must decide which witness or group of witnesses is telling the truth.

It is as an aid in judging credibility that the polygraph finds its judicial value. The polygraph can be a very reliable index of truthfulness. 61 It can assist the jury by placing before it evidence of credi-

60. Id. (emphasis in original).
61. See Boyce, Judicial Recognition of Scientific Evidence in Criminal Cases, 8 Utah L. Rev. 313, 322 (1963); Comment, The Emergence of the Polygraph at Trial, 73 Colum. L. Rev. 1120, 1122-23 (1973).
bility derived from otherwise non-observable signs of deceit. In criminal cases, where the defendant denies guilt, the value becomes most obvious since the jury's decision upon his credibility is disposi-

tive.

The apprehension that the polygraph will usurp this traditional jury function has formed the underlying basis for the exclusion of polygraph evidence.\(^6\) Courts fear that the jury will put inordinate weight upon the polygraph examiner's testimony on issues determinative of the case.\(^5\) Those who endorse the logical relevance approach believe that this fear is unwarranted. They assume that the prejudicial effect of polygraph evidence can be controlled, or at least minimized or simply outweighed, by a high degree of probative value.\(^4\)

Whether a court can control the impact of polygraph evidence upon the jury is open to speculation.\(^5\) Polygraph evidence, regardless of its accuracy, can never be more than circumstantial evidence. At best, it indicates only the probability that a test subject was being deceptive in his answers to certain questions. It may be too much to expect jurors to consider polygraph evidence along with all other evidence and to use it merely as an aid in reaching their final decision. Extensive cross-examination of experts, court appointment of non-biased experts, and instructions upon the nature of polygraph evidence have all been proposed to accomplish this goal.\(^6\) Such efforts may only create more problems. This process would consume a substantial amount of time; the jurors might be confused and become sidetracked from the real issues; and the proceedings might turn into a trial of the polygraph operator.\(^7\)

Other problems aside, the precautions suggested still carry no guarantee of success. It is highly likely that a jury faced with im-

\(^6\) See note 40 supra.

\(^5\) See Radek, The Admissibility of Polygraph Results in Criminal Trials: A Case for the Status Quo, 3 Loyola L.J. 289, 295-96 (1972) [hereinafter cited as Radek].

\(^4\) See United States v. Ridling, 350 F. Supp. 90, 96-97 (E.D. Mich. 1972), which suggests a number of ways to minimize prejudice, such as through the use of well-developed cross-examination of experts; the use of unbiased experts to corroborate or refute the results; as well as carefully prepared jury instructions upon the nature and reliability of lie detection evidence. See also Comment, The Emergence of the Polygraph at Trial, 73 Colum. L. Rev. 1120, 1141-43 (1973).


\(^2\) See note 64, supra.

\(^7\) Radek, supra note 63, at 302.
pressive scientific data as to the polygraph's accuracy will succumb
to the myth of the machine. It may treat the polygraph examiner's
opinion on veracity as conclusive rather than circumstantial. 68
Rather than use polygraph evidence as an aid in evaluating all of
the other evidence, the jurors may allow it to control completely
their verdict. 69

As the accuracy of the polygraph improves, the problem will be-
come even more acute. The probative value of the polygraph will
increase and the courts will become more receptive to its use. Yet
the courts' ability to control the impression which such evidence
leaves upon the jury will diminish. 70 Even in such a situation it is
doubtful that in a criminal trial polygraph evidence alone could ever
be considered sufficient grounds for conviction. Nor could the poly-
graph completely supplant the criminal jury. 71 When given other
circumstantial evidence to support its findings, however, the jury
may base its decision to convict or acquit solely upon the polygraph
evidence, in which case criminal justice would then turn upon prob-
ability rather than proof. 72 A jury trial would bear great resemblance

68. Id. at 295.
69. See Koffler, The Lie Detector — A Critical Appraisal of the Technique as a Potential
Undermining Factor in the Judicial Process, 3 N.Y.L.F. 123 (1957) [hereinafter cited as
Koffler]. In People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348 (Sup. Ct. 1938), 12 jurors were
permitted to hear testimony that a crude form of lie detector had indicated that the defendant
was truthful when he denied guilt. Upon later questioning, six jurors had acquitted upon the
basis of the polygraph evidence alone. Five of the six admitted that they had ignored the
judge's instructions to consider evidence other than the polygraph evidence. Koffler, supra
at 137-38.
70. See id. at 138-42. A small sampling of law students was presented with a hypothetical
trial. Traditional forms of evidence were non-convincing: none of the students would have
voted guilty as jurors. When, however, a polygraph test, having an accuracy of 85 per cent,
showed the suspect guilty, 40 per cent would have convicted. When the polygraph's reliability
was increased to 99.5 per cent, 85 per cent voted for conviction. A substantial number consid-
ered the polygraph evidence "proof beyond a reasonable doubt."
71. U.S. Const. amend. VI specifically guarantees the right to trial by jury in criminal
prosecutions. This provision is made applicable to the several states by U.S. Const. amend.
72. The problem with conviction based upon probability rather than proof is that the
chance of reaching a correct decision in any given case turns upon the size of the population
tested. Assume that a polygraph operator is accurate in 95 per cent of all cases. Money is
stolen from a small office. There are 20 employees, each of whom had an opportunity to
commit the theft, but only one is guilty. The law of large numbers states that if all 20
employees are tested, the guilty person will probably be detected. That same law also states
that the polygraph operator will probably make one error during the 20 tests. Thus, the
polygraph will indicate that two individuals are guilty. If the jury allows the polygraph to
control its verdict, either individual could be convicted. If the prosecutor selects one for
indictment and trial, the chances that he actually committed the crime are now only 50 per
to a lottery. Could one contend then that the probative value of the polygraph outweighs its prejudicial effect?

Other problems directly related to the reliability of polygraph techniques result from overemphasis on polygraph evidence. Acute tension in a person being tested is a large cause of erroneous readings.\textsuperscript{73} Because of physical and emotional makeup, certain individuals demonstrate such tension when placed under the stress that accompanies accusation.\textsuperscript{74} Their anxiety may be misinterpreted by the examiner as an indication of deception. If too much emphasis is put upon the polygraph, these individuals could be convicted of crimes they did not commit. Because of their abnormalities, they would be subject to unreasonable and disproportionate jeopardy.\textsuperscript{75}

In the opposite extreme, the polygraph sometimes cannot detect deceit in certain psychopathic individuals who do not possess normal lie reactions. Lack of fear of punishment, inability to appreciate that certain behavior is wrong or immoral, or the absence of repentence may allow the guilty to deceive the polygraph.\textsuperscript{76}

Equally as foreboding as the polygraph’s enormous effect upon the jury system is its potential for disrupting the traditional progression of criminal investigation. The polygraph is already widely used as an investigatory tool, and were it allowed to become evidence in a criminal prosecution, its use would increase. Given its inordinate influence on the jury, prosecutors would be encouraged to seek incriminating polygraph evidence first, and to use other forms of evidence only to corroborate the results of the polygraph tests.

One need not stretch the imagination very far to picture a prosecutor on a difficult case asking multiple suspects to prove their innocence or guilt via a polygraph test. Fear of increased suspicion as well as various business and social sanctions would have a chilling effect\textsuperscript{77} upon exercise of the right to refuse to take the test.\textsuperscript{78} A

\textsuperscript{73} Levitt, \textit{Scientific Evaluation of the “Lie Detector,”} 40 Iowa L. Rev. 440, 452 (1955) [hereinafter cited as Levitt].

\textsuperscript{74} For a case in point see Burkey, \textit{The Case Against the Polygraph,} 51 A.B.A.J. 855, 856 (1965).

\textsuperscript{75} Koffler, \textit{supra} note 69, at 143-44.

\textsuperscript{76} Levitt, \textit{supra} note 73, at 451.

\textsuperscript{77} Once he has been asked to take a polygraph test, a suspect has very little choice. Refusal will arouse further suspicion both on the part of the authorities and in the com-
suspect subjected to such compulsion, and without formal accusation, would face trial in a laboratory.

Under such a system, the entire emphasis of a criminal prosecution would turn from proof of guilt to proof of innocence. The suspect himself would become the very means of a criminal investigation and prosecution, rather than a party to it. The system would take on an inquisitional rather than an accusatorial flavor. 79

V. A PROPOSED RULE

When the Evidence Rules Advisory Committee of the Ohio Supreme Court drafts its proposed rules, it should decide that the polygraph is in need of special treatment apart from other types of scientific evidence. The need for restraint in the use of lie detectors has motivated the courts to exclude such evidence for pragmatic reasons not considered in the "general scientific acceptance" test. The task, therefore, is to fashion a modern rule which is broad enough to provide flexibility with respect to traditionally admissible scientific evidence, but which also restrains the use of the polygraph.

A rule of law which unitarily encompasses the criterion for admission of all scientific evidence will not serve the interests of justice. To be applicable to the polygraph, such a rule would have to require something approaching total accuracy. The problem is that other forms of valuable scientific evidence would be excluded along with the polygraph. 80

munity. Sanctions may include closer scrutiny of all aspects of the suspect's life, and loss of business opportunities and friendship. See Burkey, The Case Against the Polygraph, 51 A.B.A.J. 855, 857 (1965). The Committee on Government Operations of the House of Representa-

tives reported after hearings in 1964 on the use of the lie detector that as long as notations are made in any official file on an individual that he has refused to take a polygraph test, the examination can in no sense be considered voluntary. H.R. Doc. No. 198, 89th Cong., 1st Sess. 20 (1965).

78. The United States Supreme Court has indicated that coerced polygraph evidence would violate the privilege against self-incrimination. Schmerber v. California, 384 U.S. 757, 764 (1966).

79. 4 J. Wigmore, EVIDENCE § 2251, at 3095-96 (1905) states:
The system of "inquisition" properly so called, signifies an examination on mere suspi-
cion, without prior presentment, indictment, or other formal accusation; and the con-
test for a hundred years centred [sic] solely on the abuse of such a system. In the hands of petty bureaucrats, whether under James the First, or under Philip the Second, or in the Twentieth century under an American republic, such a system is always certain to be abused. The whole principle of the grand jury presupposes a formal and deliberate accusation, based on probable cause, before any person is called to answer for a crime. No doubt a guilty person may be justly called upon at any time, for guilt deserves no immunity. But it is the innocent that needs protection.

80. See text accompanying note 31 et seq. supra.
The solution finally agreed upon in the Federal Rules of Evidence represents the traditional approach to a unitary rule. Rule 702\textsuperscript{81} provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence, or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The criterion thus created is that of probative value to the trier of fact, which is the view adopted by most of the courts which have admitted polygraphic evidence.\textsuperscript{82} In fact, one of the first courts\textsuperscript{83} to use unstipulated polygraph evidence based its decision in part upon its interpretation of Proposed Rule 702.\textsuperscript{84} Thus, rather than to restrain the use of polygraph evidence at trial, the Federal Rules of Evidence, perhaps unwittingly, encourage it.\textsuperscript{85}

If any restraint is to be imposed upon use of polygraph evidence under the Federal Rules, it will be through the discretion given the courts by Rule 403.\textsuperscript{86} This grants the power to exclude all evidence otherwise admissible where its probative value is outweighed by the danger of confusion or unfair prejudice. The problem is that total faith must be put in the trial courts' ability to recognize the extent and nature of the prejudice that the polygraph produces. Those cases which have admitted polygraph evidence thus far aptly demonstrate that not all judges possess such foresight.

The rule called for is one that speaks clearly to the polygraph problem. The polygraph must be recognized as a unique scientific development, deserving special treatment in the rules of evidence. The time has passed when the polygraph can be controlled under normal rules governing scientific testimony. For the reasons previously developed, the new rule should exclude polygraph evidence which bears directly upon guilt or innocence in criminal trials. It

\textsuperscript{82} See text accompanying note 43 supra.
\textsuperscript{84} The proposed version was enacted without change.
\textsuperscript{85} There is no reference in the Advisory Committee Notes or in the Judiciary Committee Report to indicate that there was an intent to make polygraph evidence admissible. H.R. Rep. No. 5463, 93d Cong., 1st Sess. 1 (1973).
\textsuperscript{86} The text of Fed. R. Evid. 403 is as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
should also exclude polygraph evidence where it is attempted to be used in judging the veracity of witnesses in criminal trials, or of parties and witnesses in civil litigation. In these situations, the opportunity for prejudice is particularly acute. The trier of fact may put inordinate weight upon the fact that the polygraph detected a liar on one side but not the other. Using the polygraph to determine whether witnesses are credible will usurp a primary function of the trier of fact, whether it be the court or a jury. 87

The new rule should be broad enough to deal with all potential abuses and possible prejudices of the polygraph, and should provide for total exclusion, as in the following model:

Deception test evidence, in the form of actual test results or opinions based thereon, shall not be admissible, nor shall any comment be made upon refusal or willingness to take such a test.

VI. Conclusion

In excluding polygraphic evidence in the past, the courts have shown great insight. The manner in which the polygraph was restrained in the past, however, has today become outmoded. No longer can the polygraph realistically be excluded as evidence for supposed failure to achieve "general scientific acceptance."

If the use of polygraph evidence is to be restrained in the future, a new rule of law, which deals separately and adequately with the polygraph problem, must be developed. The continued failure of the judicial community to take this initiative has allowed inception and expansion of the trend toward admission. The Evidence Rules Advisory Committee would do well to take the advice of the First District Court of Appeals 88 and establish a uniform rule specifically addressed to the polygraph.

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87. See generally Koffler, supra note 69.
88. See text accompanying note 60 supra.
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SOCIAL HOST LIABILITY FOR FURNISHING LIQUOR — FINDING A BASIS FOR RECOVERY IN KENTUCKY

I. INTRODUCTION

Experience has shown that there is a substantial link between automobile accidents and the use of alcohol. Drunk drivers cause from 60 to 75 per cent of the carnage on American highways, with an annual toll of over 30,000 lives and property damage in excess of $8 billion.1 Statistics in Kentucky reflect the national trend, and last year alone there were over 1,000 alcohol-related traffic fatalities reported.2

Recent studies also show that persons under the age of 21 account for a disproportionately high percentage of drunk driving accidents.3 In apparent recognition of this fact, the Kentucky General Assembly has steadfastly refused to lower the legal drinking age to 18 from the present 21.4 Yet, despite such legal restraints, liquor is available to underage drinkers through various means, and they are plying the highways of Kentucky with a staggering toll in death and injury.

The question of liability to third parties for alcohol-related accidents involving underage drinkers is only partially answered under Kentucky law. Although it is settled that a vendor who sells alcohol to an underage consumer is potentially liable to third parties for the consequences,5 the liability of an individual who gratuitously furnishes alcohol in a social setting is not at all clear.

2. Interview with Wendell Hall, District Safety Officer, Kentucky Department of Public Safety, in Covington, Ky., Feb. 18, 1976.
3. For a discussion of the statistical relationship between minimum drinking ages and automobile fatalities see Williams, Rich, Zador & Robertson, The Legal Minimum Drinking Age and Fatal Motor Vehicle Crashes, 4 J. LEGAL STUDIES 219 (1975). The study concluded that in states which lowered the drinking age from 21 to 18 the number of vehicular fatalities increased significantly. Id. at 238.
4. KY. REV. STAT. ANN. §§ 224.080, 224.085 (1972), which set the legal minimum drinking age at 18, remained intact despite the 1968 amendments to KY. REV. STAT. ANN. § 2.015 (1971) relative to the age of majority.
6. To date, six states have permitted some degree of recovery. These include California, Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, 109 Cal. Rptr. 752 (1972); Indiana, Brattain v. Herron, 309 N.E.2d 150 (Ind. App. 1974); Iowa, Williams v. Klemsrud, 197 N.W.2d 614 (Iowa 1972); Michigan, Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); Minnesota, Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972); and Oregon, Wiener

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A number of jurisdictions in recent years have abandoned the common law bar to suits against individual social hosts. Relying variously on strict liability,\textsuperscript{7} traditional negligence\textsuperscript{8} and construction of state liquor statutes,\textsuperscript{9} these courts have permitted recovery where a social host supplies liquor to underage guests.

Such a result should be available under Kentucky law as a partial solution to the problem of underage intoxicated drivers. Considering the fact that package and tavern sales to persons under 21 are prohibited under existing statutes,\textsuperscript{10} it is obvious that a great deal of underage drinking takes place at social functions. It is only reasonable, therefore, that the barriers to recovery be removed and liability placed on the party most directly responsible: the social host who furnishes the alcohol.

II. THE COMMON LAW RULE

There was no recognized right of action at common law against a tavern keeper or social purveyor for injuries to third persons caused by a customer or guest,\textsuperscript{11} whether or not the recipient was underage. A person who became intoxicated and caused damage to other persons was the sole party who could be held liable. Even if the plaintiff could show that the liquor was sold in violation of a statute, there was no cause of action.\textsuperscript{12}

The accepted rationale for this result was that consumption of alcohol is voluntary, and therefore the actions of a vendor could not be the proximate cause of the harm to third persons. Courts reasoned that a person should not be relieved of responsibility for his

\textsuperscript{7} E.g., Williams v. Klemsrud, 197 N.W.2d 614 (Iowa 1972).

\textsuperscript{8} See, e.g., Wiener v. Gamma Phi Chapter, 258 Ore. 632, 485 P.2d 18 (1971).


\textsuperscript{12} Britton's Adm'r v. Samuels, 143 Ky. 129, 136 S.W. 143 (1911).
own voluntary intoxication. In addition, it was regularly held that the injuries were too remote to be a foreseeable consequence of the vendor's acts; the only conceivable exception was where there was an intent to injure.

The harshness of the common law bar to recovery was mitigated somewhat by the adoption of "dram shop" or "civil damages" acts beginning in the post-Civil War period. It is generally recognized that the motivation for reform came almost entirely from temperance sympathies, and not from more lofty principles of justice for injured third parties. Dram shop acts characteristically impose civil liability upon an innkeeper for damages caused by the illegal sale of intoxicants. Most statutes provide for strict liability merely upon a showing that the injury was inflicted by an intoxicated person, and consequently it is not necessary that the state of intoxication be the proximate cause.

The object of dram shop legislation was to impose an economic burden on the traffickers of intoxicating spirits, and courts universally declined to extend the statutory liability to non-commercial purveyors. Despite the loose language of some statutes, social hosts were spared the fury of reform. As one court stated:

[T]he legislature [never] intended to enact a law that makes social

15. Kentucky was not among the nearly 25 states which at one time adopted dram shop acts. For a list of states having such legislation see 12 AM. JUR. TRIALS, Dram Shop Litigation § 2 (1966).
17. E.g., Ore. Rev. Stat. § 30.730 (1974), which provides as follows:
Any person who shall bargain, sell, exchange or give to any intoxicated person or habitual drunkard spiritsuous, vinous, malt or intoxicating liquors shall be liable for all damage resulting in whole or in part therefrom, in an action brought by the wife, husband, parent or child of such intoxicated person or habitual drunkard. The act of any agent or employee shall be deemed the act of his principal or employer for the purposes of this section.
19. E.g., Bristline v. Ney Bros., 134 Iowa 172, 111 N.W. 422 (1907); Sworski v. Coleman, 208 Minn. 43, 235 N.W. 297 (1940).
drinking of intoxicating liquors and the giving of drinks . . . to another, such conduct as to render the giver or social host liable under the Dram Shop Act. If such was the law, a social drink with your neighbor or friend would become a hazardous act. It would open up the floodgate of litigation as to almost every happening where someone was injured.22

In those states without dram shop acts, the common law bar against vendor liability has been abrogated by court decisions which impose liability under traditional negligence theory.23 The negligence element of foreseeability, however, presented an imposing barrier for most claimants, and the early cases were based on particularly aggravated facts. In McCue v. Klein,24 a Texas case decided in 1883, the tavern keeper induced a customer to drink three pints of whiskey in rapid succession. After doing so the man dropped dead. His widow was permitted to recover damages. Similarly, in Nally v. Blandford,25 decided in 1956, the Kentucky Court of Appeals found liability where the vendor knew that the deceased purchased a quart of whiskey pursuant to a wager that he could "chug-a-lug" the entire quart.

With the advent of motor vehicles and the associated consequences of drunk driving, courts were increasingly more receptive to third party suits against vendors. This resulted from public policy favoring highway safety, a policy which did not exist at common law. Gradually, the courts imposed liability without requiring extraordinarily reckless or wanton conduct on the part of the defendant.26

One of the early cases to abandon the common law rule against liability was Rappaport v. Nichols,27 decided in 1959 by the New Jersey Supreme Court. The court permitted recovery in a wrongful death action where a tavern keeper sold liquor to an intoxicated minor who subsequently killed the plaintiff’s husband in an auto accident. Applying traditional negligence principles, the court emphasized foreseeability in finding that the defendant had breached his duty of care:

23. See, e.g., Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940); Dunlap v. Wagner, 85 Ind. 529 (1882); Ibach v. Jackson, 148 Ore. 92, 35 P.2d 672 (1943); Ridden v. Greem, 97 Tenn. 220, 36 S.W. 1097 (1896).
24. 60 Tex. 168 (1883).
25. 291 S.W.2d 832 (Ky. 1956). See also Pike v. George, 434 S.W.2d 626 (Ky. 1968).
27. 31 N.J. 188, 156 A.2d 1 (1959).
When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent.28

As a further buttress, the court determined that state laws prohibiting the sale of liquor to minors provide an alternative basis for recovery.

By far the majority of courts following in the footsteps of the New Jersey Supreme Court predicated recovery on the violation of a statute and negligence per se.29 In Pike v. George,30 for example, the Kentucky Court of Appeals permitted a cause of action where the plaintiff was injured in a car crash after the defendant sold intoxicants to a minor. The court held that the violation of a penal statute was a wrong, actionable in tort where the injuries proximately result from the illegal act.

Although there is no longer any vitality in the common law rule barring suit against vendors in the absence of dram shop acts, the corollary rule with respect to social hosts continues to be honored by the majority of American courts.31 A persuasive trend in the opposite direction is gaining momentum, however, and the extension of civil liability to social purveyors is proceeding apace.

III. SOCIAL HOST LIABILITY: THEORIES OF RECOVERY

In expanding personal injury liability to non-commercial suppliers of alcohol, courts have used three different approaches to establish a duty of care. These include common law negligence principles, strict liability under dram shop acts, and negligence per se based on liquor control statutes.

(A) Liability Based on Standard Negligence

(1) The prima facie case—The most far-reaching decision which

28. Id. at 202, 156 A.2d at 8.
30. 343 S.W.2d 626 (Ky. 1968), reversing by implication Waller’s Adm’r v. Collingsworth, 144 Ky. 3, 137 S.W. 766 (1911), and Britton’s Adm’r v. Samuels, 143 Ky. 129, 136 S.W. 143 (1911).
extends liability to the social host was rendered by the Oregon Supreme Court in *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*. In *Wiener* the plaintiff was severely injured in an automobile collision following a fraternity party during which the driver of the car, a minor, imbibed an excessive amount of alcohol. The complaint proceeded on the alternative theories that the defendants were negligent as a matter of law for violating state liquor laws, and that there had been a breach of a common law duty of care.

At the outset, the court rejected the claim resting on negligence per se. It held that statutes which prohibit giving liquor to underage drinkers were intended to protect minors from the vices of alcohol, not to furnish a civil remedy for third persons. In spite of long-standing authority to the contrary, the court departed from precedent and ruled that a cause of action did exist under simple negligence:

We think that each case must be decided on its own facts, and we reject the rule suggested by the defendants that furnishing alcohol to others in a social setting, even if the host acts unreasonably, can never give rise to liability for acts of the guest whose intoxication results.

A prima facie negligence case under the *Wiener* formulation would depend on findings relative to the duty of care owed by the defendant to the plaintiff. In strict tort application, a duty exists "where a reasonable man would recognize the existence of an unreasonable risk of harm to others," under circumstances where social policy favors the imposition of a burden on defendant over the risk to plaintiff. In the final analysis, courts adopt a pragmatic approach and define duty as "an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection."

The court in *Wiener* viewed the element of duty as primarily a problem of policy formation. It held that a social host is under a common law duty to deny his guests further access to alcohol where the host "has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasona-

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33. 485 P.2d at 21.
34. Id.
35. Id. at 21-22 (footnote omitted).
ble things.” Three examples of persons to whom the duty would be owed are “those already intoxicated, . . . those whose behavior the host knows to be unusually affected by alcohol,” and “young people . . . who by virtue of their youth” could be expected “to behave in a dangerous fashion under the influence of alcohol.”

The standard of care which evolves from the Wiener case is that a social host should refuse to serve alcohol to a guest where a reasonably prudent man would not permit him to consume alcohol. In making the determination of what is reasonable, however, the court stressed the necessity of considering each case on its own facts. While a host may be charged with knowledge of whether his guests are of legal age or not, the presence of such constructive knowledge would be determined, to a great extent, by the type of social setting involved. Knowledge would necessarily arise in the case of a fraternity party, wedding reception, or graduation ball. The likelihood of large numbers of underage guests having access to alcohol in such situations would put a reasonable man on notice. Given this knowledge, the risk of an accident involving an underage drinker would be great enough to impose on the host the burden of ascertaining the ages of his guests and taking appropriate steps to prevent accidents. At political functions or lodge dances, the guests are more likely to be responsible adults, and the burden of verifying age would be exceptionally great in view of the remote risk of an accident involving an underage drinker.

Although the court in Wiener did not discuss the element of causation, it is nevertheless a crucial aspect of a prima facie negligence action. Courts which deny recovery against social hosts focus on the remoteness of the defendant’s acts in relation to the intervening negligence of the intoxicated guest. But under more modern concepts of causation, recovery is not foreclosed simply because the defendant’s negligence was not the sole proximate cause. Under the Restatement view, for example, an intervening act of negligence does not destroy the chain of causation if it was reasonable foreseeable to the defendant.

38. Id. at 175, cited in 485 P.2d at 21.
39. Id. at 21.
40. Id. at 23.
41. Id. at 21-22.
43. RESTATEMENT (SECOND) OF TORTS § 447 (1965) states:
§ 447. Negligence of Intervening Acts. The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a
The same considerations which define the scope of a social host’s duty also apply in determining when his negligent conduct is the proximate cause of an injury. Foreseeability of harm in the social host context is only difficult in its formulation, not in its application, and courts following Wiener should face no analytical impasse.

(2) *A negligence theory for Kentucky*—There is no decision under Kentucky law which specifically treats the question of a social host’s liability. For years the common law rule of tavern keeper immunity held sway, and in the absence of dram shop legislation there was no right of recovery.

The first Kentucky case to find a tavern keeper liable was *Nally v. Blandford*, a wrongful death action decided in 1956. It was alleged that the defendant sold a quart of liquor to the deceased knowing that he intended to drink the entire contents in pursuance of a bet. After gulping down nearly the whole bottle, the man became ill and died the following day.

In permitting recovery the Court of Appeals reiterated its longstanding adherence to the common law rule of nonliability. That rule, said the court, “affords no liability for injury for [sic] death following the mere sale of liquor to an ordinary man.” The distinctive features of this case, however, took it out of the general rule and the plaintiff was allowed to recover:

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superseding cause of harm to another which the actor’s negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor’s conduct and the manner in which it is done is not extraordinarily negligent.

The Kentucky Court cited with approval § 447 of the *Restatement of Torts* (1934) in *Miles v. Southeastern Motor Truck Lines, Inc.*, 295 Ky. 156, 166, 173 S.W.2d 990, 995 (1943). This section was preserved in the revision unchanged.

44. Curiously enough, however, Kentucky at one time evidently acquiesced to prohibitionist pressures and adopted a hybrid form of dram shop act. Enacted in 1893, it provided that a wife had a cause of action against a saloon keeper for selling liquor to her inebriate husband if she first gave notice to the vendor stating that her husband is a drunkard and that no liquor should be served to him. Mercifully, the statute was repealed in 1922. Act of March 22, 1922, ch. 33, § 45, [1922] Ky. Acts. 131. Several cases have construed this statute, e.g., *Keyser v. Damron*, 159 Ky. 444, 167 S.W. 381 (1914); *Eilke v. McGrath*, 100 Ky. 537, 38 S.W. 877 (1897).

45. 291 S.W.2d 832 (Ky. 1956). See text accompanying note 25 supra.

46. *See Waller’s Adm’r v. Collingsworth*, 144 Ky. 3, 137 S.W. 766 (1911); *Britton’s Adm’r v. Samuels*, 143 Ky. 129, 136 S.W. 143 (1911).

47. 291 S.W. at 834.
We think it is reasonable to conclude... that, since the vendor knew when he sold the liquor to the intoxicated person that such person intended to drink all of it without ceasing and that the vendee could not be safely trusted with it, the vendor could reasonably foresee that death might result. 48

Of particular significance is the fact that _Nally v. Blandford_ permits the plaintiff to recover under ordinary principles of negligence. Once the court determined that the general rule of nonliability did not apply, it became a simple matter of determining whether the defendant "had reasonable grounds to believe that the deceased could not be trusted with the whiskey." 49 This has the effect of creating for tavern owners a common law duty to use reasonable care in the serving of alcohol.

The _Nally_ decision specifically states that this duty is subject to the common law rule of nonliability for the "mere sale of alcohol to an ordinary man." 50 However, in a subsequent case, _Pike v. George_, 51 the Court of Appeals cast considerable doubt on the continued efficacy of this rule in Kentucky. It flatly stated that "there are... circumstances under which a licensee who sells alcoholic beverages may be held responsible in damages," 52 thus abrogating the absolute common law barrier to suit against vendors.

Under Kentucky law, therefore, precedent exists for the adoption of further exceptions to the rule of nonliability for purveyors of alcohol. _Pike v. George_ has paved the way for expanding liability, and _Nally v. Blandford_ provides a standard of care which is, by its terms, broad enough to serve in the social host context. Thus, adoption of the doctrine announced by the Oregon Supreme Court in _Wiener_ 53 would be theoretically consistent with precedent in Kentucky, and would not upset the existing case law scheme.

The critical ingredient, of course, is a determination by Kentucky courts that there is a sound policy rationale for permitting recovery against non-commercial suppliers of alcohol. In view of the mounting death toll on Kentucky highways and the ever-increasing use of intoxicants by underage drivers, the need for added legal restraint

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48. _Id._ at 835.
49. Britton’s Adm’r v. Samuels, 143 Ky. 129, 132, 136 S.W. 143, 144 (1911). The court cited this language in deciding the _Nally_ case. 291 S.W. at 834.
50. _See_ text accompanying note 47 _supra._
51. 434 S.W.2d 626 (Ky. 1968).
52. _Id._ at 629.
53. _See_ text accompanying note 32 et seq. _supra._
at the source of supply is obvious enough. Moreover, the practical effects of creating relatively untested burdens for social hosts are not nearly as radical as they might appear. The Wiener foreseeability test creates a narrow range of liability, and provides ample defenses for avoiding unwarranted results.

(B) Liability Based on Violation of a Statute

(1) The prima facie case—An alternative approach to finding social host liability under negligence principles is by predicated recovery on the violation of a liquor control statute. The foundation of this theory is the well-recognized common law doctrine that violation of a penal statute is negligence per se.

In order to base civil liability on a criminal statute, it must be shown (1) that the plaintiff was a member of the class for whose protection the measure was adopted; and (2) that the injury was of the type which the statute was intended to prevent. In effect, the legislation itself establishes the duty as well as the standard of care, and if a violation is shown the defendant will be found to have acted negligently as a matter of law. Causation must also be proved, and contributory negligence, assumption of the risk and other familiar tort defenses will bar recovery.

The two leading cases which establish liability through negligence per se were based on exceptionally broad statutory language. In Brattain v. Herron, the Indiana court was clearly on solid footing when it construed the state statute as not limiting criminal liability to commercial purveyors of alcohol. The statute reads in part:

No alcoholic beverages shall be sold, bartered, exchanged, given, provided or furnished, to any person under the age of 21 years. Any person guilty of violating this paragraph shall be punished

54. See text accompanying notes 38-39 supra.
56. E.g., Blue Grass Restaurant Co. v. Franklin, 424 S.W.2d 594 (Ky. 1968); Commonwealth v. Ragland Potter Co., 305 S.W.2d 915 (Ky. 1957); Brown Hotel v. Levitt, 306 Ky. 804, 209 S.W.2d 70 (1948).
60. See generally W. PROSSER, TORTS § 36 (4th ed. 1971).
62. IND. REV. STAT. ANN. § 7-1-1-32 (Burns 1972) (emphasis added).
The court was aided in its decision by an earlier Indiana Supreme Court case\(^6^3\) which held that the statute evidenced a legislative intent to protect the citizens of Indiana from intoxicated minors.\(^6^4\) The \textit{Brattain} court simply concluded that in view of such precedent, and considering the broad contours of the statutory wording, a social host could be held negligent as a matter of law.

A comparable result using similar reasoning was reached in a California case, \textit{Brockett v. Kitchen Boyd Motor Co.}\(^6^5\) Again, the statutory vehicle for finding negligence per se contained broad language:

\textit{Every person who sells, furnishes, gives or causes to be sold, furnished, or given away, any alcoholic beverages to any person under the age of 21 years is guilty of a misdemeanor.}\(^6^6\)

As in the \textit{Brattain} situation, a previous state supreme court case\(^6^7\) furnished ample support for finding a legislative intent to protect the public from intoxicated minors.\(^6^8\) Yet the \textit{Brockett} court limited its holding to the strong factual context before it:

It is suggested that the extension of the negligence per se rationale to furnishers of alcoholic beverages to minors imposes almost absolute liability on vendors and on every parent who keeps intoxicating liquor in the home. As we have stated, the scope of this decision is limited to the facts as alleged in plaintiffs' complaint, that the minor's intoxication was induced by his employer as the result of a Christmas party where the employer did \textit{knowingly make available} to the minor copious amounts of intoxicating beverage with knowledge that the minor was going to drive a vehicle upon the public highways.\(^6^9\)

\begin{itemize}
\item \textbf{64.} 309 N.E.2d at 156 & 157.
\item \textbf{65.} 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).
\item \textbf{66.} CAL. BUS. & PROF. CODE § 25658 (West 1964) (emphasis added).
\item \textbf{68.} 24 Cal. App. 3d at 93, 100 Cal. Rptr. 756. In further support of its decision, the court cited CAL. EVID. CODE § 669(a) (West 1968), which provides:
\begin{itemize}
\item (a) The failure of a person to exercise due care is presumed if:
\begin{itemize}
\item (1) He violated a statute, ordinance, or regulation of a public entity;
\item (2) The violation proximately caused death or injury to person or property;
\item (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
\item (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.
\end{itemize}
\end{itemize}
\item \textbf{69.} 24 Cal. App. 3d at 94, 100 Cal. Rptr. at 756 (emphasis in original).
\end{itemize}
Therefore, while *Brockett* clearly lifts the common law rule of nonliability for social hosts, it does so only as to serving minors, and expressly limits its holding to the strong facts presented. The acknowledged purpose of such a restricted holding is to avoid "subjecting every social host to civil liability for injuries caused by intoxicated guests."^70^

(2) *Application in Kentucky*—The sine qua non of these decisions is the broad statutory language which expressly includes "all persons" who serve liquor to minors, not just commercial vendors. In Kentucky, however, there is no such clear-cut opportunity to expand liability to the social host based on negligence per se.

The present statutory scheme in Kentucky is the product of an evolutionary process in that state's control of alcoholism which began in 1893 when the following statute was enacted:

*Any person who shall sell, lend or give, procure for, or furnish vinous, spirituous or malt liquor, or any mixture of either, to a person under twenty-one years of age, other than his own children, without the special written direction so to do, specifying the person by name and the quantity, from the father, mother or guardian of such infant, shall be fined fifty dollars.*^71^

This provision, former section 1306 of the Kentucky Statutes, used the same type of broad language upon which the *Brattain* and *Brockett* courts relied so heavily. After national prohibition forced its repeal,^72^ the statute was replaced with an entirely different measure expressly confined to commercial vendors:

*It shall be unlawful for a hotel, restaurant or club to sell, dispense or give away vinous, spirituous or intoxicating malt liquors to a person under 21 (twenty-one) years of age . . . .*^73^

Subsequent enactments^74^ and amendments^75^ have resulted in no substantial change, and today the statute focuses entirely on the tavern keeper:

*No retail licensee shall sell, give away or deliver any alcoholic

^70. Id. at 93, 100 Cal. Rptr. at 756.
beverages, or procure or permit any alcoholic beverages to be sold, given away or delivered to:

(1) A minor . . . .76

The only possible foundation upon which to base social host liability under the negligence per se approach is Kentucky Revised Statutes section 244.085, adopted in 1968:

(3) No person under twenty-one (21) years of age shall possess for his or her own use, or purchase or attempt to purchase or have another purchase for him or her any alcoholic beverages. No person shall aid or assist any person under twenty-one (21) years of age in purchasing or having delivered or served to him or her any alcoholic beverages.77

Although the second sentence of this section may be sufficiently ambiguous to permit a broad interpretation, it is doubtful that the General Assembly intended to create a right of action against social purveyors. In the first place, section 244.085 was enacted as part of a larger measure styled as an act “relating to minors purchasing alcoholic beverages.”78 Its purpose was to strengthen enforcement of the minimum drinking age by prohibiting the use of bogus identification, and by prescribing penalties for underage drinkers who induce an illegal sale of alcohol.79 In addition, the language of the second sentence, “purchasing . . . delivered . . . served,” closely parallels the language of another Kentucky statute which prohibits the sale of liquor to underage persons and which is applicable only in retail situations. That statute uses the language “sell, give away, or deliver,”78 and unquestionably applies only to retail operations. The second sentence in section 3 is best read, therefore, as merely prohibiting a person from assisting an underage drinker in purchasing alcohol, not furnishing it gratuitously on social occasions.

The legislative background of section 244.085 provides further evidence that it will not support a civil action against social purveyors. While early Kentucky statutes contained the same type of broad wording which made the decisions in Brattain and Brockett possible, there has been no such language on the statute books since 1922.81 All subsequent enactments have been directed solely to ven-

77. Id. § 244.085(3) (emphasis added).
81. See text accompanying note 72 et seq. supra.
dors, and it is therefore evident that the General Assembly intentionally omitted any reference to non-commercial purveyors.

In view of this legislative intent, it would be difficult for Kentucky courts to extend liability to the social host based on section 244.085 and negligence per se. This approach was used in *Pike v. George*,82 where the Court of Appeals created vendor liability by finding that a sister statute83 was enacted to protect the public from intoxicated minors. In that case the defendant clearly violated a penal statute, and his common law duty arose as a matter of law. However, in the social host context there can never be recovery under the present statutory scheme84 unless Kentucky courts are prepared to construe section 244.085 beyond its plain meaning, and find that a social host could violate it criminally. Given the legislative history of this statute, a plaintiff seeking recovery against a non-commercial purveyor will have a hard time convincing a court that section 244.085 prohibits the mere gratuitous furnishing of alcohol at social functions.

(C) Liability Based on Dram Shop Acts

1. The prima facie case—Courts in two jurisdictions have established the duty and liability of a social host by applying state dram shop acts. In *Williams v. Klemsrud*85 and *Ross v. Ross*,86 the courts simply concluded that neither the legislative history nor the language87 used in the statutes expressly confined their application to suits against vendors.

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82. 434 S.W.2d 626 (Ky. 1968).
84. In another line of cases, recovery against a social host was permitted on the basis of statutes prohibiting the furnishing of intoxicants to minors without a doctor's prescription, and the consumption of alcohol on public highways. As to the first basis, Kentucky has no corresponding statute, although such a measure was in effect until the end of prohibition. See Act of March 17, 1934, ch. 146, art. IV, § 12(c), [1934] Ky. Acts 630. The second basis for recovery is so narrowly drawn as to preclude widespread application beyond those cases in which the alcohol was furnished to a person while driving on a public highway. See *Thaut v. Finley*, 50 Mich. App. 611, 213 N.W.2d 820 (1973); *Lover v. Sampson*, 44 Mich. App. 173, 205 N.W.2d 69 (1972).
85. 197 N.W.2d 614 (Iowa 1972).
87. The statute which the Iowa court applied fairly admits of such a construction:

   Every . . . person who shall be injured in person or property . . . by any intoxicated person . . . shall have a right of action . . . against any person who shall, by selling or giving to another contrary to the provisions of this title any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages.

A common criticism leveled against liability founded on dram shop acts is that a strict liability rather than a negligence standard is being applied to social hosts. In many cases the various dram shop statutes were hastily drafted with little regard for the consequences which such sweeping language might create. In order to recover under most civil damages acts, the plaintiff would need only show: (1) that the defendant served alcohol to the person who caused the injury; and (2) that the person was intoxicated when the injury occurred. The net effect is to free the plaintiff from showing a negligent act, and to remove contributory negligence as a defense. Thus, a defendant cannot show that he exercised due care, or that he merely contributed, but did not actually initiate or cause, the state of intoxication which led to the plaintiff’s injury.

Those courts which have extended dram shop liability to social purveyors have unleashed a virtually limitless potential for civil suit. The only feasible protection against liability is to restrict one’s guests to a minimal amount of alcohol, or refrain from serving alcoholic beverages altogether. In light of existing social norms, and considering the alternatives available under negligence law, such burdens are grossly unrealistic. Furthermore, the dram shop acts were aimed at vendors who are in a position to pass on the economic losses through higher prices. The social host’s liability is personal, yet he is virtually an insurer. Liability without fault is best reserved for commercial enterprises, not private social hosts who are largely unable to protect themselves.

(2) Application in Kentucky—In the absence of a dram shop act in Kentucky, there is simply no opportunity to adopt the approach taken by the Williams or Ross courts. The remaining possibility, therefore, is to accomplish the goal of establishing social host liabil-

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90. See text accompanying notes 18-19 supra.
91. The Iowa court expressly held contributory negligence inapplicable. 197 N.W.2d at 617.
92. See Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149, 154 (1972) (concurring opinion).
93. The Oregon Supreme Court refused to find social host liability by resorting to that state’s dram shop act, and proceeded instead on negligence principles. Wiener v. Gamma Phi Chapter, 258 Ore. 632, 485 P.2d 18 (1971). Other courts have also declined to hold a social purveyor liable. E.g., Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964).
ity by means of legislative action in the General Assembly. In adopting any such proposal, however, the legislature should avoid the harsh results of strict liability and consider only a fault system based on negligence. The ideal solution would be a codification of the standard of care announced in *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*. For example:

(1) Any person not a retail licensee, who furnishes, in any manner, any alcoholic beverage to another, shall be civilly liable in damages where by reason of such person's intoxication the person or property of a third person is injured as a proximate result thereof.

(2) It shall be an affirmative defense to any action under this section that the defendant knew or should have known that the person to whom he furnished any alcoholic beverage was over 21 years of age, and not by appearance or character intoxicated, or likely to become so as the result of such furnishing.

Liability could result under this proposal whether the defendant had served a minor or an adult. Since the statute is intended to protect the general public from injuries caused by drunk drivers, there is no reason to limit recovery to underage drunk drivers. The same result is possible under the *Wiener* decision, where the Oregon Supreme Court specifically created a duty to deny alcohol to "those already severely intoxicated" as well as "young people." The major emphasis of the foreseeability test, however, is on underage drinkers, and consequently subsection (2) treats it as the critical factor.

Even if the person who had been served was an adult, it would not be a complete defense to show that he was less than totally intoxicated when the alcohol was given to him. Under the last clause in subsection 2, the defendant could not escape liability if he knew that the person is unusually affected by alcohol, "likely to become" intoxicated after one more drink. This would also cover the situation where a quantity of alcohol is furnished under circumstances where it is foreseeable that the person will drink it shortly thereafter.

Another feature of this proposal is the fact that only non-commercial purveyors are potential defendants. Under existing case

95.1. 485 P.2d at 23.
96. Id. at 21.
97. See id.
law in Kentucky, there is an adequate remedy for aggrieved third persons against liquor vendors. In *Pike v. George* the Court of Appeals permitted negligence per se recovery against a tavern keeper based on his illegal sale of whiskey to a minor in violation of a statute. Under that same statute it is also illegal to sell alcohol to an adult who is "actually or apparently under the influence." Therefore, case law in Kentucky furnishes adequate restraints on negligent liquor sales, and needs no legislative reinforcement.

IV. CONCLUSION

A person who dispenses alcohol to inexperienced youths or intoxicated adults has created an unreasonable risk of harm to the traveling public. His acts constitute negligence, the foreseeable hazards to third persons are catastrophic, yet he escapes liability. The common law rule of immunity which dictates this result was developed long before the automobile and drunk drivers, but most courts will still deny recovery against social hosts purely on the basis of this venerable precedent.

The modern trend in tort law is to hold social hosts liable to third parties for the negligent furnishing of intoxicants to a guest. Recognizing that the foundation of the old rule has sadly eroded over the years, a number of courts now extend liability as a logical response to the frequency and seriousness of alcohol-related traffic accidents.

In economic terms a shift to social host liability would not result in unreasonable financial burdens for the average person. For one thing, the social host's potential liability diminishes in direct proportion to his guest's capacity for contribution. Under Kentucky law relating to joint tortfeasors, the drunk driver would be legally and financially responsible to the same extent as his host. Moreover, standard homeowner's insurance policies provide coverage in the event of such personal liability, and increased protection would most likely be available without causing premiums to soar beyond reason.

98. 343 S.W.2d 626 (Ky. 1968). See text accompanying note 81 supra.
100. Id. § 244.080(2).
103. See, *Dram Shop Act*, supra note 93, at 81 n.74, where it is suggested that added protection would be nominal.
An important factor in controlling the financial impact of social host liability is careful definition of the standard of care. While strict liability is perhaps appropriate in connection with vendors, it is unjustifiably harsh when imposed on private individuals. The emphasis must be on fault, since the remedial objectives of social host liability are based on considerations of public safety, not simply on financial accountability.\textsuperscript{4}

A negligence standard, therefore, presents the most realistic solution and should be adopted by Kentucky courts as the theory for recovery. In view of the likelihood that negligence per se is foreclosed under existing statutes, the best approach is to establish a common law duty of care fashioned on the \textit{Wiener} model. In that decision the court struck the proper balance by narrowing the scope of liability to those social purveyors who violate the ordinary bounds of good sense.

With alcohol firmly established as a part of modern social ritual, there is certain to be a great deal of resistance to the idea that one can be civilly liable simply for being a "good host." In answer to this, one judge observed that

\begin{quotation}
[w]e are still our brothers keepers, and it would be a rare host at a social gathering who would knowingly give more liquor to an intoxicated friend when he knows his invitee must take care of himself on the highways and will potentially endanger other persons. Social justice and common sense require the social host to see within reason that his guests do not partake too much of his generosity.\textsuperscript{5}
\end{quotation}

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\textsuperscript{4} See generally Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149, 154 (1972) (concurring opinion).
\textsuperscript{5} Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566, 573-74 (1970) (Hallows, C.J., dissenting).
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SIXTH CIRCUIT NOTES

JURISDICTION—KENTUCKY LONG-ARM STATUTE—ACTIVITIES OF FOREIGN CORPORATION HELD TO CONSTITUTE "TRANSACTION OF BUSINESS"—Davis H. Elliot Co., Inc. v. Caribbean Utilities Co., Ltd., 513 F.2d 1176 (6th Cir. 1975).

In September, 1970, plaintiff and defendant entered into a contract in which plaintiff agreed to build approximately 25 miles of electrical distribution line for defendant on Grand Cayman Island. Plaintiff, Davis H. Elliot Co., Inc., was engaged in the electrical construction and contracting business, and was organized under the laws of Virginia. The defendant, Caribbean Utilities Co., Ltd., a British West Indies corporation, dealt exclusively in the manufacture, sale and distribution of electrical power on Grand Cayman Island.

A contract proposal had been mailed by plaintiff to Robert Odear, the Managing Director and General Counsel for defendant, at his law offices in Lexington, Kentucky. The proposal was returned to plaintiff by mail, bearing the approval and signature of James S. Shropshire, Vice Managing Director of defendant Caribbean Utilities.¹

Thereafter, in June, 1971, a meeting was held at Odear's law office with officers of both corporations in attendance. The purpose of the gathering was to resolve a disagreement concerning the adequacy of plaintiff's performance under the contract. An agreement was reached, and on June 29, 1971, Odear wrote to the plaintiff confirming, on the basis of "our conversation," that the contract would terminate the following month.² Defendant's letter was written on Caribbean Utilities Co. stationery, giving Odear's law office in Lexington as its address.

The agreement of June, 1971, failed to settle the dispute, and in 1973 Elliot filed a complaint against Caribbean and its individual officers in the United States District Court for the Eastern District of Kentucky. In its first allegation, Elliot charged that Caribbean had failed to reimburse it for nearly $26,000 incurred as the result of the termination.³ The second count alleged that the individual

¹. As related in the court's opinion, the facts do not indicate whether the letter was mailed from Lexington or elsewhere. See 513 F.2d at 1178.
². Id.
³. The first count also contained an allegation of wrongful appropriation of a motor vehicle which was valued at $1200. The district court quashed service on this claim "on the ground that Caribbean does not transact sufficient business in the Commonwealth of Kentucky to
officers were liable for wrongfully inducing the defendant corporation to breach the termination agreement.

Upon motion by Caribbean, the district court quashed service as to the claims in the first count on the ground that Caribbean did not transact sufficient business in Kentucky to permit service in that state. It also dismissed the second count for failure to state a claim upon which relief can be granted. Thereafter, Elliot appealed, and the Sixth Circuit reversed, holding that (1) Caribbean had the requisite minimum contacts with the state to subject it to the personal jurisdiction of the district court under the Kentucky long-arm statute; and (2) Elliot's complaint was sufficient to support a claim for relief.

**JURISDICTION OVER NONRESIDENTS**

The authority of state courts to exercise in personam jurisdiction over nonresidents has a long and well-documented history. In 1877 the Supreme Court held that "no state can exercise direct jurisdiction and authority over persons (or property) without its territory" unless such nonresidents can be served with process within the state, or unless they voluntarily submit to its jurisdiction. These jurisdictional theories of actual presence and consent may have served the needs of nineteenth century America, but as the population, commerce and their respective means of mobility and communications developed, so did the need for more flexible methods of asserting jurisdiction over nonresidents.

The advent of the automobile brought with it the nonresident motorist statute under which a foreign motorist, by using the forum state's highways, automatically "consented" to the jurisdiction of that forum. The exercise of jurisdiction based on "implied consent" make it amenable to service there and for "insufficiency of amount in controversy." Id. The Sixth Circuit upheld service and permitted plaintiff to aggregate his causes of action under 28 U.S.C. § 1332(a) (1970). 513 F.2d at 1182-83.


5. A comprehensive discussion of the court's finding in this regard appears at 513 F.2d at 1182.


8. See, e.g., MASS. GEN. LAWS ANN. ch. 90, § 3A (1975).
was sustained by the Supreme Court in *Hess v. Pawloski*, and was later used to permit jurisdiction over a nonresident on the basis that his agents were doing business within the forum. In the case of corporations, jurisdiction was sustained on the basis that the corporation gave its "consent" to be sued, or that it was "doing business" within the forum to a degree sufficient to establish its "presence."

Although the fictions of "implied consent," "presence" and "doing business" served to extend the jurisdictional power of state courts into previously untouched but necessary areas, the constitutionality of such theories was frequently questioned. The courts responded with a quantitative analysis which ignored other factors, such as inconvenience to the defendant, which could be relevant to the exercise of jurisdiction. Finally, the fictional theories of jurisdiction were rejected by the Supreme Court in *International Shoe Co. v. Washington*. Under the new test, the exercise of jurisdiction by the forum state was held to be proper if the nonresident "has certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice."

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9. 274 U.S. 352 (1927). The Court sustained the exercise of jurisdiction not only on the ground that the nonresident, by using the state's highways, had impliedly consented thereto, but also emphasized the dangerous propensities of motor vehicles which the state had a right to regulate. *Id.* at 356. Emphasis was placed on the dangerous character of the automobile in an effort to distinguish the Court's earlier decision in *Flexner v. Farson*, 248 U.S. 289 (1919), which held that nonresident individuals could not be deemed to have consented to jurisdiction simply by doing business in a state, since the state was without power to exclude them.

10. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935). Although the Iowa statute under consideration in *Goodman* addressed itself to "any business," jurisdiction was not predicated on the fact that defendant's agents were necessarily "doing business" within the forum state, but rather focused on the type of business in which the defendant was engaged. The type of business was the sale of securities, an activity which was subject to special regulation by the state, as was the use by nonresidents of Massachusetts state highways in *Hess*. The *Flexner* decision was distinguished on the ground that service there was upon an individual who was no longer acting as agent for the defendant. One authority has suggested that such a ground was so tenuous that the Court may be said to have overruled *Flexner*. See, *State-Court Jurisdiction, supra* note 6, at 918 n.54.

11. See, *State-Court Jurisdiction, supra* note 6, at 919-23.


13. 326 U.S. 310 (1945). In *International Shoe*, the State of Washington sought to collect unemployment compensation taxes from the defendant, a Delaware corporation with its principal place of business in Missouri, which had no contacts with Washington aside from its employment of salesmen to solicit orders in that state. The Supreme Court, in an opinion by Chief Justice Stone, held that the defendant's activities constituted sufficient contacts with the plaintiff State to make it fair, just and reasonable for Washington to enforce the tax obligation. *Id.* at 320.

14. *Id.* at 316. The reasonableness/fairness test of determining the propriety of jurisdiction had been utilized to a very limited extent prior to *International Shoe*. See *Hutchinson v.*
unanswered, i.e., what were the boundaries of due process with respect to the assertion of jurisdiction over nonresidents?\textsuperscript{15}

Since 1945 the Supreme Court has addressed itself on two occasions to this particular question. In \textit{McGee v. International Life Insurance Co.},\textsuperscript{16} the Court effectively dropped all bars to jurisdiction over nonresidents by sustaining California’s exercise of jurisdiction over a foreign insurance company which had no office or agent soliciting business in that state. Its only contact with the forum was the presence of the insurance policy which was the subject of the suit. Although \textit{McGee} indicated that there was virtually no limit to the extent of a state’s power to exercise jurisdiction over nonresidents, the Supreme Court adopted a contrary position one year later. In \textit{Hanson v. Denckla},\textsuperscript{17} the authority used to sustain jurisdiction over the nonresidents was \textit{McGee}, which was distinguished as follows:

\[ \text{The requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of } \textit{Pennoyer v. Neff} \ldots \text{to the flexible standard of } \textit{International Shoe Co. v. Washington}. \ldots \text{But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.} \ldots \text{Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limita-} \]

\begin{flushright}
\textsuperscript{15} Chief Justice Stone set forth some guidelines in this area by observing that:

\text{[T]he criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity. \ldots is a little more or a little less.}\\
\text{326 U.S. at 319.}

The phrase “boundaries of due process” is derived from these guidelines. The phrase is necessarily imprecise. It simply refers to the existence of such “boundaries” in any jurisdictional inquiry. A description of the dimensions of these boundaries can only be provided under the facts of a particular case. Therefore, the use of the phrase serves two purposes in that it not only certifies the presence of such boundaries, but also requires a case-by-case inquiry as to the limits imposed by such presence.

\textsuperscript{16} 355 U.S. 220 (1957).

\textsuperscript{17} 357 U.S. 235 (1958). In \textit{Hanson}, a Pennsylvania domiciliary executed a trust instrument in Delaware, naming a Delaware bank as trustee. The settlor later moved to Florida where she attempted to exercise her power of appointment over the trust in favor of two of her grandchildren. Following her death, an action was brought in Florida by the settlor’s residuary legatees asserting the power of appointment had not been effectively exercised and that they were thus entitled to the appointed property as a part of her residuary estate. The Delaware trustee was served by publication and by mail. The Supreme Court, reversing the Florida decision that personal jurisdiction over the Delaware trustee was valid, held that sufficient minimum contacts did not exist between Florida and the trustee to make the latter amenable to service of process in that state.\]

\textsuperscript{15} Chase & Gilbert, Inc., 45 F.2d 139 (2d Cir. 1930); Farmers’ & Merch. Bank v. Federal Res. Bank, 286 F. 566 (E.D. Ky. 1922).

\textsuperscript{16} Chase & Gilbert, Inc., 45 F.2d 139 (2d Cir. 1930); Farmers’ & Merch. Bank v. Federal Res. Bank, 286 F. 566 (E.D. Ky. 1922).
tions on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that state that are a prerequisite to its exercise of power over him.\textsuperscript{18}

\textit{Hanson} thus indicated that there are indeed some limits embodied in the due process clause beyond which state courts cannot go in exercising extra-territorial jurisdiction. In this context the Court re-emphasized the due process restraints on the minimum contacts doctrine, stating that “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”\textsuperscript{19} It remained for the courts to determine whether this constitutional limitation of fairness imposed by the due process clause had been offended in the particular case presented.

The evolution of jurisdictional inquiries by the Supreme Court from \textit{Pennoyer} to \textit{Hanson} not only provided some guidance to the courts in determining the boundaries of due process, but also afforded guidelines to the states within which jurisdictional legislation could be structured. Prior to \textit{International Shoe}, jurisdiction statutes utilized the well-worn phrases “consent,” “presence” and “doing business” as the basis for jurisdiction.\textsuperscript{20} Since \textit{International Shoe} abandoned these fictional concepts in favor of a “fairness” test, it remained to be seen whether state legislatures would follow suit.

\textbf{LONG-ARM IN KENTUCKY}

In 1946, the Kentucky General Assembly enacted a long-arm statute which provided for jurisdiction over foreign corporations in certain limited circumstances.\textsuperscript{21} However, this statute was not responsive to the standard provided by \textit{International Shoe} and was criti-

\textsuperscript{18} Id. at 251 (citations omitted).
\textsuperscript{19} Id. at 253.
\textsuperscript{20} See, State-Court Jurisdiction, supra note 6, at 998-1000.

This section contained two basic requirements which had to be met before jurisdiction could be obtained over nonresident corporations: (1) the corporation must have been doing business within Kentucky without having complied with the provisions of Ky. Rev. Stat. Ann. § 271A.385 (1974), concerning the designation of a process agent; and (2) the cause of action must have arisen out of, or have been connected with, the doing of business by the corporation in Kentucky. A third limitation implicit in the statute was its application to foreign corporations only, thereby precluding its applicability to nonresident individuals.
cized for that reason. Because of the restrictiveness and narrowness of the 1946 statute, the General Assembly enacted a broader long-arm statute in 1968. It is with the interpretation and effect of this statute that the Sixth Circuit was concerned in the Elliot case.

In light of the fact that a state is not required to exercise the full judicial power that the Constitution will permit, it was initially necessary for the Sixth Circuit to determine whether the Kentucky General Assembly, through the enactment of the long-arm statute, intended the limits of personal jurisdiction to be co-extensive with the boundaries of the due process clause. Once the limits of jurisdiction authorized by the statute were established, a second inquiry was necessary to determine whether the exercise of jurisdiction over Caribbean was within or without those limits.

The pertinent provision of the Kentucky long-arm statute under consideration provides for the exercise of personal jurisdiction over a corporation “transacting any business in this Commonwealth.” Caribbean urged that this phrase was simply a “codification” of judicial interpretations of the phrase “doing of business” found in the former Kentucky statute, and as such was not co-extensive with

Provisions for making foreign corporations subject to service in the State is a matter of legislative discretion and a failure to provide such service is not a denial of due process. . . .
42 U.S. at 440, citing 257 U.S. at 535.
25. The question has arisen in the past whether a federal court, in the absence of a federal statute, is limited by, or is obligated to follow, the particular jurisdictional principles of the state in which it sits, or whether it is free to develop a federal test of amenability to suit. The Sixth Circuit follows Judge Friendly’s decision in Arrowsmith v. United Press Int’l, 320 F.2d 219 (2d Cir. 1963), which held that the question of whether a foreign corporation is subject to suit in a state is governed by the law of the state where the district court sits, rather than by federal law. See Velancha v. Regie Nationale des Usines Renault, 336 F.2d 292 (6th Cir. 1964). See generally Comment, Choice of Law in the Federal Courts: Use of State or Foreign Law to Determine Foreign Corporation’s Amenability to Suit, 1964 Duke L.J. 351 (1964).
26. 513 F.2d at 1179.
(1) as used in this section, “person” includes . . . a corporation . . . [which] is a non-resident of this commonwealth.
(2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person’s:
(1) Transacting any business in the commonwealth . . .
the boundaries of due process. The Sixth Circuit disagreed with this position for two reasons. First, reference was made to a number of judicial interpretations of the former long-arm statute which had cited International Shoe and its progeny as authority to indicate that the term "doing of business" had been interpreted as being co-extensive with the limits of due process. Second, and more compelling to the Sixth Circuit, was the fact that the present Kentucky statute was practically identical to the Illinois long-arm statute which had been interpreted to extend jurisdiction to the limits of due process. Therefore, the court held the limits of personal jurisdiction authorized by the Kentucky statute to be co-extensive with the boundaries of the due process clause.

(1) The "Transacting any Business" Provision in the Kentucky Long-Arm Statute is not a Codification of Judicial Interpretations of the "Doing of Business" Provision in the Former Statute.

Having found the limits imposed by due process and the limits imposed by the Kentucky General Assembly to be identical, the court was faced with determining whether those limits had been violated under the facts presented. The Sixth Circuit applied the three-pronged test which it developed in 1968 to facilitate such jurisdictional inquiries:

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

29. ILL. ANN. STAT. ch. 110, § 17(1)(a) (Smith-Hurd 1971).
31. 513 F.2d at 1180-81.
32. Southern Mach. Co. v. Mohasco Indus., 401 F.2d 374, 381 (6th Cir. 1968). Southern Machine was an action by a licensee for declaratory judgment against the other party to the licensing agreement which was dismissed by the district court for lack of in personam jurisdiction. The Sixth Circuit reversed.

The court found that it was contemplated by the defendant that the machines which were subject to the licensing agreement were to be marketed in Tennessee, and that such a machine had in fact been sold in Tennessee and, therefore, the agreement had a foreseeable, direct impact on the commerce of Tennessee at the time it was executed. The court also found that the defendant had purposefully availed itself of the privilege of transacting business in Tennessee.

33. 513 F.2d at 1181, citing 401 F.2d at 381.
Caribbean's activities—the adoption of a Lexington address, the negotiation of a termination agreement in Lexington, and the finalization of the agreement in a letter prepared in and evidently sent from Lexington—were found by the court to constitute purposeful activity within Kentucky. The court further held that Elliot's cause of action arose from Caribbean's activities in Kentucky since it was based upon a contract voluntarily made in that state. Finally, the court held that if "fair play and substantial justice" would be offended by the maintenance of the action, or if the exercise of jurisdiction would be unreasonable, Caribbean had failed to so demonstrate.34

Caribbean's first line of defense was its assertion that the new Kentucky long-arm statute does not permit the exercise of jurisdiction over nonresidents to the limits of the due process clause. To sustain this argument, Caribbean attempted to persuade the Sixth Circuit that the new statute was not, in fact, "new" at all, but was simply the former "doing of business" statute disguised in different terminology only. The acceptance of this argument would have placed Caribbean on more favorable jurisdictional ground, since judicial interpretations of the former statute indicated that its extra-territorial reach did not extend to the limits permitted by due process. The court was thus presented with two questions: (1) was the "transacting any business" standard in the new statute simply a "codification" of judicial interpretations of the "doing of business" standard contained in the former long-arm statute; and (2) had those state courts which interpreted the "doing of business" standard indicated that it did not extend to the boundaries permitted by due process?35

The former Kentucky long-arm statute,36 providing for the exercise of jurisdiction over foreign corporations found to be "doing business" within the state, was enacted in 1946. This date could indicate that the statute was enacted in response to the principles announced the previous year in International Shoe, which permitted the exercise of jurisdiction based on minimum contacts. However, the date of enactment could also indicate that attention was given to prevailing interpretations of the long-arm statutes of the

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34. 513 F.2d at 1182.
35. Id. at 1179.
period which consistently utilized the "doing business" standard.\(^{37}\)

Prior to *International Shoe*, "doing business" statutes were interpreted as requiring business to be done in a "continuous and systematic" manner.\(^{38}\) In cases involving solicitations of sales within a state, courts usually required something more than mere solicitations to sustain the exercise of jurisdiction.\(^{39}\) Although *International Shoe* swept away the necessity for requiring "continuous and systematic" business activities or "solicitation plus" to sustain the exercise of jurisdiction, it remained for the courts, in the absence of clear legislative direction, to determine the jurisdictional limits to which the "doing business" statutes might extend.\(^{40}\) The Sixth Circuit was of the opinion that the decisions interpreting the Kentucky "doing of business" statute had extended its jurisdictional reach to the limits of due process.\(^{41}\) This finding was based on the fact that state courts had looked to *International Shoe* and its progeny "as the touchstones for determining the scope of personal jurisdiction of the Kentucky courts in 'doing of business' cases."\(^{42}\)

Based on the four cases cited by the Sixth Circuit,\(^{43}\) this conclusion is not entirely free of doubt. The brevity of the jurisdictional inquiry undertaken by the Kentucky Court of Appeals in *Field Enterprises Educational Corp. v. Hopkins*\(^{44}\) does not support its description as a "touchstone" for determining the scope of personal jurisdiction.\(^{45}\) Moreover, another state decision, *Charles Zubick & Sons v. Marine Sales & Service*,\(^{46}\) although citing *International Shoe*...
as authority, sustained the exercise of jurisdiction over the nonresident corporation on the basis of three to four years of continuous and substantial business activity within Kentucky. Such a standard is entirely consistent with the restrictive interpretations of "doing business" statutes enacted prior to 1945.47

The two remaining cases48 cited by the Sixth Circuit are federal decisions which rely heavily upon International Shoe, Field Enterprises and Zubick. Neither case presented a fact situation which called for an in-depth examination of the scope of personal jurisdiction under the "doing of business" statute.49 From a survey of state and federal decisions purporting to define the scope of the former long-arm statute, it is apparent that those courts were hampered by the absence of circumstances which would have afforded an opportunity to define precisely the scope of the statute.50 Therefore, the most that can be said regarding the jurisdictional reach of the former "doing of business" statute is that its scope was never fully determined by the courts interpreting it, and that the Sixth Circuit in Elliot attributed to it a flexibility which was not clearly supported by previous case law.51

Although the opinion of the Sixth Circuit that the limitations inherent in the former long-arm statute were co-extensive with the limits of due process is not especially well-founded, its opinion on

47. The Zubik opinion suggests at one point that the Kentucky "doing of business" standard could reach to the limits of due process when it stated that "it might even be argued that a single act of doing business might be enough." Id. at 36. However, the court did not find it necessary to inquire further into the subject as defendant's activities in Kentucky were more than sufficient to constitute "doing business."


49. In McKenna v. Udall, 418 F.2d 1171 (D.C. Cir. 1969), the jurisdictional issue was hypothetically decided; the nonresidents under discussion were not before the court. In the other case, Irby v. All State Indus., 305 F. Supp. 772 (W.D. Ky. 1969), the nonresident swimming pool manufacturer had no contacts with the forum state and was held not amenable to service of process.


51. For a discussion of how some state courts faced with interpreting "doing business" statutes have held that they should be allowed to contract and expand according to the prevailing due process limitations, see State-Court Jurisdiction, supra note 6, at 1000-02.
that question, pro or con, was not vital to its ultimate decision. The statute presented to the court was not, as Caribbean argued, of the same character as the former “doing of business” statute. Rather, it was an entirely new vehicle granting extra-territorial powers to Kentucky courts, and, as the Sixth Circuit correctly determined, references to judicial interpretations of the former statute were out of place. Thus, even if there were some merit in Caribbean’s position that the limits of the former statute did not extend to the limits of due process, a possibility which the Sixth Circuit conceded, there was absolutely no foundation for its position that the phrase “transacting any business” was a “codification” of judicial interpretations of the “doing of business” standard embodied in the former statute.

(2) The Kentucky Long-Arm Statute Extends Jurisdiction to the Limits of Due Process.

Since the Kentucky Court of Appeals had not yet been called upon to interpret the Commonwealth’s new long-arm statute, the Sixth Circuit was obligated to interpret the statute as if the question were actually before the Kentucky Court of Appeals. To facilitate this inquiry, the Sixth Circuit looked to judicial interpretations of the long-arm statutes in Ohio and Illinois. The similarity between the language used in these statutes and the language of their Kentucky counterpart, coupled with the fact that the limitations on the two foreign statutes and the limitations imposed by due process had been held to be coextensive, led the Sixth Circuit to conclude that the limitations inherent in the Kentucky statute were also coextensive with the limits of due process.

The constitutionality of the Illinois long-arm statute was sustained by the Illinois Supreme Court in Nelson v. Miller. This decision was based on “the legitimate interest of the State in providing redress in its courts against persons who, having substantial contacts with the State, incur obligations to those entitled to the State’s protection.” The court further found the limits of the Illi-

52. 513 F.2d at 1180.
55. ILL. ANN. STAT. ch. 110, § 17(1) (Smith-Hurd 1968).
56. 513 F.2d at 1180.
57. 11 Ill. 2d 378, 143 N.E.2d 673 (1957).
58. Id. at 382, 143 N.E.2d at 679.
nois long-arm statute and those imposed by due process to be co-
extensive. The provision was said to "reflect a conscious purpose to
assert jurisdiction over nonresident defendants to the extent permit-
ted by the due-process clause."59

The Sixth Circuit placed great emphasis on the Nelson decision
when it was called upon to identify the limitations of jurisdiction
in the Ohio long-arm statute in In-Flight Devices Corp. v. Van
Dusen Air, Inc.60 The In-Flight decision cited the identity between
the Ohio and Illinois statutes and noted that the construction of the
Illinois provision in Nelson had been "widely heralded as a decision
of major import [which]. . . could not have escaped the Ohio legis-
lators during their deliberations."61 Therefore, the limitations on the
exercise of extra-territorial jurisdiction by Ohio courts was held to
be co-extensive with the limits of due process. Identical reasoning
was used in Elliot to determine the limits of the Kentucky long-arm
statute. As the Kentucky provision was substantially identical to
the Illinois statute, the Nelson construction was said to be equally
applicable.62

This result is sound for several reasons. It must be observed that
the "transacting any business" provision of the Kentucky statute is
identical in content to the Uniform Interstate and International
Procedure Act.63 The official comments64 to this Act disclose that its
"transacting any business" provision is derived from the Illinois Act
and should be given the same broad interpretation as that found in
the Nelson case. Furthermore, the courts in those states which have
adopted the uniform provision have arrived at the same due process
result.65 Finally, the caption and preamble to the 1968 long-arm

59. Id.
60. 466 F.2d 220 (6th Cir. 1972).
61. Id. at 225.
62. 513 F.2d at 1180. The Kentucky Court of Appeals has specifically used this type of
reasoning to interpret statutes of other states. In Conney v. Parsley, 192 Ky. 827, 234 S.W.
972 (1921), the Court of Appeals observed:
While the courts of one state, which has adopted in terms a statute previously passed
by another state, will not be bound by the interpretation of the courts of such other
state, the interpretations of the courts of that state before the enactment by the sister
state are treated as persuasive and will ordinarily be followed.
Id. at 837, 234 S.W. at 976.
63. Uniform Interstate and International Procedure Act § 103(a)(1).
64. Id., Commissioner's Comment.
Inc. v. Denver Fire Clay Co., 496 F.2d 117 (Okla. 1972); but see George v. Strick Corp., 496
F.2d 10 (10th Cir. 1974).
legislation indicate the desire of the Kentucky General Assembly for an expanded basis of jurisdiction over nonresidents.\textsuperscript{66} Thus, the finding by the Sixth Circuit that the limitations of the Kentucky long-arm statute are co-extensive with the limits of due process is consistent with legislative intent, and as such is not unwarranted.

(3) \textit{Caribbean had the Requisite "Minimum Contacts" with Kentucky to Subject it to the Personal Jurisdiction of the District Court.}

Once the limits of jurisdiction imposed on the long-arm statute had been delineated, it remained for the Sixth Circuit to determine whether these limits would have been violated by the exercise of jurisdiction over Caribbean. In the Sixth Circuit, such jurisdictional inquiries are conducted through the utilization of a three-pronged test\textsuperscript{67} which was developed from a general overview of \textit{International Shoe}, McGee and Hanson.\textsuperscript{68}

(4) \textit{First, Did the Defendant Purposefully Avail Itself of the Privilege of Acting in the Forum State or Causing a Consequence in the Forum State?}

The main thrust of Caribbean's argument against the exercise of jurisdiction was its contention that it had not engaged in purposeful activity in Kentucky. Caribbean stated that its only reason for placing a Lexington address on its letterhead stationery was to prevent a delay in communications between Odear, as Managing Director of Caribbean, and his law office in Lexington. Beyond that, defendant argued, its activities in supplying, or contracting to supply, electrical power to a Caribbean island certainly had no "realis-
tic impact" on the commerce of Kentucky. The difficulty with this issue, of course, lies in determining what constitutes "purposeful activity."

The "purposeful activity" test is clearly derived from the Supreme Court's decision in Hanson, and has been implemented by the Sixth Circuit in Southern Machine Co. v. Mohasco Industries, Inc. The test, simply stated, is that if the defendant transacts any business with the forum state through which it acquires a legally protected right, it has acted within that state. The Sixth Circuit found that the maintenance of the Lexington address, the negotiation and conclusion of the termination agreement in Lexington, and the formalization of the agreement by letter in Lexington, combined to constitute "purposeful activity" on the part of Caribbean. The propriety of this result is apparent from the fact that Caribbean assumed the privilege of conducting activities in Kentucky when it elected to maintain a mailing address in Lexington. Further, Caribbean acted upon that assumed privilege by negotiating and concluding the termination agreement in Kentucky. These activities make it clear that Caribbean had enjoyed, or had the potential to enjoy, the benefit and protection of the laws of Kentucky. Thus, had Elliot breached the contract, the courts of Kentucky would have been available to Caribbean.

Although little difficulty is encountered in concluding that Caribbean had "purposefully acted" in Kentucky for purposes of jurisdiction, some confusion does arise in attempting to determine whether Caribbean's activities had a realistic impact on the commerce of Kentucky. This concept of "realistic impact on the forum's commerce" was utilized by the Sixth Circuit in Southern Machine and has been described as an elaboration on the "purposeful activity"

70. 401 F.2d at 381.
71. See, A New Sole for International Shoe, supra note 68, at 352-53.
72. 513 F.2d at 1181-82.
74. In Southern Machine the court stated:
For purposes of [general fairness], business is transacted in a state when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state . . . .
401 F.2d at 382.
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requirement in terms of the "transacting any business" clause of a long-arm statute. Caribbean utilized this elaboration to assert that the transactions which were related to the termination agreement had no realistic impact on the commerce of Kentucky. It equated "commercial impact" with "financial gain or loss in Kentucky," reasoning that while the breach of a contract between a West Indian corporation and a Virginia corporation might produce a gain or loss in those respective domiciles, it would certainly not produce such a result in Kentucky. This logic is acceptable in that some positive commercial effect would obviously be had in Virginia and on Grand Cayman if the contract had been performed, and a negative effect would have resulted in both locales from a breach. What then was the commercial impact in Kentucky? To this question, the Sixth Circuit could not supply a satisfactory answer. It simply stated that the effects of such a breach "may not be readily quantifiable, but they are, nevertheless, real."

The court's difficulty in identifying commercial realities stems from the fact that the circumstances of Elliot were not susceptible to the "commercial impact" elaboration. This elaboration has been utilized by the Sixth Circuit in circumstances where contact with the forum state consisted of some commercial enterprise which would take place within the forum state. Hence, any breach of contract by a non-resident would have a specific commercial effect within the borders of that state. The "commercial impact" concept lends support to the relative fairness of jurisdiction in such circumstances, but its application is awkward, at best, under the facts of Elliot. However, it is important to note that the "commercial impact" concept is not an absolute prerequisite in finding that a non-resident has "purposefully acted" in the forum state. Rather, it is

76. 513 F.2d at 1181-82.
78. The Sixth Circuit observed in In-Flight that the Southern Machine decision had set forth, in somewhat more concrete terms, one essential element of the "traditional notions of fair play" required by International Shoe. This was the purposeful activity requirement, "designed to avoid the situation when the unilateral activity of the plaintiff can drag an unsuspecting and unwilling defendant into a foreign forum." In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 226 (6th Cir. 1972). The "concrete term" developed in Southern
an elaboration of the "purposeful activity" test which is a useful factor to consider in determining whether one has "transacted business" within a state, although such utility may be restricted by the facts presented.

(5) Second, Did the Cause of Action Arise from the Defendant's Activities in the Forum State?

The fact that the claim must arise from the defendant's activities in the forum was explicit in the former Kentucky long-arm statute and remains as part of the present provision as it has been construed in the Sixth Circuit. This requirement is fundamental to an assertion of jurisdiction over nonresidents within the boundaries of due process and has been so described. Although it did not elaborate, the Sixth Circuit correctly found the breach of contract action of Elliot to have arisen out of Caribbean's activities in Kentucky. This is demonstrated clearly by the fact that the contract upon which the claim was based was voluntarily negotiated in Kentucky by Caribbean's officers and agents.

As is true of all three standards outlined in Southern Machine, this second requirement is derived from a combined reading of International Shoe, McGee and Hanson, in which cases the requirement was satisfied in the first two, but was significantly absent in the third. It is important to note that this standard has not been universally applied. For example, the Pennsylvania long-arm statute has been held not to require the cause of action to arise within Pennsylvania as long as the defendant is doing any business at all in Pennsylvania. In Glen Knit Industries, Ltd. v. E. F. Timme & Son, Inc., the defendant foreign corporation asserted the fact that the cause of action did not arise in Pennsylvania even though the

Machine was the "commercial impact" concept, which serves as an indicia of "purposeful activity," but does not of itself constitute an independent standard. See, A New Sole for International Shoe, supra note 68, at 352-53.

79. Act of March 21, 1968, ch. 46, [1968] Ky. Acts 152. This prerequisite was sustained under the former statute in Etheridge v. Grove Mfg. Co., 415 F.2d 1338 (6th Cir. 1969), which held that there was no jurisdiction over the cause of action because it did not arise out of defendant's activities in Kentucky, even though the defendant had sufficient contacts to be considered as "doing business" within due process limitations.

80. 513 F.2d at 1182.


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The corporation conducted unrelated business there, citing as authority *In-Flight.* The district court, applying Pennsylvania law, found the phrase "any action arising within this Commonwealth" to mean "nothing more than [that] the cause of action is filed in Pennsylvania," and that *In-Flight* did not state the correct law. This result departs from the guidance provided by *International Shoe* and its progeny, and should not be followed as precedent. In any event, *Southern Machine* is the prevailing law in the Sixth Circuit regarding where the cause of action must arise in order to invoke the powers of a long-arm statute.

(6) Third, Did the Acts of the Defendant, or the Consequences Thereof, Have a Substantial Enough Connection with the Forum State to Make Jurisdiction Reasonable?

The third standard of *Southern Machine* is addressed to the due process concepts of "fair play and substantial justice" as embodied in the philosophy of *International Shoe.* The virtue of the standard is found in its flexibility, but this precludes the possibility of creating definitive guidelines by which courts may determine what is fair and what is unfair. Nevertheless, some considerations may be enumerated which have proved helpful to the courts in determining the propriety of exercising extra-territorial jurisdiction.

One consideration often receiving attention is the extent of the forum state's interest in the controversy. This aspect is derived from cases in which a state interest was found in protecting citizens from nonresident motorists, and in regulating the sale of securities and insurance. A state interest has also been found in resolving a suit brought by one of its residents, and in securing for its businessmen the benefits of their bargains. Although the existence of a bona fide state interest in the controversy is not alone sufficient to make the exercise of jurisdiction over the defendant reasonable, it is a factor which must be considered in any jurisdictional question.

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85. Id. at 1177-78.
86. Id.
Another factor considered in determining the reasonableness of the exercise of jurisdiction has been referred to as "an estimate of the inconveniences" and as a "balancing of conflicting interests." This idea of balancing the "conveniences/interests" has been analogized to the doctrine of forum non conveniens. Under this approach the factors which are often considered include ease of access to sources of proof; availability of witnesses; the need to view the premises, if appropriate; the public interest of the court; and all other factors which would make trial of the case easy, expeditious and inexpensive. Trial convenience to the defendant is another factor deserving of consideration. Although such convenience was de-emphasized in Hanson and cannot alone be determinative, it is, nevertheless, a potentially persuasive factor in a minimum contacts inquiry.

Courts often consider the status of the defendant as a buyer or a seller, or as a consumer or businessman, as factors in a "fairness" determination. The rationale behind making a jurisdictional distinction between a defendant's status as a buyer or as a seller is found in the fact that in a commercial setting it is more frequently the seller who comes into the state to sell something. While the buyer maintains a more passive role, it is usually the seller who is the "aggressor" and thus more likely to have acted in a manner rendering him subject to long-arm jurisdiction. Further, if the nonresident buyer is a consumer or a local businessman who makes infrequent interstate transactions, the propensity of a state court to exercise its long-arm jurisdiction should be reduced.

94. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930).
96. Id. at 790-91. Under the doctrine of forum non conveniens, a court may, in its discretion, decline to exercise jurisdiction over a transitory cause of action when it believes the action may be more appropriately tried elsewhere. See, A New Sole for International Shoe, supra note 68, at 357.
98. In Hanson the Supreme Court observed that "those restrictions [on extra-territorial jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant litigation." 357 U.S. at 251.
As the above factors indicate, application of the third standard of *Southern Machine* will ultimately depend upon the circumstances of the particular case presented. Any enumeration of factors and guidelines to assist in such an application will be limited only by the infinite variety of possible circumstances.

In *Elliot*, the Sixth Circuit did not undertake an independent discussion of the "fairness" standard, but simply concluded that maintenance of the suit against Caribbean would not be unreasonable or offend traditional notions of fair play and substantial justice. The omission of such a discussion possibly resulted from the fact that *Elliot* did not present the standard long-arm conflict of resident versus nonresident, but dealt rather with two nonresidents. This circumstance of the nonresidency of both parties does not lend itself to an analysis utilizing the traditional fairness standards which are usually present where one of the parties is a resident of the forum. As the plaintiff was a nonresident, the state did not have a great interest in protecting its rights against the defendant. The "commercial impact" on Kentucky, which was not identifiable, fails to increase Kentucky's interest in the matter. Why then was it fair to exercise jurisdiction over Caribbean? The answer is at the very foundation of the fairness requirement and it may be explained in terms of a balancing of interests. In most long-arm decisions, the interest of providing the resident plaintiff with a forum is weighed against unfairness which might result to the defendant. The "commercial impact" on Kentucky, which was not identifiable, fails to increase Kentucky's interest in the matter. Why then was it fair to exercise jurisdiction over Caribbean? The answer is at the very foundation of the fairness requirement and it may be explained in terms of a balancing of interests. In most long-arm decisions, the interest of providing the resident plaintiff with a forum is weighed against unfairness which might result to the defendant. In *Elliot*, the interest of Kentucky in providing a forum for the nonresident plaintiff was negligible and the decision cannot be explained in those traditional terms. Therefore, the focus of the decision was on the unfairness to Caribbean if jurisdiction were asserted, and the Sixth Circuit found, by reason of Caribbean's activities in Kentucky, that such unfairness would not result. The *Elliot* decision aptly demonstrates that fairness, with its inherent flexibility, is the key word in any jurisdictional analysis.

**Conclusion**

The significance of the Sixth Circuit's decision in *Elliot* is that it represents the first judicial inquiry into the specifics of the Ken-

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103. 513 F.2d at 1182.

104. Following the determination that the limits of the Kentucky statute were co-extensive with the limits of due process, the decision and analysis in *Elliot* focus on the "transacting any business" provision of the statute and do not deal with the other bases of jurisdiction. See *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 229-32 (6th Cir. 1972).
tucky long-arm statute. As such, it provides guidelines by which nonresident individuals or corporations may gauge their affairs and determine their amenability to service of process in Kentucky. In enacting the long-arm statute, the stated goal of the Kentucky General Assembly was to extend the permissible scope of jurisdiction over nonresidents. Through *Elliot*, that goal has been attained.

Ridley M. Sandidge, Jr.

Three days after an armed robbery/murder was committed in Louisville, Kentucky, appellant Minor, having learned that he was being sought as a suspect, appeared with his lawyer at a police station. When he was asked to make a statement he declined, explaining that counsel advised him not to do so. Thereafter, appellant was charged with armed robbery and willful murder. He was tried, convicted and sentenced to two concurrent terms of life imprisonment.

The prosecution’s case-in-chief rested largely on the testimony of two witnesses who placed appellant at the scene of the crime. No mention was made of the fact that the accused had presented himself to police and that he had refused to make a statement. Nor was there any evidence on the record that he had received his Miranda warnings.

During the defense’s case-in-chief, the accused took the stand and asserted the alibi that he was at home asleep. On cross-examination the following exchange of questions and answers took place:

“Q. Now, tell this jury, please, if you have ever told between June 28th, 1968 and this good day June 11th, 1969 if you’d ever told the story before to anyone, including the police, that you were home this night asleep.

“A. Yes, well, I discussed it with my attorney.

“Q. I understand that. I’m asking if you told the police that night when you went to headquarters or if you ever told anyone besides your attorney until this good day that you were at home that night?

“Mr. Shobe: I will stipulate, Your Honor, that I advised my client not to discuss this with the police.

“Mr. Ousley: Oh, no. Mr. Shobe, I’m not saying anything about you. I’m just asking the question if he told anyone besides his attorney.

“The Court: Overruled. I’m going to let the witness answer.

1. See Minor v. Commonwealth, 478 S.W.2d 716 (Ky. 1971).
2. 527 F.2d at 2.
3. The first of these was a victim of the robbery, who made an in-court identification of appellant based on a police line-up. The other witness testified that he had seen the accused in the vicinity of the robbery within 15 or 20 minutes before the crime occurred. Id. at 6 (Weick, J., dissenting).
4. Id. at 4.
"A. I hadn't discussed anything with anyone other than my lawyer.
"Mr. Ousley: I understand, that's what you are telling the jury. You
did not tell the police a year ago this story that you're telling the jury
today, did you?
"A. No, I-
"Q. On the advice of your attorney, I understand that; correct?
"A. Correct.
"Q. You never told anyone else: correct?
"A. Correct."

No objection was raised to this line of questioning. In addition, the
alibi was corroborated by two of the appellant's sisters and his aunt.
At the close of the defense's case-in-chief no motion for a directed
verdict of acquittal was made.6

Later, during his closing argument, the prosecutor pointed out
that the accused's silence at the police station, together with his
alibi story a year later at trial, showed that his defense was a perju-
rious fabrication. "[A]ny decent, good citizen," argued the prose-
cutor, "would go to the police" and say: "'Mr. Policeman, you're
all wrong. I was at home in bed and my two sisters will tell you
that.'"7 The alibi, concluded the prosecutor, was a "phony."8

Again, the defense made no objection, nor did it move for a mistrial.
After the guilty verdict was returned, however, the accused made a
fruitless motion to vacate.9

5. Id. at 2 n.1.
6. See note 16 infra.
7. The Sixth Circuit quoted the prosecutor as saying:
   "'[H]ere's something that I do not understand and I've been at this game a long
time. If you are wanted for a crime you didn't commit and you knew police were looking
for you, any decent, good citizen would go to the police and say 'I was at home in bed.'
What happened here? Nearly a year later he comes up with this phony alibi—'I was
at home in bed.' Now, I submit, think about that. If you are charged with an offense
or if I am, or the judge is, why, the first thing we would do would be to go to the
police—'Mr. Policeman, you're all wrong. I was at home in bed and my two sisters will
tell you that' . . . [But] not until a year later—'I'll tell you nothing'—not quoting
the evidence literally—'I'll tell you nothing. Prove it on me.' And he told them nothing
on the advice of his counsel, and I'm not criticizing counsel, that was proper advice,
and a year later—'I was home in bed.' . . . Some one [sic] is mistaken or not telling
the truth.'"
   Id. at 2.
8. Id.
9. Appellant moved pursuant to Ky. R. CRIM. P. 11.42, which provides:
   A prisoner in custody under sentence who claims a right to be released on the ground
that the sentence is subject to collateral attack may at any time proceed directly by
motion in the court which imposed the sentence to vacate, set aside or correct it.
Minor v. Commonwealth, 478 S.W.2d 716, 717 (Ky. 1971).
STATE AND FEDERAL APPEALS

In December, 1971, fully two and a half years after the trial, the Kentucky Court of Appeals affirmed the conviction on two grounds. First, the court held that the appellant did not make a sufficient objection to preserve the claimed error for appellate review. Secondly, even if the objection had been properly made, the use of evidence of silence was not "prejudicial to the substantive rights of the defendant." The court noted, however, that it had "no hesitancy in condemning such an argument." Thereafter, appellant sought, but was denied, certiorari before the United States Supreme Court.

Having exhausted all avenues of direct appeal, appellant filed a habeas corpus petition in the United States District Court for the Western District of Kentucky. His petition was denied without an evidentiary hearing, but on appeal to the Sixth Circuit the matter was remanded to determine whether the district court had had the benefit of the trial record and transcript. On rehearing, the district court denied the writ, finding that the prosecutor's closing argument "was a fair comment on the defendant's credibility" and "not violative of his 5th and 14th Amendment rights."

Finally, over six years after the original conviction, and despite the fact that no timely objection was made, the Sixth Circuit decided that under the plain error doctrine it had jurisdiction to hear

10. Id.
11. Id. The court stated:
   The claimed error of the trial court was not preserved for appellate review. It is only in cases where the judgment of conviction imposes the death penalty that this court will abrogate its well-established rule of procedure and review questions that have not been previously preserved for appellate review.
12. Id. at 718.
13. Id.
16. 527 F.2d at 2-3.
17. Appellant did not timely object at trial to the admission of and comment upon his silence. The court applied the plain error exception to the general rule that a timely objection is necessary to preserve the error for later review. In cases where "action at the trial is fundamental error or so taints a trial that the trial was unfair and biased, the error will be noticed although there was no objection." C. McCORMICK, LAW OF EVIDENCE § 52, at 120 (2d ed. 1972) [hereinafter cited as McCORMICK].

This principle is usually applied where constitutional prohibitions were violated by the admission of the evidence. Thus, unless there was an attempted "deliberate bypass" of state court procedures, the failure to object will not preclude federal habeas corpus relief. Fay v.
the appellant's habeas corpus petition. It reversed. In effect, the majority held that to use for impeachment purposes the pre-trial silence of an accused while he was exercising his constitutional right to remain silent is not such an inconsistent act as to be admissible under evidentiary rules. Furthermore, since the accused had been exercising his privilege against compelled self-incrimination, this evidentiary error was of such magnitude as to violate the fifth and fourteenth amendments. The dissent would have affirmed the conviction based upon its conclusion that there was no constitutional issue presented.

BACKGROUND—Hale AND Harris

Generally speaking, there are two evidentiary doctrines which govern the admissibility of a witness' silence. First, a party may use a witness' silence in the face of an accusatory statement in order to show that he assented to the facts stated therein when, under the circumstances, a reasonable man would have denied or contradicted the statement if it were not true. This is the "adoptive" or "tacit" admission rule, and is an exception to the hearsay rule. Prior silence of this nature is generally introduced during the party's case-in-chief. Second, silence at a time when it would have been natural for the witness to assert a fact is, when the fact is later asserted at trial, evidence of a prior inconsistent act. Prior silence as an inconsistent act is used on cross-examination to impeach the witness.

There is, however, a slight overlapping of these two doctrines. Silence in the face of an accusatory statement may also be used on


18. Chief Judge Phillips and Judge Peck. Judge Peck wrote the majority opinion. 527 F.2d at 2.
19. See id. at 5.
20. Id. at 6 (Weick, J., dissenting).
21. Another familiar doctrine prevents the prosecution from commenting on the accused's failure to take the stand. To infer from his silence any substantive evidence of guilt is an unconstitutional deprivation of the fifth amendment. Griffin v. California, 380 U.S. 609 (1965).
22. 4 J. Wigmore, Evidence § 1071 (J. Chadbourn rev. 1972) [hereinafter cited as 4 Wigmore]. See also D. Binder, The Hearsay Handbook § 28.2 (1975); McCormick, supra note 17, at §§ 161, 270.
cross-examination to show a prior inconsistent act. However, there may be circumstances where no accusatory statement had been made, and yet it would have been natural for the witness to have asserted the fact now asserted at trial.\footnote{24. See, e.g., United States v. Harp, 513 F.2d 786 (5th Cir. 1975); United States v. Quintana-Gomez, 488 F.2d 1246 (5th Cir. 1974); Lebowitz v. State, 313 So. 2d 473 (Fla. App. 1975).}

Both doctrines stem from the ancient maxim "aui tacet consentire videtui," or "silence gives consent."\footnote{25. WMORE, supra note 22, at § 1071.} They apply to any witness who was not exercising his fifth amendment privilege against self-incrimination at the time he was silent. It is only when the witness is exercising his right to remain silent that constitutional grounds may outweigh the necessity of applying these evidentiary doctrines. Hence, it is conceivable that on evidentiary grounds alone prior silence could be used against a criminal defendant who was not exercising his constitutional right to remain silent. Likewise, it is also conceivable that silence could not be used against a witness in a civil case where the witness was exercising his fifth amendment rights at the time of his silence.

In criminal cases the use of a defendant's silence as evidence takes on a special dimension in view of the fifth amendment privilege against self-incrimination. The Sixth Circuit has explicitly rejected the use of silence as an adoptive or tacit admission where the defendant was exercising his constitutional right to remain silent.\footnote{26. The fifth amendment provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.} Relying heavily on \textit{Miranda v. Arizona},\footnote{27. See 527 F.2d at 4, citing Glinsey v. Parker, 491 F.2d 337 (6th Cir.), cert. denied, 417 U.S. 921 (1974); Luallen v. Neil, 453 F.2d 428 (6th Cir. 1971), cert. denied, 409 U.S. 857 (1972).} the rationale behind these decisions is that the constitutional grounds which support exclusion outweigh any evidentiary grounds for its admissibility in the prosecutor's case-in-chief. Since these decisions were based solely upon constitutional grounds, they apply to state criminal proceedings through the fourteenth amendment.\footnote{28. 384 U.S. 436 (1966).}

Where the witness was exercising his constitutional right to remain silent, the use of such silence to show a prior inconsistent act

\begin{itemize}
\item \textbf{24.} See, e.g., United States v. Harp, 513 F.2d 786 (5th Cir. 1975); United States v. Quintana-Gomez, 488 F.2d 1246 (5th Cir. 1974); Lebowitz v. State, 313 So. 2d 473 (Fla. App. 1975).
\item \textbf{25.} WMORE, supra note 22, at § 1071.
\item \textbf{26.} The fifth amendment provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.
\item \textbf{28.} 384 U.S. 436 (1966).
\end{itemize}
is not a clear-cut violation of the *Miranda* doctrine. This is precisely the issue presented in the instant case. In two recent decisions which were relied upon by the Sixth Circuit, the United States Supreme Court has examined the scope of the prosecutor's impeachment authority. In the first of these, *Harris v. New York*, the defendant admitted on direct that he had sold a substance to undercover narcotics agents, but that he had given them baking powder, not heroin. On cross the prosecutor asked him whether he had made specific incriminating statements to the police following his arrest. These statements could not be used in the prosecutor's case-in-chief because prior to the interrogation the defendant was not warned of his right to appointed counsel. The Court found no constitutional error in the state's cross-examination, holding that

> [i]t does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

The Court reasoned that a defendant who takes the stand cannot assert the *Miranda* rule of exclusion in order to shelter his perjurious testimony from the prosecutor's impeachment.

Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

In another recent Supreme Court decision, *United States v. Hale*, the defendant was properly advised of his *Miranda* rights, and when confronted by the police with incriminating evidence he offered no explanation of its source. On direct examination the defendant attempted to explain it, but on cross the government attacked his testimony and asked why he did not tell this story during the police interrogation. The Supreme Court reversed his conviction and held that the defendant's silence was not inconsistent with his trial testimony and that the government's question in this instance would produce the probative danger of jury prejudice.

The Supreme Court did not decide *Hale* on constitutional grounds, but rather under its supervisory authority over the lower

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31. Id. at 224.
32. Id. at 225.
33. 422 U.S. 171 (1975).
34. Id. at 180.
federal courts, i.e., on evidentiary grounds alone. The Court stated that there were several alternative explanations for the defendant’s prior silence. The defendant had had previous contacts with the police, and he also knew that the state had a strong case against him. Under these circumstances he realized that the state would not release him even with his explanation, and it was therefore natural for him to remain silent. Hence, the defendant’s prior silence was not inconsistent with his trial testimony. The Court would have excluded the evidence in any event, however, for it found that in this instance the danger of jury prejudice would outweigh any probative value that the silence might have.

**The Holding in Minor**

In order to determine whether the use of the defendant’s silence violated his fifth amendment privilege against self-incrimination, the court must first decide whether the defendant was actually exercising this privilege. Otherwise, the evidentiary doctrines of silence as a tacit admission or as a prior inconsistent act, will govern the admissibility of the witness’ previous silence. Where the investigation has focused on the defendant and he is about to undergo an incustodial interrogation, he must be advised of his *Miranda* rights before he can voluntarily waive his right to remain silent. Here, the record did not show whether the *Miranda* warnings were given or whether the trial court had decided that it was a situation where they should have been given. However, it is clear that counsel advised the appellant of this privilege, and that he relied upon this advice when he remained silent. Since the defendant was exercising his right to remain silent, the prosecution could not and did not use his silence as evidence of guilt. Had he not exercised his constitutional right to remain silent there would still be no evidentiary grounds for admitting his previous silence in the prosecution’s case-in-chief. There was no accusatory statement from which the prosecution could infer a tacit admission. The prosecution did use the defendant’s previous silence as a prior inconsistent act for impeachment purposes. Whether in this instance such a cross-examination was proper is the issue of the case.

35. *Id.* at 181 (Burger, C.J., concurring).
36. *Id.* at 180.
37. *Id.*
39. 527 F.2d at 4.
40. See *id.*
At the outset the Sixth Circuit acknowledged that the Hale decision would have been dispositive of the issues had the appellant been convicted in a federal court. However, the Sixth Circuit did look to Hale in order to determine whether the prior silence of the appellant was inconsistent with his trial testimony. The United States Supreme Court in Hale stated the evidentiary rule as follows:

A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent. . . . If the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded.

The Court went on to say that silence at the time of arrest is so ambiguous that it is of little probative value and has a significant potential for jury prejudice.

Since Hale was not a controlling precedent, the Sixth Circuit was free to fashion its own rule, and determined that there were sufficient constitutional grounds to order a reversal. The court reasoned that the Hale evidentiary grounds for not admitting a defendant's previous silence as a prior inconsistent act are also constitutional grounds for its inadmissibility. In effect, the court adopted the evidentiary holding of the Hale case as a constitutional mandate enforceable against the states through the fourteenth amendment.

The court reached this decision after considering a critical passage from Miranda v. Arizona:

[It is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that [the individual] stood mute or claimed his privilege in the face of accusation.]

Based on this, the Sixth Circuit held that unless the use of the defendant's prior silence falls within the ambit of the Harris impeachment exception to Miranda, the prosecutor cannot use his silence at trial. The Harris decision permits prior inconsistent state-

41. Id. at 3.
42. 422 U.S. at 176.
43. Id.
44. 527 F.2d at 3.
46. Id. at 468 n.37.
ments obtained in violation of Miranda to be used for impeachment purposes so long as such statements are trustworthy and inconsistent with the testimony to be impeached. However, the Sixth Circuit found that the Harris standards were not met:

We hold that the instant cross-examination and closing argument was [sic] error of constitutional magnitude because, petitioner's silence not being sufficiently inconsistent with his trial testimony to permit the use of that silence to impeach his testimony, the admission of evidence of and comment on such silence violated petitioner's right to remain silent.

The appellant's silence was not inconsistent with his trial testimony, and had this been a federal prosecution the court would have reversed the conviction on evidentiary grounds alone. Since this was a state court decision, the Sixth Circuit had to find a federal issue or it would have had no jurisdiction over the case. Consequently, the court used the phrase "error of constitutional magnitude." This suggests that since the witness was exercising his constitutional right to remain silent, the evidentiary error is magnified by his fifth amendment privilege against self-incrimination.

The dissent's view was based on its misgivings of the majority's constitutional findings. It would have read the Sixth Circuit's decision in United States v. Brinson as applying strictly to federal prosecutions, and sharply disagreed with the majority's reliance on that case for precedent. Given the Supreme Court's conscious avoidance of the constitutional issue in Hale, the dissent argued that the circuit courts are not authorized to extend the Hale result

47. See text accompanying note 31 supra.
48. 527 F.2d at 3.


50. See 527 F.2d at 6 (Weick, J., dissenting).
51. 411 F.2d 1057 (6th Cir. 1969).
52. In his concurring opinion to the Hale case, Chief Justice Burger stated:

I cannot escape the conclusion that this case is something of a tempest in a saucer and the Court rightly avoids placing the result on constitutional grounds.

422 U.S. at 181.
to state court proceedings. Several cases considering the question have rejected the constitutional findings of the majority, and the dissent would have joined them.

CONCLUSION

The decision in *Minor v. Black*, like its predecessors, should not be interpreted to mean that a criminal defendant's silence can *never* be used to impeach his testimony. The Sixth Circuit based its decision upon the facts presented in the case and not upon any broad constitutional principle. The court emphasized its holding by expressly limiting its findings to "*the circumstances presented.*"

In light of *Raffel v. United States*, such a factual restriction of the holding was proper. In *Raffel* the defendant, relying upon his privilege against self-incrimination, refused to testify at his first trial. After the jury could not reach a verdict, a new trial was ordered. At the second trial the defendant took the stand to refute the testimony of a government witness. The prosecution on cross-examination got the defendant to admit that he had remained silent in the face of the same testimony at the earlier trial. The *Raffel* Court found that under the circumstances, it would have been natural for the defendant to reply to such accusations at the first trial. Hence, the defendant's previous silence was a prior inconsistent act which could be used to impeach his trial testimony in spite of the fact that he asserted his fifth amendment privilege against self-incrimination. In the *Hale* decision *Raffel* was considered, but the Supreme Court explicitly refused to decide whether it was overruled by *Johnson v. United States* and *Griffin v. California*.

Consequently, where the silence of a defendant in a criminal case is sought to be used as a prior inconsistent act for impeachment purposes, and (1) it does not contradict the defendant's testimony;

53. 527 F.2d at 8.
55. 527 F.2d at 3-4 (emphasis in original).
56. 271 U.S. 494 (1926).
57. Id. at 495.
58. Id. at 499.
59. 422 U.S. at 175.
60. Id. n.4.
61. 318 U.S. 189 (1943).
MINOR v. BLACK

and (2) the defendant was exercising his constitutional right to remain silent at the time, there is error of constitutional magnitude. In the situation where the defendant’s silence does contradict his trial testimony, but he was exercising his fifth amendment rights at the time of his silence, the Raffel case permits the use of such silence for impeachment purposes. The use of the defendant’s silence for impeachment purposes when the defendant was not exercising his constitutional right to remain silent may be permissible if the silence is sufficiently inconsistent with his trial testimony. On this later occasion ordinary evidentiary rules apply.

Even where the evidentiary error is clearly one of constitutional magnitude, the Sixth Circuit stated that it would not reverse a conviction if harmless error could be found. However, in Minor the testimonial evidence was far from “overwhelming.” The first witness had erred when initially attempting to identify the accused in a pre-trial lineup. The second witness saw the accused near the scene of the crime within 15 or 20 minutes before its commission. Applying the standards of Chapman v. California and Harrington v. California, the court found that the use of such silence was not “harmless beyond a reasonable doubt.”

The Raffel decision has not been overruled and is still precedent.
today.\textsuperscript{72} Since the facts in \textit{Raffel} involve a trial setting, it may be distinguishable from \textit{Minor} and other cases. However, to classify the facts of a particular case as pre-trial, trial, post-arrest, etc., is only an aid in explaining the circumstances surrounding the witness' silence. To use such words as determinative factors may be misleading when attempting to decide another case. The touchstones are whether the silence was a prior inconsistent act, an evidentiary concept, and whether the witness had relied upon his fifth amendment privilege against compelled self-incrimination. The trial court in its search for the truth should have the discretion to determine whether, under the particular facts of the case presented, the witness' silence was indeed inconsistent with his trial testimony. If it was inconsistent the court should allow the impeachment under the rationale that the witness cannot use his fifth amendment right to remain silent as a shield for his perjurious testimony, i.e., the \textit{Harris} reasoning. The \textit{Minor} case is not in conflict with this analysis because Minor's silence was not inconsistent.\textsuperscript{73}

\textbf{Terrence F. Lenick}


\textsuperscript{73} For further treatment regarding the use of silence as an impeachment tool, see Comment, \textit{Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence}, 123 U. Pa. L. Rev. 940 (1975); 33 Am. Crim. L. Rev. 263 (1975); 87 Harv. L. Rev. 887 (1974); 33 Md. L. Rev. 363 (1973); 5 Toledo L. Rev. 381 (1974).
CHARACTER OF ACCUSED—CROSS-EXAMINATION—FOR PURPOSES OF IMPEACHMENT A FEDERAL PROSECUTOR MAY NOT USE EVIDENCE OF PRIOR CRIMINAL CONDUCT WHICH DID NOT RESULT IN A FELONY CONVICTION—United States v. Perry, 512 F.2d 805 (6th Cir. 1975).

A four-count indictment was returned against appellant, Perry, by a federal grand jury charging him with unlawful possession and forgery of United States Treasury checks.1 Trial was set before the United States District Court for the Eastern District of Tennessee, and appellant was convicted by a jury on two of the four counts.

On appeal to the Sixth Circuit,2 appellant sought reversal based on three assignments of error involving prejudicial statements by the court and by the United States Attorney who prosecuted the case. In a short per curiam opinion, the Sixth Circuit reversed and remanded for a new trial. It found that the prosecution improperly attempted to impeach appellant on cross-examination, and in the process it severely criticized the United States Attorney for his unprofessional conduct at trial.3

Approximately one week before trial commenced, the prosecution decided to try the defendant on only two of the four counts.4 This information was not made known to the court, and the judge told prospective jurors in his opening remarks that “Mr. Perry is charged on a four-count indictment.”5 The prosecutor immediately approached the bench and advised the court of its mistake, whereupon the judge instructed the jurors that trial would proceed on the “first and second counts only.”6 At the close of the government’s case the defendant unsuccessfully moved for dismissal on the grounds that he had been prejudiced by the prosecution’s neglect.7

The defendant testified on his own behalf and was extensively cross-examined by the government. At one point he was asked whether he was a “member of what is called the Dixie Mafia out in East Ridge [Tennessee].”8 An objection to this question was sus-

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3. See text accompanying notes 41-43 infra.
4. The government was unable to proceed on the two counts because a key witness was unavailable. 512 F.2d at 806.
5. Id. at 805.
6. Id. at 806.
7. The defendant also objected to references by prosecution witnesses relative to matters contained exclusively in the two counts which were dismissed. The court responded by directing a verdict of acquittal on the disputed counts. Id.
8. Id.
tained before he could reply. Thereafter, the prosecutor asked whether he had "illegally signed any other checks" in addition to those which were the subject of the indictments being tried. Defendant responded that he had not, and the government immediately called a Treasury Department agent in rebuttal. In spite of objections the agent was permitted to testify that the accused had forged other checks on previous occasions.

The principal issue on appeal was whether the prosecutor's questions on cross-examination and the rebuttal testimony were properly admitted into evidence. The court held that for purposes of impeachment it is prejudicial error to ask questions or use rebuttal testimony relating to prior criminal conduct which did not result in a felony conviction.

USE OF CHARACTER EVIDENCE

The Sixth Circuit trod a well-worn path in holding such evidence inadmissible. The leading common law case of Regina v. Routon, decided in 1865, expressed the general rule that evidence of a defendant's bad character should be excluded:

The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because, although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety-nine.

By far the majority of American courts have adopted the common law rule of inadmissibility. They proceed on the theory that evi-

9. Id.
10. Id.
11. By way of dicta the Sixth Circuit found that there was no reversible error in the inadvertent disclosure that there had been a four-count indictment. Id.
12. Id.
13. Id. at 807.
15. Id. at 1506.
16. E.g., Michelson v. United States, 335 U.S. 469 (1948); United States v. Yarbrough, 352 F.2d 491 (6th Cir. 1965) (dictum); United States v. Pennix, 313 F.2d 524 (4th Cir. 1963); United States v. James, 208 F.2d 124 (2d Cir. 1953); Martin v. People, 114 Colo. 120, 162 P.2d 597 (1945); People v. Oden, 20 Ill. 2d 470, 170 N.E.2d 582 (1960); Warren v. Commonwealth, 256 S.W.2d 368 (Ky. 1953); People v. Hetenyi, 304 N.Y. 80, 106 N.E.2d 20 (1952);
vidence of an accused’s bad character tends only to establish the mere probability of guilt. While courts frequently concede that such evidence is technically relevant, the justification for exclusion is founded on more pragmatic policy considerations.

Chief among these is the desire to prevent confusion of issues both for the court and the jury. Bad character is shown by proof of conduct on occasions factually unrelated to the particular issues on trial, and consequently the trier of fact is likely to be distracted by collateral matters. Purely from a procedural standpoint courts are hesitant to deal with a complicated mass of testimony which prolongs the trial and which must be sorted out by carefully worded instructions.

A further policy consideration stems from the substantive dangers of trying an accused’s character rather than his legal responsibility for the crime charged. The acknowledged probative value of character evidence is therefore mitigated by the likelihood of prejudice and unfair surprise:

The rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proved guilty.

The general rule of exclusion is designed to prevent the prosecution from initiating a wholesale inquiry into the accused’s character


17. E.g., Michelson v. United States, 335 U.S. 469, 475 (1948); C. McCormick, Law of Evidence § 190 (2d ed. 1972) [hereinafter cited as McCormick].

18. Michelson v. United States, 335 U.S. 469, 475-76 (1948); McCormick, supra note 17, § 190.


22. People v. White, 24 Wend. 520, 574 (N.Y. 1840).

23. There are a number of well-recognized exceptions to the general rule. A prosecutor may, for example, place proof of character in evidence to show motive, intent, identity or the existence of a conspiracy. See generally McCormick, supra note 17, § 190; Fed. R. Evid. 404(b).
as a part of its case-in-chief. But where the defendant elects to testify on his own behalf, and thereby exposes himself to cross-examination, the government has a limited right to introduce character evidence to attack his credibility or to impeach the substance of his testimony.

It is well-settled doctrine that a criminal defendant who takes the stand places his credibility—though not necessarily his character—in issue. The scope of cross-examination is limited, therefore, to evidence which discredits him as a witness or otherwise tests his veracity. The prosecution is restricted in its use of collateral matters, and to avoid unnecessary prejudice it may only question the accused relative to prior felony and, in some cases, misdemeanor convictions. It is reversible error to attack credibility through arrests or indictments:

The fact that an unproven charge has been made against one has no logical tendency to prove that he has been guilty of any offense, or to impair the credibility of his testimony. An indictment is a mere accusation, and raises no presumption of guilt.

In theory the defendant is subject to no unfair advantage since he can do little in any case to rebut the bare fact of a prior conviction. Similarly, the likelihood of prejudice is not a factor since he has the choice at all times to remain silent and prevent his prior convictions from coming before the trier of fact.

An exception to the rule that a defendant may only be impeached by prior convictions arises where he asserts affirmatively his good character. In such cases the government may bring in evidence of prior criminal activity whether or not a felony conviction resulted.

In Walder v. United States, for example, the accused on direct examination “went beyond a mere denial of complicity in the crimes

27. Coyne v. United States, 246 F. 120, 121 (6th Cir. 1917).
29. See McCormick, supra note 17, § 191.
. . . charged and made the sweeping claim that he had never dealt in or possessed any narcotics." On cross-examination the prosecutor questioned him concerning the details of other drug transactions and the defendant unequivocally denied the allegations. Over defense objections the government then offered the testimony of narcotics officers who had witnessed the accused sell drugs on previous occasions.

The Supreme Court held that the admission of evidence of prior criminal conduct was proper. By asserting his good character on direct, the defendant "opened the door" for the government to impeach him with rebuttal testimony which was otherwise inadmissible. The rationale supporting this result is premised on the utter lack of prejudice of the accused. While he may in general terms deny the case against him and risk a limited attack on his credibility, "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony" and assert his good character unchallenged. Accordingly, the prosecution is not restricted to the narrow question of credibility and may freely rebut the defendant's good character claims.

The Decision in Perry

In applying these settled rules of law to the facts in Perry, the Sixth Circuit concluded that the prosecution exceeded the permissible scope of cross-examination. It found prejudicial error in two major respects:

First, the prosecutor sought to impeach the appellant's credibility by asking him whether he had signed other checks without authorization. This was improper because it was not an inquiry about forgery convictions and appellant had not attempted to establish his good character.

The prosecution's mistake in this regard was to use prior criminal conduct which did not result in conviction as a means of eliciting a perjurious remark. It is obvious, however, that the United States Attorney was looking for a way to introduce evidence relating to the

31. Id. at 65.
32. Id. at 64.
33. Id. at 64-66.
34. McCormick, supra note 17, § 191.
35. 347 U.S. at 65.
36. 512 F.2d at 807.
37. Id. (emphasis added).
two counts which it was forced to dismiss,\textsuperscript{38} and was not simply attacking credibility:

Second, the prosecutor used a rebuttal witness to prove appellant's misconduct on another occasion, although appellant had not put into issue his good character, and the prosecutor could not introduce the issue by his question.\textsuperscript{39}

Clearly, the defendant did not raise the question of his character during direct-examination, and thus the prosecutor should not have done so on cross. As the court noted, the situation in this case was distinct from the one in \textit{Walder v. United States},\textsuperscript{40} where the accused denied prior criminal acts during direct examination. Had the appellant in \textit{Perry} sought to prove his good name, he would have "opened the door" for unlimited impeachment and rebuttal testimony.

In addition to finding reversible error in these two respects, the court expressed its disapproval of another feature of the government's cross-examination:

The district judge acted properly in sustaining the objection to the prosecutor's question about the Dixie Mafia. However, the U.S. Attorney should have been well aware of the legal irrelevance and prejudicial effect of this question.\textsuperscript{41}

The court reprimanded counsel for his apparent disregard of the Code of Professional Responsibility,\textsuperscript{42} and cited Supreme Court cases which define the nature of a prosecutor's responsibilities.\textsuperscript{43}

\textbf{Federal Rules of Evidence}

The Sixth Circuit decided \textit{Perry} prior to the effective date of the Federal Rules of Evidence, and consequently it looked exclusively to federal case law for guidance. Had the new rules been in effect, however, the result would have been the same.

Rule 404(a) of the Federal Rules of Evidence expressly codifies the

\textsuperscript{38} See text accompanying note 4 et seq. supra.
\textsuperscript{39} 512 F.2d at 807.
\textsuperscript{40} See text accompanying note 30 et seq. supra.
\textsuperscript{41} 512 F.2d at 807.
\textsuperscript{42} The court specifically addressed ABA Code of Professional Responsibility DR 7-106 (C)(2). Id.
\textsuperscript{43} Id. Reference was made to Berger v. United States, 295 U.S. 78, 88 (1935), where the Court stated:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.
long-standing bar against the use of character evidence to prove conduct:

   Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. . . .

The rule recites as an exception such "[e]vidence of . . . character offered by an accused, or by the prosecution to rebut the same." This has the effect of leaving the decision in Walder v. United States intact, and permits only the defense to place character in issue. At all times, however, the rule is subject to the trial court's discretion in limiting evidence where the danger of undue prejudice outweighs its probative value.

In sharp contrast to the preservation of the Walder doctrine is the treatment given to the traditional limitations on the scope of cross-examination. Prior to enactment of the evidence rules there was a marked lack of unanimity among the circuit courts as to which convictions were admissible for impeachment of credibility. Some

45. See text accompanying note 30 et seq. supra.
46. Fed. R. Evid. 404(b) sets forth the recognized exceptions to the general rule in cases where character evidence is critical in proving an element of an offense. See generally note 23 supra.
47. Fed. R. Evid. 403.

State law within the Sixth Circuit follows the common law rule limiting impeachment evidence to convictions. In Kentucky the rule is quite narrow, since a defendant who elects to testify may be impeached only by evidence of a felony conviction which involved dishonesty or false statement. Admissibility is subject to several conditions: (1) such evidence is not admitted until the court, in a proceeding outside of the jury's presence, determines the nature of the conviction, and whether it should be considered by the jury; and (2) the trial court, exercising its discretion, must weigh the value of the evidence for credibility purposes against the potential for prejudice to the defendant. Cotton v. Commonwealth, 454 S.W.2d 698 (Ky. 1970).

The Michigan Supreme Court has ruled that any conviction, whether a felony or a misdemeanor, may be introduced to attack credibility on cross-examination. See People v. Rapcuhn, 390 Mich. 226, 212 N.W.2d 205 (1973); People v. Falkner, 389 Mich. 682, 209 N.W.2d 193 (1973).

The rule in Ohio is similar to that in Michigan. In State v. Tabasko, 22 Ohio St. 2d 36, 257 N.E.2d 744 (1970), and State v. Murdock, 172 Ohio St. 221, 174 N.E.2d 543 (1961), the Ohio Supreme Court held that any prior conviction is admissible to challenge the credibility of a witness, whether or not the witness is also the accused. A major exception to the rule limiting cross-examination to convictions was set forth in State v. Hector, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969), where a witness was permitted to be questioned as to whether he was under indictment. Such an inquiry is permissible, ruled the court, where that fact would
courts permitted the use of both felonies and misdemeanors; others allowed only felonies; and still others looked strictly to the elements of moral turpitude and dishonesty as the probative basis for an attack on credibility.

In recent years federal courts were influenced by the decision in *Luck v. United States*, where the emphasis was placed on the probative value of the evidence rather than on strict distinctions between misdemeanors and felonies. The *Luck* rule focused on the nature of the previous crime and its relation to credibility in terms of the honesty and veracity of the witness. Nearly all of the circuit courts adopted some form of the newer approach, and placed increasingly more discretion in the hands of the trial court.

With the adoption of Rule 609(a), federal courts are now governed by what is essentially a codification of the *Luck* doctrine. Attacks on credibility are restricted to evidence of conviction for crimes "punishable by death or imprisonment in excess of one year," but only where the "court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the reasonably tend to show that his testimony might be influenced by interest, bias or a motive to testify falsely. See also State v. Williams, 85 Ohio App. 236, 88 N.E.2d 420 (1947).

The rule in Tennessee is similar to that in Kentucky. In *Posley v. State*, 288 S.W.2d 455 (Tenn. 1956), the court held that the prosecution is limited to an inquiry concerning conviction for crimes involving moral turpitude.


50. *E.g.*, Johnson v. United States, 424 F.2d 537 (9th Cir. 1970); Carlton v. United States, 198 F.2d 795 (9th Cir. 1952).

51. United States v. Remco, 388 F.2d 783 (3d Cir. 1968); Ciravolo v. United States, 384 F.2d 54 (1st Cir. 1967).

52. 348 F.2d 763 (D.C. Cir. 1965).

53. *Id.* at 768-69.


In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A "rule of thumb" thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; traffic violations, however serious are in the same category.

*Id.* at 940 (footnote omitted).

55. *See generally* 3 WEINSTEIN, *supra* note 44, ¶ 609[03]. The lone exception was the Sixth Circuit. *Id.* at n.2.

56. In 18 U.S.C. § 1(1) (Supp. IV, 1974) a felony is defined as "[a]ny offense punishable by death or imprisonment for a term exceeding one year."
defendant. In the case of misdemeanors, any such lesser offense which "involved dishonesty or false statement" may be used for impeachment. In addition, a conviction more than ten years old is presumptively considered too remote to be relevant.

In substance the evidence rules maintain the previous distinction between felonies and misdemeanors. Felony convictions, however, are more freely admissible since they are not subject to the same explicit standards of relevancy as are misdemeanors. The circuits are presumably free to flesh out Rule 609(a) by requiring the trial courts to consider certain factors in determining when the probative value of a felony conviction outweighs its prejudicial effect. In this regard, the line of decisions following Luck will provide guidance for courts such as the Sixth Circuit which have not squarely faced the problem to date.

CONCLUSION

Both the common law and the federal rules adhere to basic principles of fairness by limiting the admissibility of character evidence. The general rule forbidding trial by reputation is essential to a civilized system of criminal justice, and for the most part the complex set of exceptions is consistent with higher instincts of fair play.

At no time, however, should the rules permit the defendant to open a line of inquiry which is closed to the prosecution and profit by the unchallenged use of perjurious testimony. At first glance

57. Fed. R. Evid. 609(a).
58. Id.
59. Fed. R. Evid. 609(b).
62. The Sixth Circuit has long held to the view that all felony convictions and only those misdemeanors which involve moral turpitude are admissible. See United States v. Conder, 423 F.2d 904 (6th Cir.), cert. denied, 400 U.S. 958 (1970); United States v. Lloyd, 400 F.2d 414 (6th Cir. 1968); Smith v. United States, 283 F.2d 16 (6th Cir.), cert. denied, 365 U.S. 847 (1960).
63. This has been a fundamental policy concern throughout federal case law. See, e.g., Loper v. United States, 405 U.S. 473 (1972); Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954); Williams v. Wainwright, 502 F.2d 1115 (5th Cir. 1974); United States v. Gonzalez, 491 F.2d 1202 (5th Cir. 1974); United States v. Ambrose, 483 F.2d 742 (6th Cir. 1973); United States v. Caron, 474 F.2d 506 (5th Cir. 1973).
this would appear to be the result of the decision in Perry, since the court held that it was error to admit testimony to rebut the defendant's denial that he had ever forged other checks. The critical factor was that the prosecutor himself initiated the question which drew the defendant's perjurious reply. The court held that the original question as well as the rebuttal testimony should not have been allowed. On this point the Sixth Circuit made the proper distinction and emphasized the difference between placing one's character in issue on direct, and being questioned on cross as to crimes which did not result in conviction.

The holding in Perry reaffirmed the Sixth Circuit's support for the rule limiting cross-examination to felony convictions and misdemeanors involving moral turpitude. Under the facts before it, however, the court had no opportunity to reexamine previous law and consider any significant changes. With the adoption of evidence rules, the precedential value of Perry has been greatly mooted, and is best limited to its facts. Thus, any radical shift in the Sixth Circuit's view of cross-examination will have to come when the opportunity to construe the federal rules is squarely presented. In the meantime, however, the Perry decision stands as a basic illustration of the method to be used in applying the general rules.

Kenneth B. Segel
Robert E. Haley
BOOK REVIEWS


Reviewed by Jasper B. Shannon*

Centennials beget memories with efforts to recall the past. The Bicentennial bids fair to be as prolific as the population has been. The origins of a people or a region are often clouded in myth and legend. Kentucky is no exception. In fact, the Blue Grass state has few peers in this regard. The sifting and winnowing of folklore from brutal facts is often confused in the ruthless ravages of time. Conflict has characterized both the life of Kentuckians and accounts of their history. Partisan views become ingrained in the scar tissue of old wounds. Second and third generations take up the cudgels for ancestors long since reduced to primeval dust.

Historian Chinn reports the bitter years of early Kentucky, the first half century of its existence. It is a story of almost 50 years of continuous warfare. First, the fight between England and France, then the settlers' fight in the War of Independence against the mother country. Next the Indians, encouraged and abetted by the British, engaged in fierce guerrilla combat with the land-hungry frontiersmen. Sadism was indulged in by all sides. Finally, Kentuckians on occasion fought with each other, a foretaste of civil conflict to come.

On the whole, the author has done a first class job. He has no hobbies to ride, no theories to defend. He, in simple expository style, gives an accurate account of what happened when and how. The why is discussed with less assurance. The volume is beautifully printed upon excellent white paper. It is clear and readable. The illustrations are numerous and useful. The greatest weakness is the proofreading. The volume is replete with misspellings, at least 100 in 600 pages. Many errors are of an elementary type likely to be found in freshman writing. Kentucky: Settlement and Statehood should be on the shelves of every high school library in Kentucky,

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but surely a reprinting should correct the egregious errors so that students will not be encouraged to indulge in similar mistakes.

Mr. Chinn has performed his work in a scholarly fashion. He seeks facts, not color, as some of his predecessors have done. Though he does not only reexamine primary sources, he does not neglect them. His use of secondary materials is eclectic, giving balanced views where there is conflict. Mr. Chinn is unnecessarily humble before the image of college historians, a motley group. His work stands on its own feet.

Lawyers and law students will read Kentucky with profit. They will note that the legal profession was no more popular in early Kentucky than in the contemporary media after Watergate.

By and large, Kentuckians have been an undisciplined lot. They came to the region eagerly seeking land. They rebelled at restraints. The numerous means of acquiring land titles made the first period an ugly one for control. It was a lucrative field for property lawyers from which some political careers were launched. Pioneer Kentuckians were frequently debtors who might be imprisoned for debt. Courts existed to protect property, hence there were many disagreements between farmers and courts. The legislature intervened on the side of popular majorities to the dismay of lawyers and judges.

Mr. Chinn does not stress political theory. He neglects Professor Lowry's pioneer study of John Locke's influence upon the thinking of the framers of the first and second constitutions. In the reviewer's judgment, more importance should have been attached to George Nicholas' role in defeating Father David Rice's effort to bring Kentucky into the Union as a free state. Had the 1792 convention decided otherwise, the whole future of the state and nation might well have been dramatically different. The attempt of the first constitution to establish an indirect and aristocratic government failed. Whether because of the conditioning impact of the frontier, or due to the tradition of egalitarianism inherited from England, or the contemporary influence of the French Revolution, is not clear. It is the fashion to speak of our contemporary society as a pluralistic one. Kentucky has been pluralistic from the beginning, often taking the form of a sectarianism intense and frequently intolerant. Early clerics may sometimes have been wrong, but they were seldom in doubt.

Finally, pioneer resistance to the introduction of feudalism through the Transylvania Corporation was successful. Two centuries later, corporate ownership of the soil appears on the road to success as lawyers serve as the scouts for conglomerates, even those
dominated by the oil-rich Arabs. The bulldozer may achieve what neither the British nor the Indians could accomplish, namely the destruction of the natural beauty of the state. One of the chief assets of early Kentucky has already been destroyed—the eternal silence of the countryside. Rock and roll, Japanese motorcycles, and the fantastic capacity of modern industry to make noise, appear likely to eliminate the original charm of Kentucky.

Contemporary students attempting to do penance for early acquisitive brutality may well object to the repeated use of "savages" for "Indians." In view of the reduction of frontiersmen to the practices of taking scalps and on occasion murdering men, women and children in raids on Indian villages, it is difficult to determine who were the "savages."

Kentuckians may read Kentucky: Settlement and Statehood for enlightenment. As they do, they should meditate and perhaps utter a prayer of thanksgiving.


_Reviewed by Robert Kosseff*

This book can best be described as a manifesto detailing the rights of the individual as a patient. A case is strongly presented that each and every individual has the right to be fully informed about the nature of his illness and the course of any proposed treatment, including the attendant risks, and that every individual has the right to direct the treatment he is receiving, as well as the right to refuse treatment and the right to terminate treatment. Subsumed among these rights of the individual, but paramount over all others, is the right to die.

While the right to die may mean many things to many people, to the author the right to die means the right of an individual to choose death when the life he faces is devoid of quality and filled only with pain, anguish and suffering. "A person in distress should have the right to die painlessly, at a time of his own choice, with that sense of decency, self-control and personal dignity every free person should feel."

The right to die contains within it the right of the competent

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individual to refuse medical treatment and have his wishes adhered to, plus the right of the individual to terminate his own life when living is only a futile effort of pain and agony in the face of certain and irreversible disease. Heifetz indeed advocates physician-aided suicide in cases of the hopelessly and terminally ill to the extent of making the means of suicide available to them. The right to die is further extended to include the right of parents to choose death for the severely deformed, disabled or extremely retarded newborn. The author draws the line at euthanasia, arguing for something akin to a decriminalization of euthanasia: that euthanasia continue to be considered a crime, but an individual’s altruistic motivation in taking life be a statutorily defined element in determining both guilt and sentence.

In ranging far and wide over a diverse group of subjects, specificity and consistency are often lacking in this work. When dealing with the right to terminate the life of a newborn infant, the author suggests that the essential safeguard against abuse will be the parents themselves. Yet it is reasonable to assume that oftentimes the highly emotional involvement of parents with the fate of their newborn child may prevent a reasoned and rational decision on their part. The book draws a line between physician-aided suicide, which is advocated with no criminal sanctions attaching when done to aid the irreversibly, terminally ill patient, and active euthanasia for which criminal sanctions are to be maintained with motivation considered in deciding guilt and sentence. This is analogous to drawing a line between placing a gun in the hand of one intent on committing suicide and pulling the trigger for him. To allow criminal sanctions to fall on one side of the line but not the other seems both arbitrary and illogical.

To those who sanctify life above all else, this book will be anathema. The author recognizes this but premises his conclusions and his positions on what he considers to be the basic moral law of society: “Do not to others as you would not have others do to you.” In fact, this fundamental premise means simply that each person must place himself in the shoes of the other person before presuming to impose moral judgments on the person who is making difficult decisions about his or another’s right to die. In an era of technological innovations, where life can often be maintained by complex machinery or powerful drugs, the book makes a strong argument that life must be judged by something more than simply the absence of death.
This work, which is occasionally overly anecdotal and at times too vague and non-specific, in the end makes a strong case for the quality of life and the right to end life and choose death when all the quality of life—the ability to reason, the ability to sense and to enjoy and to participate in one's environment—is gone, replaced only by inevitable biological death and incalculable human suffering. The author's philosophy may best be summed up by this quote: "Death is a natural process neither to be feared nor to be resented. What should be feared is not death, but the inability to feel the joy and serenity of life. That is the reason for remorse."


*Reviewed by William A. Stearns*

Helter Skelter is an account of the Tate-LaBianca murders, and the resulting trial of Charles Manson and "family." It is written by Vincent Bugliosi, the prosecutor in the case, with Curt Gentry. The title of the book was a term borrowed by Manson from the Beatles' "White" album, and used by him to describe the ultimate revolution—a race war in which the blacks would annihilate the whites. During the holocaust, Manson's "family" would be hiding in the "bottomless pit," a location in Death Valley from which they would later emerge to rule the world.

Up to a point, Bugliosi paints a vivid picture of Charles Manson, but he acknowledges that the psyche of the man whose ultimate purpose was to create helter skelter is unexplainable. More baffling than Manson's personal mental condition is the psychic hold this diminutive creature had on his "family." Through a combination of drugs, sex and possibly what Manson considered love, he was able to dominate his followers to the extent that they would commit murder for him, a fact that Bugliosi successfully proved at the trial.

The first portion of the volume deals with the murders themselves and the ensuing investigation. After reading this book, one cannot help but believe that it was a true miracle that the murders were ever solved, since there was virtually no connection between the slain and Manson's marauders. It was strictly by chance that the Tate-LaBianca people became victims. Further, according to Bugliosi, the investigating officers thoroughly bungled the job, which

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adds to the miraculousness of the solving of the mystery. Two different law enforcement agencies, the Los Angeles County Sheriff's Department and the Los Angeles Police Department, whose officers are in close proximity to one another, had little or no communication or cooperation concerning the progress of their separate investigations. Some of the most important clues—a gun and the clothes worn by the killers on the night of the Tate murders—were found by private citizens. The gun was found by a small boy; the clothes were discovered by a mobile TV news crew who simply retraced what they believed the gang's movements to be.

The major portion of the volume deals with the trial itself, and from this section it is easy to see that Vincent Bugliosi is extremely talented both as a trial attorney and as an investigator. At the time the case was assigned to him, the evidence resembled two scrambled jigsaw puzzles, with many pieces missing. Bugliosi rose to the monumental task of finding the missing pieces, sorting them out, putting them together, and forming a picture which resulted in the conviction of all of the defendants.

However, Bugliosi is unduly critical of the defense attorneys. He seems to forget that he was assigned solely to the Manson case, and was able to spend countless hours in preparation. By his own admission, he lived "with the Tate-LaBianca cases for almost two years, averaging 100 hours per week." He forgets also that he had all the investigation help he desired, albeit bumbling, in the form of law enforcement officials. He forgets that he did not have a client who was constantly telling him how to run the trial and what tactics to use.

Humorous passages in this grim tale are provided by the description of Manson's attorney, who was responsible for lengthening the trial beyond reason. "Kanarek was something of a legend in the Los Angeles Courts." He once objected "to a prosecution's witness stating his own name because having first heard his own name from his mother, it was hearsay." His modus operandi is best described by this judicial admonishment: "you take interminable lengths of time in cross-examining on the most minute, unimportant details; you ramble back and forth with no chronology of events, to just totally confuse everybody in the Courtroom, to the utter frustration of the jury, the witness and the judge."

Analyzing this volume with an eye to the efficacy of the correctional system, one cannot help but wonder what happened. Manson was a product of that system, having spent several terms in various
institutions. At the age of eighteen, he was described by one official at the Petersburg, Virginia, federal reformatory as "dangerous—shouldn't be trusted across the street," and by another official in another facility as "unable to control himself and no doubt will be in serious difficulty soon." Charles Manson is a prime example of our correctional system's practice of warehousing people for a time, and then unleashing them on society.

In this book, Bugliosi was able to avoid two major pitfalls. He did not make the volume sensationalistic but neither did he enumerate a purely sterile, uninteresting chronology of events. This rather lengthy book reads easily and is a well-documented account of a famous trial.

One last thought—a truly frightening one—is that Charles Manson will be eligible for parole in 1978. To appreciate how frightening, read this book.