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IN MEMORIAM

JOHN G. TOMLIN, JR. (1916-1978)

Chase College of Law, Northern Kentucky University, has an empty niche with the passing of John G. Tomlin, Jr., Professor of Law. Professor Tomlin dedicated the last eighteen years of his life to the education of students at Chase College of Law, unselfishly sharing his experience, his knowledge and his love of the law.

John G. Tomlin, Jr., known to all as simply “Mike,” graduated from Washington and Lee, and the University of Cincinnati Law School. He served his country in Military Intelligence during World War II and in Korea. Whenever duty called, “Mike” Tomlin answered. In times of stress, he provided easement. In times of woe, he provided comforting solace.

His association with Chase College of Law commenced in 1960. He gave a firm handclasp to hundreds of Chase Law graduates over the years. His was a quiet strength. And when his physical powers began to fail, he still and nevertheless, continued to perform his duties at Chase almost until the very end. He faced the last crisis of his life in his typical fashion, resolutely and uncomplainingly.

John G. Tomlin, Jr., his life and works, have made a lasting impress upon us all. Professor Tomlin died on Monday, August 21, 1978.

Let others hail the rising sun:
I bow to that whose course is run.¹

EUGENE W. YOUNGS
PROFESSOR OF LAW

¹. David Garrick, On the Death of Mr. Pelham.
KENTUCKY'S IN FORMA PAUPERIS STATUTE: 
INDIFFERENT JUSTICE OR MERELY DIFFERENT JUSTICE?

Majorie Herbert*

We live in increasingly impersonal communities where the more traditional modes of social control and personal leverage, public opinion and reputation, are less and less effective. Therefore, a person whose property or personal rights are threatened by another turns to the courts as a last resort for protection. But legal advice is expensive. Indeed, litigation designed and executed by competent counsel is usually very expensive. Yet, "seeing a lawyer" becomes a necessary part of self-assertion and self-protection.

But if recourse to courts is increasingly necessary, and our ability to pay determines the possibilities of that recourse, it follows that there is a hierarchy of protected, less protected, and nonprotected persons in American society, a hierarchy of access to court that parallels our hierarchy of wealth. This is a reality which is repugnant to the principles of our democratic society. We treasure the symbols of "blind justice" and the "day in court" and prefer to believe that they represent realities available to every citizen. But the person of limited or no financial means in Kentucky must rely on the in forma pauperis statute. This statute enables a poor person to have court-assigned counsel and to have the court fees and costs waived. But the statute is not supported with legislation allocating funds to pay for counsel and costs. The statute helps to maintain the illusion that poor persons have access to our courts. It provides an escape from the administrative and financial burdens necessary in allowing the poor use of our courts because it reduces an enormous social, economic, and political responsibility to a judge-made decision. It is an inadequate law—hardly a sword or shield for survival in today's world.

This essay will explore the problems in Kentucky's in forma pauperis statute, its history and case law construction. Section II will be a report of field research on how circuit judges decide in forma pauperis motions, while the third section will discuss possible avenues for change.

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I. KENTUCKY'S IN FORMA PAUPERIS STATUTE: WHAT ACCESS TO THE COURTS DOES THE LAW PROVIDE FOR INDIGENTS?

_Boddie v. Connecticut_¹ was welcomed as presaging the Constitutional right of access to the courts for the poor. In _Boddie_ the Court ruled that a state's denial of dissolution of marriage because of inability to pay court fees and costs was a denial of due process. The logic of the decision was that marriage is a fundamental right and the state holds a monopoly on the means of dissolving the marital relationship. Justice Harlan's opinion for the Court's majority was careful to point out: "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment. . . ."²

Justice Harlan's caution in _Boddie_ has been reinforced in more recent cases. In _Ortwein v. Schwab_³ the Supreme Court upheld the requirement of a $25.00 filing fee for appealing an administrative decision on old age assistance. The Court said that the required fee was not a denial of due process because the petitioners had received an administrative pre-termination hearing,⁴ and that the fee did not violate equal protection requirements because it was rationally justified to meet court expenses. In 1973 the Supreme Court upheld a fee requirement as applied to an indigent seeking a discharge in bankruptcy,⁵ and in _San Antonio v. Rodriguez_⁶ the Supreme Court listed fundamental rights and did not include access to court.

The indigent Kentucky citizen, lacking the constitutional construction providing access to the courts, must look to the in forma pauperis statute for access and aid. The indigent criminal defendant fares much better with the in forma pauperis statute than the civil litigant. In a criminal case, the state prosecutes an individual citizen and the result can be imprisonment. The constitutional provisions relevant to criminal prosecution in the fourth, fifth, and sixth amendments have been construed by the Supreme Court as necessitating certain allowances for indigent defendants. _Griffin v. Illinois_⁷ held that the denial of appellate review of a criminal convic-

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tion to an indigent because of inability to afford the necessary transcript was a denial of equal protection and due process. Gideon v. Wainwright\textsuperscript{8} held that a refusal by the trial court to appoint counsel for an indigent charged with a felony was a denial of the right to counsel as provided in the sixth amendment and as applied to the states by the due process clause of the fourteenth amendment. The Supreme Court, in Douglas v. California,\textsuperscript{9} relied explicitly on Griffin and held that the equal protection clause guaranteed indigent defendants the right to counsel in criminal appeals. These cases have generated further speculation as to whether the constitutional arguments imply the indigent criminal defendant should be supplied investigatory and witness fees by the state.\textsuperscript{10} The Supreme Court's construction of the equal protection and due process clauses as to their implications for indigent criminal defendants has resulted in courts and legislatures taking responsibility for the costs of an indigent's defense. Kentucky's Public Defender Act\textsuperscript{11} provides for payment of counsel fees, and the in forma pauperis statute is used to waive costs and obtain appeals. The in forma pauperis statute becomes a part of a larger system of legislation which attempts to alleviate the indigent criminal defendant's vulnerability to injustice by criminal prosecution.

The situation is different in civil cases. Kentucky is one of thirty-four jurisdictions including the federal which has an in forma pauperis statute.\textsuperscript{12} Since the Supreme Court has not construed access to court as a fundamental right, the poor person in Kentucky seeking action in civil courts has only the in forma pauperis statute to alleviate the financial burdens incident to civil legal problems.\textsuperscript{13}

Kentucky's in forma pauperis statute\textsuperscript{14} has been amended twice in one hundred seventy-seven years—in 1958 and in 1976. Originally

\textsuperscript{8} 372 U.S. 335 (1963).
\textsuperscript{9} 372 U.S. 353 (1963).
\textsuperscript{10} See, e.g., Note, Discriminations Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435 (1967); Note, Equal Protection and the Indigent Defendant: Griffin and Its Progeny, 16 Stan. L. Rev. 394 (1964); Comment, Griffin v. Illinois, 25 U. Chi. L. Rev. 143 (1957).
\textsuperscript{12} Note, Proceedings in Forma Pauperis, 9 U. Fla. L. Rev. 65 (1956).
\textsuperscript{13} Lexington, Louisville, and the Northern Kentucky area have Legal Aid Offices which accept some civil litigation, and there are two federally funded legal service organizations in three rural areas of the state. However, most counties have neither locally nor federally funded legal services for the poor.
enacted in 1798,\textsuperscript{15} it was a copy of an Act of 1786 of Virginia\textsuperscript{16} having a history rooted in English law.\textsuperscript{17} The intent of the legislation was stated in the preamble: “Whereas it is intended that indifferent justice shall be had and administered to all the citizens of this Commonwealth, as to the poor as to the rich . . . .”\textsuperscript{18} The preamble is no longer in the statute, and the language was modernized by the 1958 amendment.\textsuperscript{19} The present statute, amended in 1976, reads:

1. A court shall allow a poor person residing in this state to file or defend any action or appeal therein without paying costs, whereupon he shall have any counsel that the court assigns him and shall have from all officers all needful services and process, including the preparation of necessary transcripts for appeal, without any fees, except such as are included in the costs recovered from the adverse party, and shall not be required to post any bond except in an amount and manner reasonable under the circumstances of his poverty.

\textsuperscript{15} Act of Jan. 30, 1798, ch. XIV, Ky. Acts 39:


\textsuperscript{17} See Maguire, Poverty and Civil Litigation, 36 HARV. L. REV. 361 (1923). This article provides a comprehensive history of in forma pauperis statutes. It traces from Roman law through English legal history the development and, in some instances, the decline of legal provisions for poor persons’ access to courts. Maguire points out that 2300 or 2400 years ago, Roman law protected the poor man, and that in following centuries, in medieval, Elizabethan, and modern England, there have been courts more open to the poor than were the courts of Massachusetts in 1923. \textit{Id.} at 371.


\textsuperscript{19} Act of June 19, 1958, ch. 126, § 44, Ky. Acts 562:

Except as provided in paragraph (b) of subsection (2) of KRS 28.460, a court may allow a poor person residing in this state to prosecute or defend any action therein without paying costs, whereupon he shall have any counsel that the court assigns him and shall have from all officers all needful services and process without any fees, except such as are included in the costs recovered from the adverse party.

\textit{Ky. Rev. Stat.} 28.460(2)(b), which provided that reporters’ fees were to be taxed as part of the costs of the action, and that the reporter would not be required to file a transcript in a civil case unless paid by the party who ordered it, has been repealed, Act of Dec. 22, 1976, ch. 14, § 491.
(2) A "poor person" means a person who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter or clothing.

(3) Application to proceed without payment of costs and fees, pursuant to subsection (1) herein, shall be made by motion supported by the affidavit of the applicant stating the reasons that he is unable to pay the costs and fees or give security therefor.\(^{20}\)

The law seems to provide the indigent civil litigant the same general aids and protections afforded an indigent criminal defendant, but there are major differences. The criminal indigent has the benefit of funds and administrative structures of the Public Defender's Act. The appointed counsel is paid and decisions concerning eligibility are usually made by the public defender's office. But the indigent pursuing civil legal matters must have eligibility for waived costs and appointed counsel determined by the judge, and the judge must make his decision with few guidelines. No further appropriated funds are available. These differences point to the major problems in Kentucky's statute.

The proportionally large number of in forma pauperis cases litigating the matter of transcript costs and fees reveals the plight of the indigent civil litigant. The statute places the burden of expense of the civil in forma pauperis case upon the local court, the court clerks, and court reporters, and effectively places them in direct or indirect opposition to in forma pauperis suits. In 1856 an appellant obtained a ruling on a court clerk to show cause why he had refused an application to make a transcript of the record for the court of appeals. The clerk answered that the appellant was insolvent and had refused to give security for the fee. The court of appeals decided that it was the duty of the clerk to make out a transcript for the unsuccessful litigant without previously demanding security for the fee.\(^ {21}\)

Kentucky's Court of Appeals ruled in 1905 that a clerk must furnish a transcript to an indigent appellant and the judge may direct the reporter to file a transcript upon motion of any party suing in forma pauperis.\(^ {22}\) But in 1939 the court of appeals ruled that in the absence of evidence heard on a motion to furnish a transcript, it will be presumed that there was sufficient evidence to sustain the

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court's overruling the motion.\textsuperscript{23} The court of appeals defended the court clerk again in 1941 by ruling that in a case where a pauper applies for a free transcript and the court clerk and reporter are not notified when the motion has been made in circuit court, the clerk and reporter do not receive adequate notice to refute the pauper's evidence.\textsuperscript{24} Furthermore, in no event can the official court reporter be required to furnish a transcript in civil cases free of cost.\textsuperscript{25} The \textit{Clause} case identifies the clerk and reporter as adversaries of the indigent by conceding them a right of notice and a right to refute the pauper's claim of poverty.\textsuperscript{26}

The court clerk's resistance to in forma pauperis suits is as old as the statute and reflects a basic problem in the law. The circuit court clerk has a salary set by the state legislature.\textsuperscript{27} But the statute provides that his salary is to come from collected fees, and the fee system is deeply embedded in the state's political structure.\textsuperscript{28} It is commendable to provide a statutory means for poor persons to sue or defend themselves in court, but unless some financial base is legislated to assume the cost that is lifted from the pauper's shoulders, another obstacle is placed in the pauper's path, \textit{i.e.} the one who must pay the cost.

Another person who feels the financial burden of civil in forma pauperis suits in Kentucky is the court reporter. The court reporter is sometimes reimbursed by the county fiscal court for services rendered in paupers' suits, but this varies greatly from place to place.\textsuperscript{29} The amendments to the in forma pauperis statute in 1958 and 1976 were, in part, efforts to clarify and protect the court clerk's position, but the central purpose of the statute undermines this effort. If a litigant meets the standard of eligibility under the statute and the case is appealed, he or she will probably be too poor to pay for transcripts. In \textit{Braden v. Commonwealth},\textsuperscript{30} the court of appeals was sympathetic with the court reporter and reluctant to overrule the

\begin{itemize}
\item 23. McIntosh v. Armour & Co. of Ill., 279 Ky. 517, 131 S.W.2d 393 (1939).
\item 25. \textit{Id.} at 694, 149 S.W.2d at 11.
\item 26. \textit{Id.} at 692, 149 S.W.2d at 10.
\item 27. Ky. REV. STAT. § 64.345 (1977).
\item 29. The field research interviews reported in Section II, \textit{infra}, included questions about how in forma pauperis suits are financed. Some of the judges commented on how the court reporter is paid in in forma pauperis suits. In some instances the county fiscal court pays the court reporter, but there appear to be cases where the court reporter is not paid at all. The judges remarked that the pay from the fiscal court was less than the reporter would normally make.
\item 30. 277 S.W.2d 7 (Ky. 1955).
\end{itemize}
Nevertheless, the court decided that the lower court had abused its discretion in refusing the cost of a transcript ($4,000.00) to a litigant who was deeply in debt ($7,254.00). The court stated that it was not necessary that the in forma pauperis appellant be completely destitute. The court of appeals distinguished Braden's case from Shipman v. Commonwealth\(^{31}\) in which only ten witnesses testified and the court said that a bill of evidence could have been presented in narrative form.\(^{32}\) Braden's trial lasted thirteen days, and the court said that Braden's attorney could not be expected to make up a bill of evidence from memory.\(^{33}\)

The Supreme Court ruled in Griffin v. Illinois\(^{34}\) that the pauper's rights in a criminal case cannot be defeated by transcript costs, and Kentucky has followed the Griffin ruling regardless of the amendment to the in forma pauperis statute.\(^{35}\) But the issue remains quite alive in civil cases. The state district court is the initial determiner of whether an in forma pauperis appeal and "free" transcripts are allowed. The federal district court in Duke v. Wingo\(^{36}\) construed Kentucky's in forma pauperis statute as giving a statutory right to proceed as a pauper and a right to a free transcript upon a showing of indigency.\(^{37}\) Kentucky's highest court in Braden said,

> The Court sympathizes with reporters but it is a duty of office, and the fiscal court of the county can raise the salary. It is not the duty of the trial court to protect a reporter from hardship he might reasonably anticipate when the position is accepted.\(^{38}\)

Regardless of the court's reminder of duty, the discretion resting with the trial judge in ruling on in forma pauperis motions and the pressures of disgruntled clerks and reporters upon the exercise of that discretion militate against the poor person's access to civil courts. As one circuit judge remarked, "The clerks do not like in forma pauperis suits, and we have to work with those clerks and reporters."

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pauperis statute is unusual. But the provision is quite problematic and is almost never used. In *Wright v. Crawford*, the court of appeals held that a defendant who was subject to imprisonment under civil judgment was entitled to a hearing on the issue of his claimed indigence and to appointed counsel. The defendant had defended an assault charge pro se and had asked for appointed counsel and in forma pauperis proceedings. The trial judge refused, saying there was no authority for appointment of counsel in civil cases. The court of appeals ordered the trial judge to hold a hearing on the matter of indigence and to appoint counsel. But the appeals court stated that the statutorily permitted imprisonment of Wright brought the case within the rationale of the rule applicable to appointment of counsel for indigents in criminal cases.

In *Parsley v. Knuckles*, the court of appeals stated that there was nothing in the common law which requires providing counsel in civil cases, and any step toward that end must be made by the legislature. The court distinguished *Parsley* from *Wright* by stating that indigence as an issue was not presented, and the in forma pauperis statute was not considered under the facts of the case.

Kentucky’s Public Defender Act provides counsel (and salaries for counsel) for indigents in criminal cases. There are no legislated funds for court appointed counsel in civil cases. It is doubtful the court of appeals would construe the in forma pauperis statute to force appointed counsel to serve in a civil case. In *Bradshaw v. Ball*, the appeals court decided that the burden on the legal profession of representing indigent criminal defendants without compensation constitutes a substantial deprivation of property and is constitutionally infirm. The court further declared that attorneys were no longer required to accept court appointed indigent criminal defendants and those attorneys declining would not be subject to sanction. This decision implies that the provision of the in forma pauperis statute for assigned counsel when applied to civil suits is a dead letter.

40. 401 S.W.2d 47 (Ky. 1966).
41. 346 S.W.2d 1 (Ky. 1961).
42. Id. at 2, 3.
44. 487 S.W.2d 294 (Ky. 1972).
45. Id. at 296.
46. Id. at 299, 300.
In summary, this section has discussed problems in constitutional right of access in civil cases, a comparison with criminal cases, and problems in Kentucky's in forma pauperis statute. Since the Supreme Court has not construed access to civil courts as a fundamental right, the poor person in the state is dependent upon the in forma pauperis statute to assure court access and protection. Theoretically, the state lifts the financial burden of court costs from the pauper, but the absence of a fair system of defraying the costs causes resistance from those who must bear them and greatly diminishes the possibilities for the statute's use.

II. FIELD RESEARCH WITH CIRCUIT JUDGES: THE IN FORMA PAUPERIS STATUTE IN THE COURTS

This section will discuss the results of field research with Kentucky circuit judges. An appendix with the interview questions and computations of the answers is included.47 The researcher developed a representative sample of fourteen circuit judges throughout the state. At the time of the interviews, there were eighty-six circuit judges in Kentucky, and the sample included fourteen judges, one from every large urban area in the state as well as judges from rural areas in all sections of the state. The sample also included two public defenders for purposes of comparison. The judges and public defenders were interviewed either directly or by telephone. The central goal of the research was to explore judicial attitudes toward in forma pauperis applicants, in forma pauperis cases, and alternative systems for access to the courts for poor persons.

All the judges interviewed said that the large majority of the criminal cases in their courts were cases in forma pauperis. Nearly all the judges said that while the court rules on eligibility, the previous screening for eligibility by the public defender is normally accepted. An example of guidelines for eligibility used by a public defender's office is:

An individual or a person legally dependent upon or living in the household of an individual whose estate is of a net value of $1,500.00 or less and whose real income (take home pay minus obligations arising out of unusual emergency situations such as uncompensated

47. The schedule of questions was developed and the data collected before the 1976 amendment to the in forma pauperis statute. The research also predates the recent changes in the state judicial system, and the judges interviewed were circuit judges rather than district judges.
casualty loss, disaster or hospitalization) for the preceding year falls at or below $2,750.00 for the principal member of the household plus an additional $750.00 per annum for each dependent will be considered, prima facie, a needy person entitled to the services.

Thus, the typical family of four, which is probably not at all typical for an accused indigent, would be eligible if the family's real income did not exceed $5,000.00. When an indigent makes an appearance in court without applying for a public defender, the court will appoint one. Applications and screening for financial eligibility then proceed with the public defender. Most of the judges interviewed commented very favorably upon the public defender system, particularly those systems employing full time attorneys. As judges commented on the improved efficiency in expediting cases, one remarked, "The indigent accused can receive fine counsel from an attorney who has developed expertise as a public defender and knows the prosecutor from experience, perhaps better counsel than a middle class person could find or afford." One judge in the sample said that he believed the public defender system was greatly abused by persons who could afford to pay, and another stated that he believed it was a step toward socialistic law.

Many of the judges expressed antagonism toward persons making a bond and then having a public defender. One judge told of placing an order in the clerk's office that no one making a bond over $1,500.00 was to be represented by a public defender, and of sometimes making payment of costs a condition of probation. Even though the guidelines suggested by one public defender's office state, "a needy person's right to the services of the . . . Public Defender's office shall not be affected by his release on bail. . . .", many judges see the capacity to make bail as indicative of financial resources. While the court of appeals in Braden48 noted that an appearance bond does not offer evidence against indigence, the suspicion was stated by the majority of judges interviewed. The standard for allowing in forma pauperis appeals was generally more liberal among the judges, the primary reason being that persons imprisoned are without income.

A very small minority of civil cases in the judges' courts were in forma pauperis. The average number was two per cent. Two of the judges had never experienced one since one judge handled only criminal cases and another had been on the bench for a short period

of time. Of the small number of civil in forma pauperis cases, the large majority were dissolution of marriage cases. Other types of cases mentioned were uniform support proceedings and voluntary termination of parental rights. There were no reports of landlord-tenant disputes, appeals from public assistance administrative decisions, or repossession cases.

Attitudes are admittedly difficult to measure, but a number of questions in the interview were designed to explore the judge's attitude toward in forma pauperis applicants and proceedings. One question asked what kinds of information about an applicant is most persuasive in deciding in forma pauperis motions. Ten judges indicated that being unemployed was most persuasive to them. Nine judges said that having no property was influential, and seven stated that having a number of dependants and no job persuaded them of poverty.

The judges were questioned as to the kind of information that made them suspicious of in forma pauperis applicants. Eight judges responded that ownership of property caused them to be skeptical. Several of these judges specified luxury items such as rings, watches, televisions, cars, or real estate as triggering suspicion. Ten of the judges said that the appearance of the applicant ("nice clothes, jewelry, etc.") made them suspicious. Twelve of the judges were dubious of an in forma pauperis applicant who was free on bond, while five said that their suspicions were aroused by intuition, their general impression of the applicant.

The majority of the judges did not express dissatisfaction with the present relief that the in forma pauperis statute provides. Over half of the judges interviewed said that the legal needs of the poor were being adequately met. One said that he did not know of any cases where poor persons were deprived of pressing claims in court because of finances, commenting that expanding the public defender system to cover civil cases would encourage "vexatious and useless litigation." Another judge said that there is simply no way to fund civil in forma pauperis cases adequately, and that society was becoming "over legalized" anyway.

Three judges in the interviews said that the existing in forma pauperis statute is abused and affords many ineligible persons "free rides." Only three stated that they did not believe that the in forma pauperis statute adequately met the legal needs of Kentucky's poor persons. One judge said that he knew of many cases where the poor person is penalized because of the type or lack of counsel afforded. Another judge pointed out that poor people were especially vulner-
able to repossession, eviction, and unjust treatment because the courts were unavailable. One judge said that a lot of "good folks are too proud to plead themselves paupers, and they go in need rather than be humiliated."

The tiny fraction of civil cases that are in forma pauperis does not reflect the legal problems of poor persons in Kentucky. On the contrary, it shows the lack of access the poor person has to the courts. One judge estimated there are five civil cases for every criminal case in the trial courts. Yet the field research shows that the majority of criminal cases are in forma pauperis with a tiny minority of the civil cases being pursued in the same fashion.

The judges' attitudes toward in forma pauperis applicants reflect middle class attitudes toward poor persons. The American work ethic and our cultural tradition of perceiving poverty as a moral defect prompt such judicial attitudes.49 The majority of the judges interviewed did not view persons on public assistance as eligible for in forma pauperis proceedings. In fact, welfare recipients seemed to evoke distrust.

The term "pauper" has negative connotations. The dregs of society, the completely penniless and dependant are buried in nameless graves in a Pauper's or Potters Field. One judge said, "When I was a lawyer, I paid for some cases myself rather than do an in forma pauperis." Another judge stated that the in forma pauperis motion carries the stigma of failure or parasitic dependency for the majority of the middle class.

Since the judge is elected by the local population, these judges' attitudes may indicate an awareness of the political repercussions which could occur with widespread use of the courts by poor persons. Landlord-tenant disputes, contested repossessions, and reviews of administrative decisions would all be litigation resulting in decisions which would affect the landlords, shopkeepers, and administrators who elect judges. The judge participates in and identifies with a community whose interests are likely to be different from the potential in forma pauperis litigants.

The majority of the judges interviewed believed that the legal needs of the poor are being met under the present use of the statute, and that their complacency toward access to the courts and atti-

and reasonably well informed decision due to the judge's knowledge of the community. On the other hand, the urban judge, when allowing in forma pauperis motions in civil cases on the basis of affidavits, may be opening the courtroom to an opportunistic liar at the court's expense. Consequently, the bench cannot be the means for reform.

The supreme court is reluctant to narrow the trial judge's discretion because of the fear of mandating an untenable economic burden or opening the door to innumerable frivolous suits. Kentucky's courts will be guided in their in forma pauperis decisions in part by the Constitutional construction of the Supreme Court, but those constructions have not granted access to the court the status of a fundamental right. One legal scholar commented, "By curtailing advancement of their reasoning of Boddie, the Court has in effect allowed court costs to bar an indigent's access to the judicial process in many instances." 55

Contemporary law reviews contain several proposals for legal challenges for court access for the poor at the constitutional guarantee level. These proposals fall into three basic approaches. One approach is the right to a hearing before a deprivation of property. This is an argument for the application of the reasoning of Griffin57 to a civil context, that due process requires an opportunity for a hearing on the merits in civil cases. It is argued:

For procedural due process purposes, where one's principal concern is not with discrimination, but rather with whether there has been a deprivation by the state, there is enough state action to warrant a hearing whenever state legislation, such as court fee requirements, is responsible for the loss of an otherwise expected benefit. This approach seems to offer limited gains, since a logical extension of the argument, if successful, could be that the fees are a rational

55. A helpful analysis of state court decisions in in forma pauperis suits can be found in Comment, supra note 1.
tudes toward indigents are similar to the judicial attitudes described in the results of a study published in the Stanford Law Review. That study said:

Whether one wishes to characterize the work of the local tribunal as policy-making, norm enforcing, or simply dispute settling, the local judge inevitably weighs competing interests (social, political, legal, economic and others) in arriving at decisions. That process involves the exercise of discretion, which, in incremental fashion plays an important role in shaping community lifestyle.

The authors pointed out that the low visibility of a circuit judge's decisions means maximum discretion, and that in turn greatly enhances the political role played by the judge. The study reported that the judges displayed restrictive attitudes toward in forma pauperis proceedings through harsh eligibility standards.

Kentucky's judges express normative attitudes toward poor persons, and they play key roles in shaping the policy which opens or closes the courtroom to the state's poor. The attitudes reported by this research are a part of the problem the poor person faces when seeking legal protection or relief in civil courts. The in forma pauperis statute in action in the local court bench limits, discourages, or even denies the indigent's access to court.

III. SUGGESTIONS FOR CHANGE

Kentucky's in forma pauperis statute can be changed through legal challenges or legislative reform. This section will discuss possible avenues for either mode. The field research reported in section II implies little hope for increasing the opportunities of the poor by depending upon a more enlightened exercise of judicial discretion. This does not mean that the judges are the villains. On the contrary, judges are burdened with innumerable difficult decisions and duties. The judge has a responsibility under the law as it is written to allow paupers to sue or defend. But the judge cannot merely rubber stamp every in forma pauperis motion and become a party to the law's abuse. Nor can the judge take the necessary time to investigate and weigh the claim of poverty. In rural areas of Kentucky, what may appear as an arbitrary ruling may actually be a sensitive

51. Id. at 1061.
52. Id. at 1069.
53. Id. at 1069, 1075.
means to defray court expenses, and the compelling state interest of court finances must be balanced against the particular interest of the poor person's cause of action and his resources to pay. That reasoning could return one to Kras and Ortwein. Furthermore, poor persons have legal needs in many areas other than "property."

Another avenue for legal challenge is a model for a "newer" equal protection. Gerald Gunther takes the recent Supreme Court decisions which reject housing and allocation of welfare benefits as fundamental interests, and suggests an attack through scrutiny of legislative intent. Gunther claims that there is a growing discontent with the rigid Warren Court two tier formulation of equal protection, and says that the Supreme Court displays a "strikingly diminished" judicial deference to legislative purposes. Gunther and other commentators suggest scrutinizing whether or not legislative means further legislative ends. The articulated purposes for court fees could be examined. If the stated purpose is to offset court expense, the rationale of the means and ends would probably be upheld. On the other hand, if the articulated purpose is to discourage frivolous suits, the rationale would be difficult to defend. The achievements of this approach would be quite limited. A state legislature could more easily, and probably more readily amend the articulated purposes for court fees and costs than develop a sound statutory base for indigents' access to courts.

There is another direction of constitutional development suggested by Justices Brennan and Douglas in their concurring opinions in Boddie v. Connecticut which would declare access to the courts a fundamental Constitutional right. Justice Douglas criticizes the majority opinion by Justice Harlan as reviving substantive due process. The reasoning of Ortwein and Kras and the directions of possible Constitutional development legal scholars have divined from them would seem to bear out his contention. Justice Douglas

60. For example, custody decisions, institutionalization for mental incompetence or mental illness and invasion of privacy.
63. Id. at 12.
64. Id. at 20.
65. Note, supra note 59, at 584.
67. See generally id.
68. See Note, Indigent's Access to Civil Court, 4 Colum. Human Rights Rev. 267 (1972).
would decide on equal protection grounds, relying on the *Griffin-Douglas* line of cases to find invidious discrimination based on wealth. Wealth would become a suspect category, and barriers to the legal process because of poverty would mean a denial of equal protection.

Justice Brennan attacks the majority's reasoning in *Boddie* about the state's monopoly over marriage and says:

A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court is usually 'the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interest in court.' The right to be heard in some way at some time extends to all proceedings entertained by courts. The possible distinctions suggested by the Court today will not withstand analysis.

If wealth were defined as a suspect category, and access to courts declared a fundamental Constitutional right, states would respond by developing legislation for civil indigents comparable to the Public Defender Act.

Kentucky's legislature does not have to wait for the Supreme Court to act. One measure could be to amend public assistance laws to allow subsidy for legal needs. That could result in public assistance administrations assuming the responsibility for financial eligibility.

Another proposal for legislative measures which could enlarge court access is to develop a sliding scale for financial eligibility in legal aid or public defender systems comparable to approaches utilized in medical or dental services. A sliding scale of payments rather than a fixed eligibility rule would be more realistic. Legal services are unique in the strong emphasis on financial eligibility and their lack of a system for providing services in the same office for a person who is not an indigent. Kentucky's eligibility standard is now an improvement over the previous absence of a standard, but there are no legal facilities throughout the state where it can be

70. *Id.* at 386.
71. *Id.* at 387-88 (Brennan J., concurring in part) (quoting majority at 376-77).
74. *Id.* at 570.
In forma pauperis employed. The Legal Services Corporation Act\textsuperscript{75} does not provide for facilities with a sliding scale for fee; it is an all or nothing federally funded legal service for people too poor to pay anything. Furthermore, these legal services are limited as to the types of cases that can be handled, and the scarcity in funding and location greatly limit the degree to which they serve the legal needs of the poor.

Perhaps more immediate advances toward improving court access for poor persons could occur through revision and expansion of the in forma pauperis statute. One legal scholar comments:

Because the scope of relief that can be provided by in forma pauperis statutes is limited only by the legislatures' unwillingness to expend public funds for the benefit of the poor litigant, legislation has clearly the greatest potential for ameliorating the condition of the indigent seeking access to the civil courts.\textsuperscript{76}

A law which does not include adequate administrative and financial structures is hardly more than an easy expression of good intentions. As far back as 1495, the Act of Henry VII failed because an administrative burden (sifting bona fide causes of honest men) was placed upon an overworked court which did not have the auxiliary administrative machinery.\textsuperscript{77} Kentucky has made the same mistake by conceding to the circuit judge the decision of financial eligibility. A more efficient and accurate procedure could be developed if legislation were enacted providing an auxiliary administrative office to do these tasks. This is, in effect, how the public defender system operates in the state, and it is eminently sensible.

One may argue that in those areas of Kentucky where legal aid is available, similar procedures occur in civil cases. But most of Kentucky has no legal aid, and in those very few areas that do, the legal aid offices have restrictions on types of cases handled. An American Bar Foundation survey of two hundred and seventy-five legal aid organizations throughout the United States showed that, although a significant number of legal aid offices had broadened eligibility standards, many still have unreasonably restrictive rules for financial eligibility or very narrow rules as to the kinds of cases handled, or both.\textsuperscript{78} The restrictions on financial eligibility and the type of case handled are inspired by fears of competition from the private bar.\textsuperscript{79}

\begin{footnotes}
\item[77] Maguire, supra note 17, at 378.
\item[78] Silverstein, supra note 73, at 549.
\item[79] Id.
\end{footnotes}
The large majority of Kentucky counties have no legal aid or federally funded legal services. The poor person is left to the generosity of the local bar's charity work, the circuit judge's discretion if the cause gets that far, or the mercy and fiduciary sensitivities of a contingent fee arrangement.\(^8\)

A legislated model for more expanded court access for poor persons can be found in Great Britain. Henry Maguire describes an English model which includes a poor person's department in the Royal Courts of Justice with branch offices in district registries.\(^2\) Their departments are administrative centers where applications for relief are made. These departments investigate, and if the application is accepted, appoint counsel. Nothing except the actual trial of approved cases comes before the judge.\(^6\) Maguire suggests that a comparable arrangement in the United States would include waiver of costs and fees subject to reinstatement if the financial situation warrants it, and a fund made available for advancements and witness fees.\(^4\)

The application of the English model for legislation in Kentucky could result in a public defender system for civil cases. A department in state government, perhaps the Department of Human Resources, could assume administrative responsibility for in forma pauperis applications. Maguire claims that an adequate in forma pauperis statute would not place an intolerable burden on the courts.\(^8\)

Two states in the United States have moved in the direction of developing auxiliary administrative structures. West Virginia has shifted the administrative tasks of determining eligibility for statutory relief to a body better suited to such evaluations by making the waiver of all statutory fees mandatory when an applicant submits a certification of poverty from the chief executive officer of a legal aid society.\(^8\) New Hampshire provides for mandatory waiver of fees

\(^{80}\) Note the much publicized and extremely lucrative black lung contingent fee practice in eastern Kentucky.

\(^{81}\) See generally Solomon, "This New Fetish For Indigency": Justice and Poverty in An Affluent Society, 66 COLUM. L. REV. 248 (1966). Solomon points out that the legal requirements of the poor involve domestic relations, housing, welfare, mental illness, civil rights, credits and collections, employer-employee relations, and consumer matters. Most matters do not involve money judgements. Thus, the contingent fee is often irrelevant.

\(^{82}\) Maguire, supra note 17, at 391.

\(^{83}\) Id. at 394.

\(^{84}\) Id. at 400.

\(^{85}\) Id. at 401.

whenever the applicant is represented by a legal aid society, a federally funded legal service, or counsel assigned in accordance with the rules of the court.\footnote{87. N.H. Rev. Stat. Ann. § 499:18-b (Supp. 1977).}

If Kentucky is to provide real access to her courts for those persons unable to pay the costs, legislation to supplement the in forma pauperis statute must be enacted. Private legal aid corporations which are controlled by the fears of the local bar are clearly inadequate. The intent of indifferent justice stated in the ancient preamble of our in forma pauperis statute implies the kind of access to courts that can only be provided by a much more broadly conceived statute which includes funding and an administrative machinery which has guidelines for financial and legal eligibility.

CONCLUSION

More and more people are turning to the courts for settlement of disputes. While the indigent have legal needs, complex programs of public assistance have created legal needs along with ameliorating poverty. A democratic society cannot allow wealth to determine whether or not a person can seek redress or protection in its courts. The constitutional arguments for protection of the indigent criminal defendant logically extend to the potential imprisonment or loss of rights and property that can result in civil litigation. As it is written and construed, Kentucky's in forma pauperis statute allows very few poor persons to turn to the civil courts. A public defender system for civil matters, comparable in scope and financial base to the criminal system, would be a major step toward the "indifferent justice" and healthy democratic society intended by our forefathers.
APPENDIX

The following is the schedule of interview questions. There were fourteen judges and two public defenders interviewed. The responses given to the questions are reported in percentages.

1. How frequently do in forma pauperis motions appear in your court?
   A) Criminal - 57% of all criminal cases handled.
   B) Civil - 1.8% of all civil cases handled.
   (These percentages represent averaging the responses.)

2. What kinds of cases are accompanied with in forma pauperis motions?
   A) Criminal cases - no breakdown.
   B) Civil cases - 99% were dissolution of marriage, with a very few voluntary termination of parental rights and Uniform Support cases.

3. What kind of cases are you more disposed to allow to proceed in forma pauperis?
   A) Criminal - 100% of the judges interviewed said that they allowed criminal in forma pauperis cases because of Constitutional considerations and the Public Defenders Act.
   B) Civil - (Note - 99% of the in forma pauperis civil cases were dissolution of marriage cases.)
      98% of the judges interviewed were disposed to allow in forma pauperis dissolution of marriage, especially if initiated by women or prisoners.
      2% of the judges were opposed to in forma pauperis dissolution of marriage.
      100% of the judges would allow in forma pauperis voluntary termination of parental rights and Uniform Support proceedings.

4. How frequently do the following types of in forma pauperis cases occur? (These responses represent averaging the responses.)
   A) An individual files in forma pauperis without an attorney.
      1% of the civil in forma pauperis suits were filed without an attorney.
   B) An individual filed in forma pauperis with an attorney.
      99% of the civil in forma pauperis suits were filed with an attorney.
   C) An individual files in forma pauperis with an attorney furnished by a legal services organization.
25% of the civil in forma pauperis cases were filed with the services of an attorney furnished by a legal services organization.

(Note — The criminal in forma pauperis cases come under the Public Defender Act)

5. When an in forma pauperis proceeding is allowed, who pays the costs?
   A) Criminal - Public Defender
   B) Civil -
      50% of the judges said “No One”
      40% of the judges said “The County”
      10% of the judges said that dissolution of marriage cases were taxed against the husband if possible.

6. When a plaintiff proceeding in forma pauperis wins, is the defendant assessed costs?
   100% of the judges responded yes.

7. What information do you require for an in forma pauperis motion? (Note - These categories were answers given by the judges, they were not suggested. Many judges answered with more than one category.)
   Property — 64% of the judges
   Income — 57%
   Number of dependants — 14%
   Employed — 35%
   Debts — 14%

8. What information about an applicant is most persuasive to you in deciding in forma pauperis motions? (Note in question 7 applies)
   No employment — 75%
   No property — 60%
   Having a number of dependants and unemployed — 50%

9. What kinds of information cause you to suspect or rule against in forma pauperis motions? (Note in question 7 applies)
   Property (real or personal, especially nonessential items like TV’s) — 85% of the judges
   Appearance — 70%
   Intuition — 35%
   Employed — 35%
   Free on Bond — 90%
10. Have you experienced any problems peculiar to in forma pauperis proceedings?
   No — 65% of the judges
   Yes — 35%

11. In what way, if any, are such proceedings burdensome for the court? (Note in question 7 applies)
   Court reporters and clerks do not like them — 65% of the judges
   Financially burdensome — 14%
   Not burdensome — 35%

12. What suggestions would you offer toward developing a criteria for deciding in forma pauperis motions? (Note in question 7 applies)
   None — 60% of the judges
   Anyone on bail bond should not be allowed in forma pauperis — 30%
   Standardized affidavit — 35%

13. Do you have suggestions for an alternative procedure for meeting this aspect of the court’s responsibility? (Note in question 7 applies)
   None — 70% of the judges
   Small claims court — 20%
   Develop a uniform plan for paying clerks and reporters — 10%
THE CRIME OF INCEST

David Royce*
Anthony A. Waits**

I. INTRODUCTION

While no satisfactory classification of sexual deviations has been devised, it is generally accepted that incest veers far from the norm of conventional sexual behavior. Broadly defined, "incest" refers to sexual activity between members of a family whose kinship would ordinarily preclude marriage. There does not appear to be a universally accepted definition of incest, although intra-family incest taboos are universal with few exceptions. The incest taboo prohibiting sexual relationships between father and daughter, mother and son, and brother and sister, is a constancy in virtually all civilized cultures. Societies have defined incest differently, however, and even in the United States, definitions of and penalties for incest vary widely among the states.

While brother-sister incest is said to occur frequently, and

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3. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1141 (1964).

The incest taboo is an almost universal social tenet and although among human societies there is known to be infinite variation of taboo practice within the extended family, application to members of the nuclear family is the most universal of the various incest taboo manifestations.

Certain sub-populations of a very special religious or state-religious nature have been exceptions to the general taboo. These include the royal-religious families among some African societies and the ancient priestly ruling class of Peru. The only known society which provides a more general exception to the universal rule of nuclear family incest taboo is ancient Egypt where property inheritance considerations apparently were of importance sufficient to sanction marriage within the nuclear family.

Id. (footnotes omitted).
5. Hughes, supra note 4, at 326.
mother-son incest has occasionally been reported, father-daughter (or stepfather/stepdaughter) incest is most commonly reported in literature. Furthermore, it is the incestuous relationship between father and daughter which produces the most dramatic consequences. In this study of the legal and social ramifications of the crime of incest, the terms "incest" and "incestuous intercourse" should be broadly construed as referring to any of the aforementioned intra-family relationships; however, emphasis should be placed on the father-daughter (or step-father/step-daughter) relationship since it is the most common and produces the greatest harm to the familial structure.

The crime of incest has never existed at common law in the United States and was created by statute at varying times in the different states. Statutory prohibition of incest evolved from religious or moral principles that societies throughout the ages determined to be of such vital importance to their preservation as to justify legal sanction. Devlin, in his treatise on law and morals, gave great thought to the justification of legal sanctions for violations of moral principles. Devlin believed that a public morality was the essential element to the existence of a society. He rationalized that, just as society has the right to use the law to prevent treason, so also has it the right to use the law to prevent immorality. Thus, it is the right of society to preserve itself and its morality which gives it the power to use the law to enforce its moral principles.

Incest is universally regarded as a crime against the morality of society, and morality has long been the single most inhibiting factor serving to reduce the incidence of incestuous activity. Nevertheless, moral principles alone are not sufficient to alleviate the incidence of incest, and the necessity of statutory and judicial prohibitions against incestuous relationships is thus apparent.

II. INCIDENCE

An early estimate placed the incidence of incest at 1.9 cases per
CRIME OF INCEST

million population.14 More recent research suggests that incestuous behavior occurs with much more frequency. One such study found that incest occurred in nine percent of a sample of child abuse cases from the New York boroughs of Brooklyn and the Bronx.15 Another study found the incidence of incest in Santa Clara County, California to be 200 cases per million.16 It is felt that even this estimate did not reflect the true incidence of incestuous activity.17 The Children's Division of the American Humane Society has reported that 5,000 cases of incest may occur annually in the United States.18 Other estimates of potential incest range from the results of one study which suggest that 500,000 children may be sexually victimized every year,19 to those of another which calculated that in 1965 two million families concealed the fact that one of their daughters was a victim of incest.20 Many authorities seem to agree that the reported cases of incest represent the tip of the iceberg.

The implication of incest as a dynamic in other social problems is also striking. One study indicated that forty-four percent of the female drug abusers sampled had been involved in an incestuous experience, and almost half of these women had run away from home by age sixteen.21 Another study found that five percent of all female admissions to inpatient psychiatric services had been involved in incestuous relationships.22 In a sampling of 700 psychiatric patients, four percent were found to have been involved in incestuous relationships.23 And another researcher found that over one-fifth of a sample of prostitutes had been incestuously assaulted as children.24

15. V. DeFrancis, Protecting the Child Victim of Sex Crimes Committed by Adults 27 (1969).
17. Id.
24. Giarretto, supra note 6, at 145.
It is certain that incest has inherently harmful consequences and, therefore, it is not difficult for a society to justify the enactment of laws prohibiting such activity. Potential victims and society in general are entitled to be protected from potential incest offenders by the additional prohibitive force of judicial and legislative enactments since moral principles alone have not been able to sufficiently reduce the incidence of incestuous activity.

III. STATUTORY ANALYSIS

The crime of incest is generally more encompassing in United States' jurisdictions than in other civilized countries around the world. A comparative study of several state statutes will provide a better understanding of the crime of incest as it exists in the United States today and give some insight as to why incest has been regarded by some as a crime which, by its very nature, is "repulsive and shocking to every sense of decency."26

In Kentucky the statute prohibiting incestuous intercourse provides that

[a] person is guilty of incest when he has sexual intercourse with a person whom he knows to be an ancestor, descendant, brother or sister. The relationships referred to . . . include blood relationships of either the whole blood or half blood without regard to legitimacy, relationship of parent and child by adoption, and relationship of stepparent and stepchild.

As in other states, the crime of incestuous marriage is a separate offense in Kentucky.28

Ohio has recently amended its statute prohibiting incestuous intercourse, and the revision should prove to be an innovative step toward better protection for those susceptible to sexual abuse.29 In order to fully understand the revision which took place in Ohio, a look at the former statute prohibiting incestuous intercourse will lend assistance. It read in part:

Persons, nearer of kin by consanguinity or affinity than cousins, having knowledge of their relationship, who commit adultery or fornication together, shall be imprisoned . . . 30

25. Hughes, supra note 4, at 323.
In contrast, the new statute makes the crime of incest part of a very broad prohibition that encompasses sexual conduct with a person other than one’s spouse in a variety of situations where the offender is considered to be taking “unconscionable advantage” of the victim. The statute, entitled “Sexual Battery,” was enacted to broaden the coverage of what was formerly known as incestuous conduct so as to include not only sexual conduct by a parent with child, but also sexual conduct by a stepparent with stepchild, a guardian with his ward, or a custodian or person in loco parentis with his charge.

Ohio’s sexual battery statute is an attempt to enlarge the area of protection for potential sex offense victims. It includes sexual conduct by coercion, which is somewhat less restrictive than sexual conduct by force or threat of force, a necessary element in prosecuting for rape. The distinguishing characteristic of this statute as it pertains to incestuous conduct is that it extends the proscribed degree of relationship to that of a guardian with ward and that of a person in loco parentis with his charge.

New York’s statute prohibiting incestuous intercourse is similar to that of Kentucky, except its coverage does not extend to relationships between stepparent and stepchild. It proscribes sexual relations between blood relatives:

A person is guilty of incest when he marries or engages in sexual intercourse with a person he knows to be related to him, either legitimately or illegitimately, as an ancestor, descendent, brother or sister of either the whole blood or halfblood, uncle or aunt, nephew or niece.

In comparison with Ohio’s new sexual battery statute, the New York statute is greatly limited in its scope of proscription. The gravamen of the offense under the new Ohio statute is that the offender takes unconscionable advantage of his or her relationship to the victim, arising out of kinship or duty of protection or supervision. In this respect the Ohio statute is specifically broader than its predecessor and the Kentucky and New York statutes prohibiting only certain intra-familial intercourse.

32. Id. Committee Comment.
33. OHIO REV. CODE ANN. § 2907.02 (Page 1975).
34. N.Y. PENAL LAW § 255.25 (McKinney 1967).
35. KY. REV. STAT § 530.020(1) (1975).
36. N.Y. PENAL LAW § 255.25 (McKinney 1967).
37. OHIO LEGIS. SERV. COMM., PROPOSED OHIO CRIMINAL CODE (1971).
IV. PROSECUTION OF THE CASE

Generally, in order to prosecute for the crime of incest, three facts must be established: (i) the relationship of the offender and the victim; (ii) the offender's knowledge of that relationship; and (iii) sexual intercourse with the victim. 38

The most difficult element of the offense to establish is the act of sexual intercourse. Generally, the prosecution has the right to present proof of the commission of the offense at any time prior to the finding of the indictment charging incestuous intercourse. 39 While each act of sexual intercourse constitutes a separate and distinct offense, 40 charging the commission of incest on a number of occasions within a given period of time has been held to be specific enough to support an indictment for the charge of incest. 41 However, where the crime is so charged, the court will, on a motion for a bill of particulars, require the prosecution to specify, or approximate, a particular date of occurrence. 42

Where numerous acts of intercourse are alleged, the prosecution, upon proper motion, will be required to elect a specific incident upon which to base its case. 43 Even if no such motion is made by the defense, the court may, sua sponte, instruct the jury to consider evidence of subsequent acts only for the purpose of corroboration of the first. 44 It should be noted, however, that if the defense counsel fails to make timely objection and the court fails to so instruct the jury on its own, this failure is not a basis for appeal. 45

As a rule, "evidence of the commission of crimes other than the one that is the subject of the charge is not admissible to prove that the accused is a person of criminal disposition . . . ." 46 However, there are important exceptions to this rule. Kentucky has adopted the following position:

38. E.g., Cecil v. Commonwealth, 140 Ky. 717, 131 S.W. 781 (1910).
40. State v. Brown, 47 Ohio St. 318, 81 N.E.2d 546 (1948); Barnhouse v. State, 31 Ohio St. 39 (1876).
41. Keeton v. Commonwealth, 459 S.W.2d 612 (Ky. 1970); Smith v. Commonwealth, 109 Ky. 685, 60 S.W. 531 (1901) (evidence of prior acts held admissible in corroboration of testimony); State v. Jackson, 82 Ohio St. 318, 81 N.E.2d 546 (1948).
42. E.g., Breeding v. Commonwealth, 191 Ky. 128, 229 S.W. 372 (1921); Bardue v. Commonwealth, 144 Ky. 428, 138 S.W. 296 (1911).
44. Id.
CRIME OF INCEST

(1) Evidence of independent sexual acts between an accused and the victim of an alleged sex crime is admissible to prove a disposition and inclination in the accused to engage in sexual acts with the victim. Upon admission of such evidence, the trial court must admonish the jury that such evidence may be used only to corroborate other testimony as to the offense charged.

(2) Evidence of independent sexual acts between an accused and persons other than the victim of an alleged sex crime, if such acts are similar to that involved in the charge and not too remote in time, is admissible to prove disposition and lustful inclination in the accused, intent as to the act charged, motive, or a common plan, scheme, or pattern. Upon admission of such evidence the trial court must admonish the jury that such evidence may be used only to corroborate other testimony as to the offense charged.47

A general qualification to the above rules is that even though such evidence might be admissible thereunder, the court has the power to exclude it upon a determination that its probative value is outweighed by its possible prejudicial effect.48 Nevertheless, it has been stated,

In prosecutions for sex crimes the law has come closer than in any other area to allowing proof of a defendant's general predisposition to engage in criminal activity. Prior acts of sexual misconduct by the accused with his alleged victim, as well as prior acts with other person, have ruled admissible . . . .49

A further limitation to admissibility is that “evidence of other crimes’ may not be admitted when the other crimes have no relevancy to the case other than to show a disposition in the defendant toward criminal activity.”50 It is not prejudicial, however, to allow the victim to testify that sexual intercourse with the accused occurred on “numerous occasions.” Such evidence is admissible to show a course of conduct.51

47. Id. Cf. Ohio Rev. Code Ann. § 2945.59 (Page 1975) (evidence of prior acts is admissible in any criminal case where motive or intent, the absence of mistake or accident on the defendant’s part, or the defendant’s scheme, plan, or system in doing an act is material); see also Fed. R. Evid. 404.

48. See Rake v. Commonwealth, 450 S.W.2d 527 (Ky. 1970); State v. Chapman, 111 Ohio App. 441, 168 N.E.2d 14 (1959) (evidence of defendant’s alleged sexual relations with one of his daughters eight years before incest prosecution held inadmissible as being too remote and, therefore, insufficient to show a course of conduct); Fed. R. Evid. 403.

49. R. Lawson, supra note 46, § 2.20, at 22.

50. Id. at 21.

51. Keeton v. Commonwealth, 459 S.W.2d 612 (Ky. 1970); Brister v. Commonwealth, 439 S.W.2d 940 (Ky. 1969); Williams v. Commonwealth, 277 Ky. 227, 126 S.W.2d 131 (1939); Barnett v. State, 104 Ohio St. 298, 135 N.E. 647 (1922)(evidence of other acts limited to
Another question which is frequently raised in sexual offense cases, and especially in rape and incest cases, is whether the accused can be convicted upon the uncorroborated testimony of the prosecutrix. Generally there are two situations in which corroboration of testimony is required: (i) where there are statutes requiring corroboration of accomplices, and (ii) where there are statutes requiring corroboration in the prosecution of sex offenses. Kentucky falls within the first category. It has a statute requiring the corroboration of an accomplice's testimony. New York, on the other hand, falls within the second category; it has a statute which provides that a person cannot be convicted of incest or an attempt to commit incest upon the uncorroborated testimony of the victim. Ohio, however, has no requirement, statutory or otherwise, that a victim's testimony be corroborated.

It has been said that the rationale for requiring corroboration in prosecutions for sex offenses lies "in the fact that crimes of this nature are easily charged and very difficult to disprove; in view of the instinctive horror with which mankind regards them." Nevertheless, the statute, standing alone, can be somewhat misleading because even with this statute, corroboration of the testimony of a prosecutrix who is a child under the age of consent is not required. This is in accord with the Ohio and Kentucky positions. As stated in Bailey v. Commonwealth:

We have held consistently in this character of case . . . that the verdict based upon the uncorroborated testimony of the prosecutrix will be sustained unless her testimony is so highly improbable as to show it to be false.

Where there is a statute requiring corroboration of an accomplice's testimony, as in Kentucky, and there is reason to believe that

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52. See generally 41 AM. JUR. 2d Incest § 24 (1968).
60. Id. at 764, 229 S.W.2d at 769; see Straub v. State, 5 Ohio C.C. (n.s.) 529, 17 Ohio Cir. Dec. 50 (1904).
the victim of the incestuous act was, in fact, a consenting party and thus an accomplice, a conviction cannot be sustained upon the victim's testimony alone. In the absence of other testimony or evidence tending to implicate the defendant in the commission of the offense, the court will instruct the jury to render a verdict of acquittal. Where corroborative evidence is required, it may be direct or circumstantial. Evidence of prior and subsequent acts of intercourse between the defendant and the victim or a third party is generally admissible for the purpose of corroboration as pointed out earlier in the article.

Generally, corroboration is not required in a charge of incestuous intercourse. If the defendant accomplished his criminal act through the exercise of force, fraud, or undue influence, or if for any reason the consent of the victim was wanting, then the victim should not be viewed as an accomplice. This is frequently the case. Kentucky cases have consistently held in a long line of decisions that, under an indictment for incestuous intercourse committed by a father on his daughter, a conviction is authorized upon the testimony of the daughter alone, and in such case, the daughter is not considered an accomplice in any sense, but rather a victim. The majority of incest offenses are committed by fathers against their daughters within the privacy of the family home. This could be one of the major reasons that the corroboration requirement is dropped in such situations.

V. PUNISHMENT

Statutory punishment for the crime of incestuous intercourse varies greatly across the United States. Incestuous rape is frequently punishable with life imprisonment. In Kentucky, incest minus the rape element carries a sentence of at least five years but not more

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61. R. Lawson, supra note 46, § 2.20, at 21.
62. Id.
63. See Sarver v. Commonwealth, 425 S.W.2d 565 (Ky. 1968); Hooper v. Commonwealth, 419 S.W.2d 756 (Ky. 1967); Anderson v. Commonwealth, 312 Ky. 768, 229 S.W.2d 756 (1950).
64. Keith v. Commonwealth, 251 S.W.2d 850 (Ky. 1952); State v. Reinke, 89 Ohio St. 390, 106 N.E. 52 (1914).
65. See generally 42 C.J.S. Incest § 17 (1944).
66. Browning v. Commonwealth, 351 S.W.2d 499 (Ky. 1961); Salyers v. Commonwealth, 255 S.W.2d 605 (Ky. 1953); Whitaker v. Commonwealth, 95 Ky. 632, 27 S.W. 83 (1894).
67. See text accompanying note 9, supra.
than ten years, and in New York incestuous intercourse is punishable by a term to be fixed by the court, not to exceed four years. However, where the court, having regard to the nature and circumstances of the crime and the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate sentence, the court may impose a definite sentence of imprisonment and fix the term of one year or less. In Ohio, sexual battery, i.e., incestuous intercourse, is punishable by an indefinite term of imprisonment to be not less than one year and not more than ten years, plus a possible fine not to exceed $5,000.

Ohio courts are required to have the convicted offender examined by the department of mental health and retardation or a state facility designated by the department, or a psychiatric clinic approved by the department, or by three psychiatrists. And upon consideration of the examination report, the court will then enter a finding and prescribe the appropriate punishment or treatment. Because of the nature of the crime of incest and the parties involved, treatment and punishment vary according to the severity of the offense and the mental state of the offender. Where mental illness is the prevailing factor involved and psychiatric care is recommended, the offender will normally be referred to the health board for treatment before a sentence will be carried out.

VI. NONREPORTING AND THE DUTY TO DISCLOSE

The most alarming aspect of the crime of incest is that it frequently goes undetected and unprosecuted. "To such a remarkable extent is the incest family able, at will, to isolate itself from all public censure, that the control of incest behavior must rely on an agent within the family." In a recent article, Sergeant Wesley Mysioneer of the Cincinnati Police Juvenile Division said that "the

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70. N.Y. Penal Law § 255.03 (McKinney Supp. 1977).
71. N.Y. Penal Law § 70.00 (McKinney 1975 & Supp. 1977). This section refers to a conviction for a violation of N.Y. Penal Law § 255.25 (McKinney 1967). A conviction for a violation of N.Y. Dom. Rel. Law § 5 (McKinney 1977) results in the imposition of a fine, and the court, in its discretion, may also sentence the violator to prison.
73. Id. § 2947.25(A) (Page Supp. 1977).
74. Interview with John Ferguson, Case Worker Supervisor for the Child Protective Service in Cincinnati, Ohio (Jan. 22, 1978).
75. Id.
76. Tormes, supra note 4, at 32.
majority of sexual abuse cases against children are done right within the household by some relative. . . . Father-daughter [situations] are most common.\textsuperscript{77} As to the difficulty of prosecuting the incest offender, the sergeant said that the mothers of children who have been sexually abused by incestuous intercourse often refuse to bring the action to the attention of the police for fear of getting beaten up by the spouse and losing their "meal ticket." In many cases, the fathers are able to persuade the mother and daughter not to testify. In such a case, where the mother refuses to report the crime, police and social workers may be left with nothing but suspicions.\textsuperscript{78} Reasons for not reporting the offense include fear of disgrace, lack of courage, and the fact that the sexual relationship between the father and daughter might serve the wife's ends, by taking the pressure of sexual advances by the husband off the spouse, although she may not be conscious of this.\textsuperscript{79}

It is not surprising that the incidence of incestuous intercourse is much greater than the number of prosecutions indicate. It should be noted, however, that the law is not the only remedy that the victimized family has available to it. Some families inflicted with the incestuous problem seek help from their clergymen; others consult their doctors or other professionals whom they ultimately feel to be better suited to deal with their problem and protect their privacy and reputation.\textsuperscript{80}

However, incest or sexual abuse is a type of child abuse in most cases and, in the majority of jurisdictions, physicians and others are under a legal obligation to report "any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of such child . . . to a municipal or county peace officer [or to the proper child protective agency]."\textsuperscript{81} There should be no other option.

\textsuperscript{77} Lang, Incest is Unmentionable—and Common, Cincinnati Enquirer, Jan. 15, 1978, at H-1, col. 1.
\textsuperscript{78} Id.
\textsuperscript{80} Interview with John Fergeson, supra note 74.
\textsuperscript{81} Ohio Rev. Code Ann. § 2151.421 (Page 1976). See also Ky. Rev. Stat. § 199.335(2) (1976). This statute provides in part as follows:

Any physician, osteopathic physician, . . . social worker, coroner, medical examiner, child caring personnel, resident, intern, chiropractor, dentist, optometrist, health professional, peace officer, mental health professional or other person who knows or has reasonable cause to believe that a child is an abused or neglected child, shall report or cause a report to be made in accordance with the provisions of this section.

See also N.Y. Soc. Serv. Law § 413 (McKinney 1976). These sections and others like them are designed to assure that protective services of the state are made available to abused and neglected children and to preserve and strengthen family life, where possible.
Physicians and others entrusted with such confidential matters are often guilty of trying to handle these matters on their own when the child’s best interest may be served by the reporting of acts of incestuous intercourse. The purpose of statutory requirements making it mandatory for physicians, nurses, school personnel, etc. to report believed or known incidents of child abuse is to assure that the protective services of the state will be made available to an abused or neglected child in order to protect such a child and to preserve and strengthen family life, where possible.\textsuperscript{82}

In Cincinnati, the Child Protective Service (CPS) provides services for families where child abuse has become a problem. The CPS is a program that has been established throughout the United States and provides services in most major metropolitan areas. The CPS receives reports of child abuse and incest by way of various channels of information, most commonly the mother, the teacher, the family physician or clergyman, the friends and neighbors of the family. The CPS attempts to alleviate the problem by providing the victimized family and abusive parent with on-going treatment and therapy programs.\textsuperscript{83} By agency policy, CPS is required to:

1. Respond promptly to reports of alleged neglect, abuse or exploitation of children to determine the validity of the report;
2. Assess the damage to children resulting from neglect or abuse;
3. Evaluate the risk of further injury to the children in the home and determine whether the children should remain in the home or whether emergency action is required;
4. Determine and identify the family problem or problems which contributed to or resulted in neglect or abuse;
5. Evaluate the potential for treatment of the underlying factors to correct conditions and rehabilitate the family;
6. Plan a course of treatment calculated to stabilize and rehabilitate the family through services of the protective agency and the use of other appropriate community resources to meet special needs of the children and parents;
7. Initiate the treatment plan and stimulate involvement of services from community resources to meet identified special needs;
8. Invoke the authority of the juvenile or family court in situations where there is risk to the children should they remain at home, or where there is active resistance to child protective intervention.\textsuperscript{84}

\textsuperscript{82} Ky. Rev. Stat. § 199.335(1) (1976).
\textsuperscript{83} Interview with John Fergeson, \textit{supra} note 74.
The CPS does not prosecute reported incidents of incest. In those cases in which an appropriate offer of service is refused and the CPS determines that the best interests of the child require family court or criminal court action, the agency will initiate the appropriate court proceeding or make a referral to the appropriate district attorney, or both.85

VII. CAUSATION FACTORS

Psychoanalysts have been unable to reach total agreement as to what the general characteristics of the incest barrier entail and, similarly, they have been unable to pinpoint the factors which ultimately lead to the destruction of the barrier. However, many factors contributing to the incidence of incestuous activity can be cited: (i) dysfunctional marriage, deceased or absent wife;86 (ii) overcrowding — studies indicate that incestuous families were more overcrowded than those of non-incestuous families;87 (iii) joblessness — creating a greater likelihood that the father will be alone in the home with the child and also potentially greater marital and personal stress which may reduce the father’s perception of his ability to perform his appropriate role as father;88 (iv) social isolation;89 (v) onset of puberty — where the daughter’s more womanly appearance may precipitate the father’s viewing her as a new sexual object;90 (vi) deviant socialization — a potent disinhibiting factor which may operate to minimize or prevent the internalization of the incest taboo;91 (vii) alcohol — acts as a disinhibiting factor and also has a tendency to produce marital stress;92 (ix) mental illness and retardation — serve as powerful disinhibitors which do not need to interact with other predisposing factors.93

85. Interview with John Fergeson, supra note 74.
86. With marital discord often comes reduced or interrupted marital sex relations. Studies have indicated that this factor sometimes causes incestuous desires.
87. Henderson, Incest, A Synthesis of Data, 17 CAN. PSYCH. A.J. 299, 300 (1972); see Berry, supra note 7.
88. See Bagley, supra note 2; Daveron, The Role of the Social Worker, in The Battered Child 140 (2d ed. R. Helfer & C. Kempe 1974); Molner & Cameron, supra note 22; Virkkunen, supra note 79.
89. H. Maisch, supra note 9, at 106; Sarles, Incest, 22 PEDIATRIC CLINICS N. AM. 633, 637 (1975).
91. H. Maisch, supra note 9, at 130; S. K. Weinberg, supra note 14, at 111-14; Cavallin, supra note 14, at 1135; Virkkunen, supra note 73.
93. Hughes, supra note 4, at 327.
Regardless of what factors are ultimately the cause of the incestuous act, one thing is certain and all seem to agree that incestuous relationships have a very disruptive effect upon the familial structure and its members. Incest produces a confusion of roles within the family: the father becomes the lover as well as the father; the daughter becomes the wife or mistress as well as the daughter. Confusion and tension are produced which lead to the destruction of the familial structure. The actual incidence of incest is generally described as evidencing profound disorganization of the intra-family relationship, coupled with a psycho-pathological condition in the incest initiator.

The Cincinnati Enquirer quoted the director of the Cincinnati Mental Health Services, Pat Hewitt, as stating that the daughter is the most abused child in families where the father has abusive tendencies, and the daughter most abused as a child was often the one with which the father later had incestuous intercourse. Hewitt described the classic example of incestuous activity as a situation where:

[S]exual activity began when the daughters were 10 or 11. The girls would attempt to tell their mothers, who would then deny it happened and say, 'you had a bad dream.' When the girls were about 14, actual intercourse first took place. Four or five years later, they started taking overdoses or cutting their wrists. Without fail, they were admitted to mental hospitals with suicidal tendencies. When the incest broke out in the open, the marriages ended in divorce. At 20-21, the daughters couldn't have meaningful relationships with either sex. Even at 26 or 27, they have no major goal in life. Usually, they're very active sexually, say they feel sorry for men and feel men want them only for sex. All these girls are messed up and have to be on medication.

Hewitt pointed out that the Mental Health Services hears most of the desperate cases where, as she puts it, "the mothers are usually the only ones who could stop the incestuous activity, but they tend to be women of 'weak egos,' fearful of being left alone with large families to support. . . . The mothers don't want anyone to know. And they don't know where to get help before it gets to the point of no return." The victimized child ultimately bears the brunt of the

94. Id.  
95. Id.  
96. Lang, supra note 77.  
97. Id.  
98. Id.
crime by being unable to establish a healthy and purposeful life. The problem is more acute than that, however, as "[t]he problem of incest, specifically of father-daughter incest has one other intrinsic importance. It is the central relationship of a syndrome developed within the family which profoundly affects the relatedness of each family member and the family as a unit to society in general." 100

VIII. CONCLUSION

Incest represents a great threat to the familial structure and inevitably to society itself, and this alone sufficiently accounts for the constancy of the incest taboo throughout the world without posing built-in biological explanations. Nevertheless, it should be noted that the most recognized consequence of incestuous intercourse is the dysgenic effect on the offspring.100 This factor has had some effect upon the promulgation of statutory laws in the United States. In fact, it explains the peculiarity of the New York statute which does not recognize the stepfather/stepdaughter relationship as being within the proscribed degree of kinship. Most modern statutes, however, are directed toward protecting the victim of incest and the family from the harmful psychological and sociological effects of the crime.

Laws dealing with the violation of the incest taboo reflect a prevailing confusion regarding the exact source of the pernicious effects of incest. Some, like those of New York State, which recognize only sexual intercourse among consanguineal relations, are based unequivocally on the hypothesis of harmful biological effects and a consequent concern for the production of defective progeny. Other states, however, recognize as incestuous behavior sexual relations between various "legal" in addition to blood relatives. The most commonly forbidden non-consanguineous sexual relationships are between adoptive or stepparents and their children. These latter laws recognize current sociological and psychological thinking that sexual relations between parents and children (whether by blood or by law) interfere with family functioning by promoting sex rivalries and jealousies within it, and produce an atmosphere which is deleterious to the healthy personality development of the child.101

The Kentucky and Ohio laws prohibiting incestuous relationships reflect their legislatures' general recognition of the current sociological and psychological thinking. By extending the prohibited degree

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99. Tormes, supra note 4, at 6.
100. Hughes, supra note 4, at 328.
101. Tormes, supra note 4, at 5.
of relationship to stepparents and adopted children, and even further to that of legal guardian and ward, the Kentucky and Ohio statutes provide maximum protection against the crime of incest.\textsuperscript{102}

In light of the alarming estimates as to the incidence of incestuous activity and the insidious miseries produced as a result, "the law must add what weight it can to the general social condemnation."\textsuperscript{103}

Aside from the legislative and judicial prohibitions, other governmental agencies have taken on part of the responsibility of dealing with incest offenders and victims. Human resources, child protective services, and mental health clinics are a few of the agencies now available to families who are victimized by the crime of incest.

The real problem involved with helping the victims of the crime of incest is getting someone to bring the offense to the attention of those who can provide help and guidance. "[T]he act of incest, unlike other serious sex crimes, takes place within the privacy of the home. . . . The sanctity of the home and the right to family privacy are cornerstones of American social and political thought. In the absence of overt symptoms family problems remain secret."\textsuperscript{104}

\textsuperscript{102} Ky. Rev. Stat. § 530.020 (1975); Ohio Rev. Code Ann. § 2907.03 (Page 1975). Note that a legal guardian, who has sexual relations with his ward, can be convicted of incest in Kentucky, even though the statute does not specifically proscribe sexual relations between guardians and wards. See McCreary v. Commonwealth, 163 Ky. 206, 173 S.W. 351 (1915) (defendant, in loco parentis, convicted of incest).

\textsuperscript{103} Hughes, supra note 4, at 330.

\textsuperscript{104} Tormes, supra note 4, at 32.
COMMENTS

BREATH ALCOHOL ANALYSIS: CAN IT WITHSTAND MODERN SCIENTIFIC SCRUTINY?

I. INTRODUCTION

In response to increasing personal injuries and property damage attributable to drinking drivers, the federal government has prodded the states into unanimously adopting "implied consent" statutes. These statutes provide for the revocation of the driver's license of anyone who refuses the reasonable request of a police officer to submit to a chemical analysis of his blood, urine, saliva, or breath in order to determine whether he (the accused) was driving while intoxicated. These laws have consistently been found to be constitutional in the face of unlawful search and seizure and self-incrimination arguments.

The proposition that a correlation exists between a normal individual's blood alcohol concentration (BAC) and his degree of neurological impairment is generally accepted in both the scientific and legal communities. Most states have adopted the statutory presumptions that a driver with a BAC of less than 0.05% W/V (weight to volume) is not intoxicated, and that a driver with a BAC greater than or equal to 0.10% W/V is intoxicated. The introduction of a BAC of .10% or greater is prima facie evidence of intoxication. BAC's falling into the area between the presumptive thresholds do not create a presumption but may be considered as evidence of intoxication by the trier of fact.

Since the only way to directly measure anything is to obtain the actual substance to be measured, the only way to directly determine

1. Section 402(a) of the Highway Safety Act of 1966, 23 U.S.C. § 402(a) (1976), provides that each state shall have a highway safety program. The Secretary of Transportation is empowered to promulgate standards for the programs. Id. The standards include requirements for legislative actions, such as implied-consent laws. 38 Fed. Reg. 30459 (1973). Other standards are aimed at controlling the property damage, injuries, and deaths attributable to drunken drivers. Failure of a state to meet the federal standards can result in a cutoff of federal highway funds. 23 U.S.C. § 402(c) (1976).


3. A reasonably thorough discussion of the absorption, distribution, excretion, and pharmacology of ethanol in man can be found in W. Rodini, DEFENDING THE DRINKING DRIVER, chs. 1, 2 (1973).

BAC is through the analysis of a blood sample obtained from the individual in question. Early technology dictated that such blood samples be obtained by phlebotomy since several milliliters (ml) of blood were required due to the comparatively low sensitivity obtainable with the scientific instrumentation of the 1920's and 1930's. Obtaining blood by phlebotomy presented the dual problems of the necessity of having medically trained personnel obtain the samples and the objection of a substantial portion of the population to this invasion of the body.\(^5\)

To avoid these problems, attempts were made to develop the means to estimate BAC indirectly. Early areas of investigation included analyses of saliva\(^6\) and urine.\(^7\) Of the methods devised, the most acceptable was breath analysis, if for no other reason than it avoided the necessity of law enforcement personnel to handle such distasteful materials as saliva and urine. The first application of breath alcohol analysis to forensic medicine was made in 1927.\(^8\)

Before breath alcohol analysis could have any substantial effect upon the growing problem of the drinking driver, it was necessary that instrumentation be made available which was both affordable and not so complicated as to require the operator to be a trained scientist. This need was filled in 1938 with the introduction of the Drunkometer\(^9\) by R.N. Harger and his associates. The Drunkometer

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\(^5\) This bodily invasion was held not to be brutal or offensive, nor to shock the conscience in Lee v. State, 187 Kan. 566, 358 P.2d 765 (1965). See Schmerber v. California, 384 U.S. 757 (1966) (unauthorized bloodtesting for alcohol held not to impair fourth or fifth amendment rights). Phlebotomy is, however, not a pleasant experience, and any direct entry into the larger veins could possibly result in generalized systemic infection. As a result, most state statutes require that persons taking blood samples for these tests be either physicians, registered nurses, or licensed medical technicians. E.g., Ky. Rev. Stat. § 189.520(7) (1970).

\(^6\) Abels, Determination of Ethyl Alcohol in Saliva, 34 PROC. SOC. EXPERIMENTAL BIOL. & MED. 504 (1936).

\(^7\) Southgate & Carter, Excretion of Alcohol in the Urine as a Guide to Alcoholic Intoxication, 1 BRIT. MED. J. 463 (1926).

\(^8\) Bogen, Drunkenness, Quantitative Study of Acute Alcoholic Intoxication, 89 J.A.M.A. 1508 (1927).

\(^9\) Harger, Lamb & Hulpieu, A Rapid Chemical Test for Intoxication Employing Breath, 110 J.A.M.A. 179 (1938). The Drunkometer is very similar to the typical modern breath analysis instrument. Most are based on the principle of Beer's law which states that there is a linear relationship between optical density (basically intensity of color) and concentration of the substance causing the color. In the typical experiment, two samples of a colored solution are placed in front of a light source. Behind each vial is a photoelectric cell which measures the intensity of the light passing through the vial. An electrical current leaving each cell is directly proportional to the intensity of the light striking it. Before the experiment begins, the current leaving the cells is electronically balanced by the operator. One vial, the "reference" vial, remains exactly as it is. In the "test" vial a chemical reaction is initiated, which consumes some of the colored substance. The decrease in color intensity results in an
was followed in 1941 by the Alcometer\textsuperscript{10} and the Intoximeter.\textsuperscript{11} Although all of these instruments are obsolete today, their progeny are based on the same scientific assumptions. The necessary assumption behind any instrumentation purporting to indirectly measure BAC based on breath analysis is that expired air from deep in the lung, \textit{i.e.}, alveolar air, contains \textit{exactly} and \textit{invariably} \(1/2100\) as much alcohol per unit volume as does the blood in the capillaries of the pulmonary circulation.\textsuperscript{12} The theoretical basis for this assumption is that the passage of alcohol vapor across the membrane barrier separating the pulmonary capillary circulation from the alveolar air will obey Henry's Law which governs the dispersion of a volatile substance across a liquid/gas interface.\textsuperscript{13}

\textit{In vivo} there are several complicating factors which make Henry's Law not necessarily applicable. Unlike the true liquid/gas interface of the experimental situation, in the lung there is a biological membrane interposed between the blood containing the dissolved alcohol
and the alveolar air into which the alcohol volatilizes. Furthermore, the air in the lung is in a constant dynamic state which varies with the condition of the respiratory system. Additionally, not everyone has the same body temperature.

These, and possibly other, biological variables introduce a real possibility of substantial error into any estimation of BAC from breath alcohol concentration. Since the blood/breath alcohol ratio does not necessarily approach 2100:1 in many individuals under laboratory conditions, much less in the breath sample obtained in the typical police station analysis, breath analysis instruments do not determine BAC with the degree of certainty which should be required before placing a defendant in the position of having to rebut a prima facie case. Failure to rebut this prima facie case can result in penalties which are at least as serious as those imposed upon some criminal defendants, although frequently the drunken driver is not charged with a “criminal” offense. In addition to the possibility of fine, jail, and/or loss of driver’s license, the convicted drunken driver faces large increases in automobile insurance rates, possible loss of employment as a result of the inability to drive, and considerable social embarrassment. Traditional notions of fair play and justice—and possibly the due process clause of the fourteenth amendment—demand that a degree of certainty more nearly approaching “beyond a reasonable doubt” be required for convictions involving such serious consequences.\footnote{14}{The Supreme Court has held that it does not matter how the state chooses to characterize the action. If a defendant can be deprived of his liberty and his good name by a finding against him, he is entitled to have each element of the offense with which he is charged by proven beyond a reasonable doubt. In re Winship, 397 U.S. 350 (1969); In re Gault, 387 U.S. 1 (1957). See note 33 infra.}

II. DISCUSSION

Early in the history of breath analysis devices, serious questions were raised about the validity of the scientific assumptions behind the instruments.\footnote{15}{Rabinowitch, Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication, 39 J. Crim. L.C. & P.S. 225 (1948). Rabinowitch, a highly respected physician and toxicologist, is one of the few “experts in the field” who does not appear to have had a vested financial interest in the general adoption of breath alcohol analysis by the law enforcement community. He succinctly summarized the applicability of breath analysis to medicolegal problems: “[I]n my opinion, the sooner this test is discarded for medicolegal purposes . . . the better . . . . [T]here is little to say in its favor.” Id. at 244.}

Harger, the inventor of the Drunkometer, was quick to reply to these assertions; so quick, in fact, that he did so in the next issue of the same journal which had published the at-
Harger was forced to recognize the shortcomings of his data as pointed out by his critic, Rabinowitch, but tried to minimize their importance by noting that the majority of the errors was on the low side, i.e., in favor of the accused drunken driver.\footnote{Harger, \textit{Medicolegal Aspects Of Chemical Tests of Alcoholic Intoxication}, 39 J. CRIM. L.C. & P.S. 402 (1948). Interesting insights into the kind of material considered suitable for publication, as recently as 30 years ago, are found in this issue of the journal. It contains an article in which the author purports to be able to identify robbers and potential murderers based upon a classification of facial characteristics and their interaction with the weather. \textit{See} Curry, \textit{The Relationship of Weather Conditions, Facial Characteristics, and Crime}, 39 J. CRIM. L.C. & P.S. 253 (1948).} He then presented a table of later data from an experiment involving simultaneous blood and breath alcohol analyses on thirty-three subjects with 100 observations.\footnote{Harger, \textit{supra} note 16, at 406. Given this argument, we are left with a minority (of undetermined size), who will have BAC's higher than the actual concentration of alcohol in the blood. For the defendant with a breath analysis reading in the range of 0.30\% W/V, the possibility of such a finding having significance is admittedly extremely remote. However, as the breath analysis readings approach 0.10\% W/V, the chances of a meaningful error creating an unfair presumption of intoxication increase substantially.} Although Harger was correct in his contention that none of the values was as far in error as those noted by Rabinowitch in a previous work, the data amply demonstrated that breath analysis is not a reliable enough criterion upon which to base a drunk driving conviction. If one assumes that the thirty-three subjects contributed equally to the data base,\footnote{Telephone Interview with Daniel Weiner, Ph.D., Biostatistician, Merrell-National Laboratories, in Cincinnati, Ohio.} each subject generated three values (with one subject contributing four). If it were further assumed that an error of plus or minus ten percent is an acceptable criterion for a legal conviction, at least eight of the individuals (twenty-four percent) could have been convicted of drunken driving based on the presumption created by statute, when in fact their BAC's were less than that needed to create the statutory presumption in the first place.\footnote{The table indicates that 24 values had a positive error of greater than 10\%. If each individual had approximately the same blood/breath ratio each time tested, which, it will be shown later is an invalid assumption, then each of 8 subjects would have generated 3 inaccurately high results. In fact, given the proper set of circumstances, i.e., a BAC of 0.09\% W/V, 20}
Harger gives insight into his own outlook, and probably that of the National Safety Council's Committee on Tests for Intoxication, with his concluding statement: "[T]he disposition of the daily crop of drunken driving cases cannot await absolute perfection in the field of chemical tests."22

During the same period, several law review articles questioned the validity of breath analysis in BAC determination. Perhaps the most comprehensive of these was written by Gardner.23 Although the author extensively discussed whether or not an individual with a BAC greater than 0.15% W/V (the level of statutory presumption at that time) is invariably intoxicated, a point apart from the considerations of this paper, he did point out that clinical findings indicate that the assumed breath/blood ratio is not a constant and that any error in the determination of breath alcohol content is multiplied by 2000 (now 2100) in the conversion to BAC.24

Another writer argued that since there was a sharp division of scientific opinion as to the validity of breath analysis results, the results of such tests should only be admissible to demonstrate whether or not alcohol was present in the system and that, in the absence of a statute, evidence as to degree of intoxication based upon breath analysis should be inadmissible.25 The authors correctly recognized the difficulty raised by the admission of such questionable evidence, particularly in light of Frye v. United States.26

24 of those 33 subjects could have found themselves faced with an invalid statutory presumption of intoxication.

21. At least four of the seven signers of the 1952 committee statement, which officially recognized the 2100:1 blood/breath alcohol ratio and the scientific validity of breath alcohol analysis, were inventors of breath alcohol detection equipment. They were Jetter, Forrester, Greenberg, and Harger.


24. Id. at 292 & n.6. Unfortunately for thousands of drunken drivers convicted since then, the voices of those commentators were lost in the storm of "expert" testimony given in courts throughout the United States by people like Harger, with a financial interest, or C.W. Muehlberger, a toxicologist employed by the Michigan State Police. Given the popularity of breath analysis among police departments, it is not unreasonable to speculate that a police employee would be under considerable pressure to support the validity of the concept.


26. 293 F. 1013 (D.C. Cir. 1923). "[W]hile the courts will go a long way in admitting expert testimony deduced from a well-organized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the field in which it belongs." Id. at 1014.

The problems of breath analysis in this area spring from two sources. First, the instrumentation is of no practical importance to scientists outside the law enforcement community. The
but implied that the "laying on of hands" by a state legislature could cure these defects.

The power of the legislature to create statutory presumptions was defined in *Tot v. United States*. In *Tot*, Congress had created the presumption that possession of a firearm or ammunition by a person previously convicted of a crime of violence created the presumption that: 1) he received the article in interstate or foreign commerce; and 2) that he received the article subsequent to the effective date of the statute. The Court held that, although legislatures have the power to prescribe what kinds of evidence can be received by the courts, "the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of . . . state legislature[s] to make the proof of one fact . . . evidence of the existence of the ultimate fact on which guilt is predicated." The controlling test was articulated as requiring a "rational connection between the facts proved and the fact presumed . . . ." In terms of drunk driving statutes, this means that there must be a rational connection between breath alcohol concentration (the fact proved) and BAC (the fact presumed). Any rational connection must necessarily be dependent

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small amount of research requiring BAC analysis performed by scientists not connected with the instruments or with law enforcement is done in laboratories where collection and analysis of blood samples is no problem. Scientists use direct measurement of BAC because it is unquestionably superior to any indirect measurement. Independent scientists have never been particularly concerned with the validity of breath alcohol analysis. The only field in which breath alcohol analysis belongs is law enforcement. The "experts in the field" are either police technicians, who are incompetent to scientifically evaluate the instrumentation, or scientists employed by police agencies, who would, understandably, be something less than unbiased observers.

Secondly, virtually the entire body of scientific literature supporting the validity of breath alcohol analysis was published by inventors of breath analysis equipment. Furthermore, Harger himself was the chief expert witness for the prosecution in most of the cases upholding the validity of breath alcohol analysis as an evidentiary tool. Unfortunately, these were typically simple driving-while-intoxicated cases, and the potential seriousness of the consequences of conviction apparently could not justify the cost of employment of expert witnesses by the defendants to offset Harger's testimony. In addition, there probably were few persons available who had examined the data, and those who had certainly were not eagerly waiting at the courthouse door as was the financially interested Harger.

In one manslaughter case, where five expert witnesses testified, the Michigan Supreme Court found admission of breath alcohol analysis results to be reversible error. People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949). A physician testified in that trial, "What is going on in this test is that you have got a continuous series of errors, some for and some against, so that the thing works like a slot machine." *Id.* at 272, 38 N.W.2d at 323.

27. 319 U.S. 463 (1943).
30. *Id.*
upon the scientific validity of the principle upon which the defective equipment is based. In cases involving evidence based on complicated scientific principles, legislatures are in no better position to weigh the arguments for and against the scientific validity of the evidence than are the courts. The only people competent to evaluate scientific validity are scientists. Consequently, general acceptance of validity by scientists in the relevant field has historically been the criterion for legal recognition of scientific evidence. When legislatures and courts were actively considering the validity of breath alcohol analysis, most of the scientists in the relevant field had a vested interest in the continued use of the instruments. They were either inventors or others connected with the law enforcement community. Therefore, the courts and legislatures were not given sufficient information from which an intelligent decision could be made. Furthermore, the quality of data demanded by the scientific community to justify general acceptance of a scientific principle was considerably lower than that demanded today.

There is no question that the amount of ethanol present in a gas mixture (e.g., expired air) can be determined with a substantial degree of accuracy and precision.\textsuperscript{31} Further, it is generally accepted in the scientific community that any person with a BAC of greater than 0.10% W/V will be impaired in his ability to drive a motor vehicle.\textsuperscript{32} The typical statute compels that the presumption of intoxication, which is an ultimate fact determining guilt or innocence, be based upon proof of a BAC greater than or equal to 0.10% W/V, which is a preliminary fact. This latter presumption is based on the single proven fact that the accused had a given quantity of ethanol in his expired air. The statutory scheme, therefore, adopts the scientific assumption that an individual having a given concentration of ethanol in his expired air will have 2100 times that concentration of ethanol in his blood. In practice, this presumption is irrebuttable in that the instrument automatically makes the conversion from breath alcohol measurement to blood alcohol estimation.\textsuperscript{33}


\textsuperscript{32} E.g., R. Erwin, 1 Defense of Drunk Driving Cases § 14.02(c) (3d ed. 1977).

\textsuperscript{33} Although this is not an irrebuttable presumption of an ultimate guilt issue, its constitutional ramifications deserve to be examined in light of both the difficulty of rebutting the presumption of intoxication once BAC has been established and the serious consequences that can follow conviction.

The Supreme Court has repeatedly held that irrebuttable presumptions will be upheld only
In recent years there has been a rekindled interest in breath alcohol analysis in scientific literature. In 1974 Yamamoto and Ueda published a paper describing a new breath analysis instrument which they had developed. The data presented in this paper is remarkably similar to data generated by others during the 1940’s and 1950’s.

Entiknap and Wright were apparently the first investigators to present blood/breath ratio data from individuals as opposed to pooled data from populations of subjects. Although data was collected only from two subjects, it is obvious that each of the subjects demonstrated significant changes in his blood/breath ratio during the course of the experiment. This fact was confirmed by A. W. Jones in 1974. His data indicated that an individual’s blood/breath ratio can vary by as much as 24% during the course of an experiment.

Great Britain has chosen to use breath analysis as an aid in screening for drunken drivers, but the law requires that blood alcohol be determined from a “laboratory specimen,” i.e., either blood or urine. In response to a movement advocating the change of the

upon a showing of a close nexus between the basic fact and the presumed fact. Although the Court has not inconsistently specified how close this nexus must be, it appears to lie somewhere between “not often contrary to fact,” United States Dep’t of Agriculture v. Murry, 413 U.S. 508, 514 (1973), and almost total certainty. Vlandis v. Kline, 412 U.S. 441 (1973). In Vlandis, the Court held that if the presumed fact were not “necessarily or universally true in fact,” finding an irrebuttable presumption from the basic fact violates due process. Id. at 452. See generally Comment, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974).

Breath alcohol analysis is sufficiently unreliable to cause the statutorily created irrebuttable presumption to fail under either of these standards. However, because of the serious nature of the proceedings, a fundamental sense of justice dictates that the standard used be the more stringent standard of Vlandis.


35. The authors seem just as eager as earlier inventors of breath analysis instrumentation to make sweeping statements about the ability of the equipment to predict BAC; however, these statements are based on data which, although insufficiently presented for critical analysis, plainly indicate that the assumed blood/breath alcohol ratio is only valid as to the population as a whole. Careful examination of the data presented indicates that the assumed ratio is possibly invalid when applied to an individual. The authors found that one group of 12 subjects had a mean blood/breath ratio of 1718 ± 371:1. The average member of this group would face the presumption of intoxication in an American court with a BAC of only 0.08% W/V. Id. at 216. The size of the standard deviation indicates that members of this group could face the same presumption with considerably lower BAC’s. Id.


37. Alobaidi, supra note 31, at 1481.

38. Road Traffic Act, 1972, c. 5-12. The drafters of the legislation made good use of the
British statute to allow conviction based on breath analysis alone, an attempt was made to discover whether an accurate determination of BAC can be made from breath analysis. The results of these experiments provide the best evidence yet that the conclusions reached by earlier investigators are of questionable validity.

In these experiments, six individuals were given 100 ml. of seventy proof liquor on empty stomachs. Blood samples and triplicate breath samples were obtained simultaneously at five to fifteen minute intervals over the next several hours. BAC was measured directly from the blood samples and estimated indirectly by multiplying the mean value of each triplicate breath sample by 2100. The two sets of values were then compared.

The data demonstrated that the blood/breath alcohol ratio varies significantly both between individuals and within the same individual over time. The data reveals the possibility that five of the six subjects could have been found to have an artificially high BAC at some time after drinking liquor and that the magnitude of the error in these cases could have been as large as 250%. Furthermore, forty-three percent (23/53) of the actual blood/breath alcohol ratios were less than the 2100:1 ratio presently assumed by the law to be valid.

Compounding the fallacies in the basic scientific assumptions behind breath alcohol analysis is the additional concern that all of the scientific data now in existence has been generated under highly controlled laboratory conditions with presumably cooperative subjects. There has never been an experiment performed under operational conditions where breath samples taken by police officers in police stations on suspected drunken drivers with operational equipment are compared with actual BAC’s. Until this type of work is done, the most that can be said for breath alcohol instrumentation is that the prediction of BAC from breath alcohol analysis is not scientifically reliable.

The published data concerning breath alcohol analysis reveals that the prediction of BAC from breath alcohol concentration is not as reliable as the courts and legislatures of this country have been led to believe. Although breath analysis is capable of predicting BAC within reasonable limits in the population as a whole, a scientist who would testify that an individual with a breath analyzer reading of much less than 0.15% W/V had, with any reasonable degree of scientific certainty, a BAC of at least 0.10% W/V would be either lying or deluding himself.

There are several possible solutions to this dilemma. First, it has been suggested that the statutes simply be changed to create a presumption of intoxication based upon breath alcohol concentration similar to the present BAC presumption. It has even been suggested that data is available to reinforce this presumption.

Second, breath analysis could be abandoned altogether as not sufficiently reliable to support a conviction in a court of law, a solution not likely to gain much popularity among the law enforcement community.

Third, and most logically, breath analysis could be used as a screening device as is done in Great Britain. Modern technology, particularly gas chromatography, is developed to the point where very accurate determinations of BAC can be performed on only a small drop of blood from the fingertip. Suspected drunken drivers should first be given breath analysis and if any trace of alcohol is found, allowed the opportunity to have a blood analysis performed on blood obtained from a finger prick. In this situation the blood analysis would be the only admissible evidence of BAC. If the subject should refuse to allow the blood sample to be obtained, a second breath analysis should be performed immediately and both determinations admitted into evidence.

41. Id. Modern experts seem to agree that even under the best conditions the BAC cannot be predicted from breath analysis with a greater accuracy than ± 10%. Id.

42. It should be noted that genetic determination of parenthood, a system vastly more reliable than breath analysis, has repeatedly been held to be only evidence which is no more weighty than any other evidence in paternity questions. This evidence is frequently ignored by juries in spite of the scientific certainty of non-parenthood. See Annot., 46 A.L.R.2d 1000 §§ 12-15 (1956). Furthermore, polygraph evidence, which is probably just as reliable as breath analysis results, has been uniformly held inadmissible in the absence of stipulation. 29 Am. Jur. 2d Evidence § 831 (1967).

This scheme would do much to eliminate the unfair situation in which a defendant is faced with the difficult task of rebutting a prima facie case of driving while intoxicated based solely or primarily on incorrect scientific evidence. Persons with artificially high breath analyzer readings would have the opportunity to rebut the now irrebuttable presumption created by breath analyzers. Furthermore, since there are at least as many breath alcohol analyses giving low estimates of BAC as there are those giving high ones, police agencies could obtain convictions in many cases which they now choose not to prosecute or in which the verdict is now for the defendant.

Police officers could easily be trained to obtain blood from finger pricks. The simplicity and safety of this procedure as opposed to phlebotomy would obviate the necessity of having trained medical personnel obtain blood samples. In fact, the finger prick is probably considerably safer than breath analysis itself. The dangers inherent in having an open glass vial containing a substance as corrosive as 50% sulfuric acid in a room with a drunk far outweigh the worst possible sequela of a finger prick, an infected fingertip. If 50% sulfuric acid were to be spilled in the eyes of a suspect or a police officer it would surely lead to permanent blindness before medical help could be obtained. Sulfuric acid in this concentration would invariably result in second or third degree burns if not washed from the skin within seconds.

Blood alcohol analyses could be run in duplicate or triplicate by trained scientific personnel, further insuring reliability. This would also remove any uncertainty on the part of the accused that the result of his alcohol analysis was influenced by the opinion or prejudice of the police officer performing the test.

WILLIAM C. KNAPP
THE FOURTH AMENDMENT AND THE ADMINISTRATIVE
SEARCH—THE PROBABLE CAUSE REQUIREMENT AFTER
Marshall v. Barlow's, Inc.

Certain questions in the area of administrative procedure have long plagued the judicial and legislative branches of federal, state, and local governments. Some are so complex that resolution is more often sidestepped rather than firmly and clearly decided. One such area of administrative procedure which presents seemingly unsolvable problems is that of the administrative search.

The history of administrative procedure is peppered with conflicts between the administrative search\(^1\) and the fourth amendment.\(^2\) As far back as 1886, this two-headed dragon representing seemingly antonymical positions harassed the United States Supreme Court, and an attempt was made then to coalesce fourth amendment rights and administrative legislative enablements.\(^3\) Untold peripheral issues are involved in an attempt to square fourth amendment mandates with enabling legislation allowing administrative search. This comment shall address the role that search warrants, or the absence thereof, have played in this constitutional drama.

DEVELOPMENT OF THE PROBABLE CAUSE REQUIREMENT

In the middle of the afternoon one day in February 1958, a Baltimore health inspector responding to a complaint of rat infestation made by a neighbor, went to investigate. Upon approaching a house, the alleged source of the infestation, the inspector noticed rodent feces about the rear of the dilapidated house. After identifying himself, the inspector asked Mr. Frank, the owner, for permission to inspect the basement area. Frank refused, and the next day the inspector and two police officers returned to the house. At no time was a search warrant, authorizing the inspector to enter, issued. When the inspector received no response to his request for admission, he swore out a warrant for Frank's arrest. Frank was found

\(^1\) An administrative search is one conducted by an administrative agency.

\(^2\) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

\(^3\) Boyd v. United States, 116 U.S. 616 (1886).
guilty of a violation of the Baltimore city code for refusing to allow the inspector to enter and was fined twenty dollars. The United States Supreme Court held that this warrantless, unconsented-to search of a private residence was constitutional because it was "of indispensable importance to the maintenance of community health." 

Eight years later, in two companion cases, the issue of warrantless, administrative searches was again addressed. The United States Supreme Court held in Camara v. Municipal Court that, unless search warrants were first obtained or consent to search was given, agencies conducting housing code inspections did so in defiance of the fundamental rights of the fourth amendment. Camara set the standard for warrantless searches of private residences as one of "reasonableness." The Court said:

Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. On the other hand, in the case of most routine area inspections, there is no compelling urgency to inspect at a particular time . . . .

It should be noted that the Court decided that municipalities which conducted area code enforcement searches did so in compliance with the reasonableness standard. The Court directly condoned area searches on two foundational rationales: area searches are necessary to seek out potentially dangerous conditions; and, since area code-enforcement inspections are not aimed at criminal investigation, there is a limited invasion of privacy.

In the companion case, See v. City of Seattle, the Court ex-
tended its holding that the fourth amendment bars prosecution of a person who refuses to let an agency inspector, without a warrant, inspect his private residence to "similar inspections of commercial structures which are not used as private residences." The Court said: "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure."\(^\text{13}\)

In expressly overruling Frank v. Maryland, Camara and See revived some fourth amendment rights with regard to administrative searches. Simply stated, absent an emergency situation, a warrant was needed for an administrative agency to conduct a search\(^\text{14}\) unless the thing or place inspected was generally within sight of the public and the deficiencies apparent.\(^\text{15}\)

Camara and See\(^\text{16}\) were not unanimous decisions. The dissenting Justices thought that because of the growth of metropolitan areas and the subsequent need for additional inspections, it was unwise to overrule Frank v. Maryland and "[strike] down hundreds of city ordinances . . . and [jeopardize] thereby the health, welfare, and safety of literally millions of people."\(^\text{17}\) The majority set forth an opinion founded on constitutional principles, while the dissent, more concerned about the safety of the public, took a more pragmatic approach. Regardless with which view one agreed, at least the issue seemed resolved.

In 1970 fourth amendment rights again entered the maelstrom of judicial debate over administrative search warrants in the case of Colonnade Catering Corp. v. United States.\(^\text{18}\) A federal statute allows the Secretary of the U.S. Treasury Department or anyone to whom the Secretary delegates authority, to enter and inspect the premises of anyone who deals in alcoholic beverages.\(^\text{19}\) A federal

\(^\text{12. Id. at 542.}\)
\(^\text{13. Id. at 545 (emphasis added).}\)
\(^\text{14. Camara v. Municipal Court, 387 U.S. at 539.}\)
\(^\text{15. See v. City of Seattle, 387 U.S. 541 (1967); see Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974) (inspector checking emissions from chimneys did not enter premises, so fourth amendment was not abridged).}\)
\(^\text{16. Justice Clark, with whom Justices Harlan and Stewart joined, filed a combined dissenting opinion in both cases. 387 U.S. at 546.}\)
\(^\text{17. Id. at 547.}\)
\(^\text{18. 397 U.S. 72 (1970).}\)
\(^\text{19. I.R.C. § 5146(b):}\)

The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any
agent for the Alcohol and Tobacco Tax Division of the Internal Revenue Service, while at a party, noticed possible infractions of the federal excise tax law. Federal agents visited the home later and demanded entry into a locked liquor storeroom. After apprising the owner that they had no warrant and “didn’t need one,” they forcibly entered the storeroom and confiscated several bottles of liquor. In the Colonnade decision, the Supreme Court of the United States observed that, historically, the liquor industry has been carefully regulated. The Court also indicated that Congress had broad latitude to “fashion standards of reasonableness for searches and seizures.” The Court stated that Congress had resolved this issue “not by authorizing forcible, warrantless entries but by making it an offense for a licensee to refuse admission to the inspector.” Colonnade laid the groundwork for a new and third exception to the holding of Camara: if Congress indicates that a search is reasonable without a warrant and the warrantless search is part of a legislative scheme to regulate a licensing program, the search falls into a category excepted from the fourth amendment principle that probable cause is a prerequisite to obtaining a search warrant.

Two years after Colonnade, the Court was again faced with this exception. In United States v. Biswell a warrantless inspection by a federal treasury agent of a locked storeroom in a pawnshop revealing certain guns which the owner was not licensed to possess was held not violative of fourth amendment rights because “close scrutiny of [firearms] traffic is undeniably of central importance to federal efforts to prevent violent crime...” The warrantless administrative search, permitted by Frank v. Maryland and laid to rest in Camara, was at least partially revived by these three exceptions. The general rule, that administrative searches required warrants, was qualified by necessary modifications for searches undertaken to protect public health, to respond to emergency situations which commanded immediate attention, and for searches authorized by Congress as part of the legislative scheme for closely regulated licensing programs. The decisions of Colonnade and Biswell

records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

21. Id. at 77.
22. Id.
24. Id. at 315.
opened the door to the allowing of exceptions to the basic rule that a warrant was needed to conduct an administrative search. Carried to their logical conclusion, these decisions made it appear as if any good argument could spawn a new exception.

Lower courts began to extend the exceptions introduced by *Biswell* and *Colonnade*. To stop these encroachments on the basic propositions asserted in *Camara*, the Court reasserted the rules of *Camara* and *See* in 1973 in *Almeida Sanchez v. United States*. The United States Border Patrol stopped a Mexican citizen approximately twenty-five miles north of the Mexican border, searched his automobile without a warrant, and found a large quantity of marijuana. Following his conviction, he challenged the constitutionality of the search in the United States Supreme Court. In reversing the conviction, the Court said that *Camara* “insisted the ‘discretion of the official in the field’ be circumscribed by obtaining a warrant prior to inspection.” The Court distinguished *Biswell* and *Colonnade* by saying that they involved federally regulated licensing questions, whereas in the case at bar, the petitioner had not been engaged in a federally licensed business. The *Camara* holding resurfaced in *G.M. Leasing Corp. v. United States*. The Internal Revenue Service, after determining that G.M. Leasing had had deficiencies for two taxable years, searched and seized certain of the corporation’s property without a warrant. The court of appeals held, “The refusal to pay authorized [the tax agents] to collect the tax by levy, and this included the power of ‘seizure by any means.’ Thus appellants were acting pursuant to statute and did not commit an illegal search.” The Supreme Court reversed in part, holding that “[t]he intrusion into petitioner’s privacy was not based on the nature of its business, its license, or any regulation of its activities.”

*Marshall v. Barlow’s, Inc.*

Recently, the Supreme Court, in the case of *Marshall v. Barlow’s,*

27. Id. at 270 (quoting Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967)).
28. Id. at 271.
30. G.M. Leasing Corp. v. United States, 514 F.2d 935, 941 (10th Cir. 1975) (quoting I.R.C. § 6331(b)).
Inc., again held that a warrantless administrative search violated the fourth amendment. What makes this decision uniquely valuable is that all of the exceptions to the holdings of Camara and See were put forth as issues on appeal. Mr. Justice White, writing for the Court, clearly and methodically stated its position as to each exception.

Mr. Barlow was the president and general manager of Barlow's Inc., an electrical and plumbing installation business. An inspector of the Occupational Safety and Health Administration [OSHA], producing proper identification, informed Barlow that he wished to conduct a search of the nonpublic working areas of the business. According to the inspector, no complaint had been lodged against the corporation; it had simply come up for inspection under OSHA's selection process. The inspector, not having a search warrant, was refused entry by Barlow. Three months later, the Secretary of Labor petitioned the United States District Court for an order compelling Barlow to allow inspection. The order was issued as requested, but Barlow again refused to allow the inspector to enter the working areas. Upon Barlow's petition, the district court issued an injunction against this type of warrantless search holding that, under Camara, a warrant was required for this particular OSHA search. The Supreme Court, in affirming, answered many questions and clarified the law as it stands presently.

The first question answered went to the idea of reasonableness, as required by Camara, under the fourth amendment. That is, could a warrantless OSHA inspection of this nature be judicially approved under the controlling standard of reasonableness? A federal statute allowed the secretary (or his delegate) to make warrantless inspections of business premises. OSHA contended that since the requi-

33. Id.

In order to carry out the purposes of this chapter the Secretary [of Health, Education, and Welfare], upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.
site legislative intent existed by statute and since OSHA needed the element of surprise to perform its functions of inspection adequately, the type inspection in controversy encompassed the elements of reasonableness. The Court disagreed, stating that it "therefore appears that unless some recognized exception to the warrant requirement applies, See v. City of Seattle would require a warrant to conduct the inspection sought in this case." 36

Next the Court defined, what, within the meaning of Colonnade, and Biswell, a pervasively regulated business was not. This was not as desirable as a clear definition of what did constitute such a business, but the Court's explanation of what did not constitute such a business was adequate enough to remove some of the guesswork by such agencies as OSHA. OSHA argued that all interstate commerce has historically been subjected to close governmental supervision. It contended that since under the exception laid out in Biswell, 37 any entrepreneur who embarks upon a business closely regulated by the government automatically acquiesces in governmental searches, businesses engaged in interstate commerce could be subjected to warrantless agency searches. The Court said that most modern businesses have some impact on interstate commerce and to hold that all these businesses were subject to warrantless searches, solely by virtue of their effect on interstate commerce, would be too broad a sweep. The key factor, in the Court's view, was the degree of governmental involvement. The classic, pervasively regulated businesses, such as the liquor and firearms industries, historically have been subjected to constant government scrutiny, as evidenced by the promulgation of regulations specifically concerning that type of business. Regulation of interstate commerce, on the other hand, is of a less particularized nature. While wages, hours, and working conditions are set by agency regulations, the regulations do not go to the specific nature of the businesses, but to the category of businesses involved in interstate commerce in general. With this fine distinction in mind, the Court determined that merely because a businessman engages in interstate commerce, it cannot be inferred that he automatically acquiesces in governmental searches. 38

The Court next addressed the exception of conspicuousness enunciated in See v. City of Seattle. 39 In dicta the Court stated that

employees could report OSHA violations, but an agency inspector is not an employee of the business. “[W]ithout a warrant [the agency inspector] stands in no better position than a member of the public.” It follows that if the violation is open enough for the public to observe, the governmental inspector needs no warrant. On the other hand, a warrant is required if nonpublic working areas are to be inspected.

The tenuous argument, that to require the issuance of warrants would place too heavy a burden on the judicial system, was rejected by the Court. The Court’s reason for the rejection was because it believed that the great majority of businessmen would consent to inspections without warrants.

Thus, in *Barlow* the Court states the present law as generally requiring warrants for searches by agencies, unless the search falls into one of the well-defined exceptions of emergency, pervasively regulated businesses, or conspicuousness. *Barlow* seems to signal the Court’s unwillingness to adulterate the definitions of the exceptions by extending them too far. Although warrants are generally required, what type of warrant is an altogether different matter. The Court in *Barlow* loosened the knot that it had tied on agency searches by broadly defining the probable cause requirement for administrative searches:

> Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that “reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].”

The only question left unresolved is that of what constitutes reasonable legislative or administrative standards for conducting an inspection. Would it be enough, for example, for a housing inspector to go to an independent magistrate and express a need for a search

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41. Id. at 1822.
42. Id. at 1824 (citations omitted) (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967)).
43. The requirement that all warrants must be issued by a neutral officer provides some assurance that the grounds for an inspection are reasonable. Id. at 1826.
warrant because he has observed a certain exterminator visit a neighborhood twice weekly for three weeks? Or must there be physical evidence, such as rodent feces, which indicates the presence of rats. One suspects the former would provide sufficient probable cause to obtain a warrant especially if it is coupled with other factors, such as a lack of inspection in that area for two years. So, if the probable cause requirement is so minimal, does not that undercut the basic policy of the fourth amendment probable cause requirement? Since there is a probable cause requirement, however minimal, the fourth amendment rights are theoretically protected. But because, in practice, a warrant can be obtained rather easily by an agency, the efficacy of the probable cause requirement is substantially diminished. However, to label the requirement that an agency must obtain a warrant a meaningless formality would be an overstatement. Agency search warrants, like criminal search warrants, protect against arbitrary infringements upon fourth amendment rights. Further, the need to obtain a warrant from an independent magistrate offers protection from harassment. For example, if OSHA claimed it needed a search warrant to ensure that procedures at a specific construction site complied with an OSHA regulation requiring that hard hats be worn on the job, the warrant probably would be granted because the reason for the inspection would satisfy the administrative probable cause requirement. On the other hand, if OSHA attempted to secure a warrant to inspect the same construction site every day for three weeks for infractions of that same regulation, it is quite possible that the independent magistrate would deny the application for a warrant. In other words, the magistrate acts as a check, and the safeguard has value as far as limiting administrative harassment.

A KENTUCKY APPLICATION OF THE PROBABLE CAUSE REQUIREMENT

Recently, the Supreme Court of Kentucky considered questions similar to those presented in Barlow in the case of Yocom v. Burnette Tractor Co.\[4\] The Kentucky Occupational Safety and Health Division [KOSHA] was set up as a division of the Kentucky Department of Labor.\[45\] A compliance officer for KOSHA informed N.W. Burnette, president of Burnette Tractor Company, that a routine safety and health inspection was to be conducted. The compliance officer did not have a search warrant, but told Burnette that

\[4\] 566 S.W.2d 755 (Ky. 1978).

a statute allowed him to undertake warrantless searches during regular working hours.\textsuperscript{46} Burnette refused to allow the compliance officer to enter. Yocom, the Commissioner of Labor, brought an action in the Franklin Circuit Court to compel Burnette to allow the inspection.\textsuperscript{47} The Franklin Circuit Court denied the Department of Labor's petition for injunctive relief. The Court of Appeals of Kentucky affirmed\textsuperscript{48} based upon the fourth amendment to the United States Constitution and section 10 of the Kentucky Constitution.\textsuperscript{49}

The Supreme Court of Kentucky affirmed the decision of the court of appeals and elaborated on the holding to define the probable cause requirement for administrative searches. The court stated,

\begin{quote}
We hold that the probable cause requirement may be satisfied by demonstrating that the place to be inspected is of the general type due for inspection under statutory or administrative standards setting up categories of places subject to inspection and bearing a rational connection to the goal sought to be achieved by the Kentucky Occupational Health and Safety Act. We specifically reject the... contention that a showing of "reasonable ground of suspicion of violation" in the particular premises is required before probable cause to inspect is deemed satisfied.\textsuperscript{50}
\end{quote}

The decision in \textit{Burnette Tractor} is consistent with the decision in \textit{Barlow}. Therefore, Kentucky's approach to administrative search warrants, specifically to the probable cause requirement, coincides with the view taken by the United States Supreme Court. Interestingly, both \textit{Barlow} and \textit{Burnette Tractor} were decided the same day. The Supreme Court of Kentucky did not have the advantage of the United States Supreme Court's opinion on the fourth amendment's reach into this area. Further, the Kentucky Court found collateral protection by the Kentucky Constitution.

\begin{enumerate}
\item\textsuperscript{46} Ky. Rev. Stat. § 338.101(1)(a) (1977) empowers the commissioner of the Kentucky Department of Labor, or his authorized representative,
\begin{quote}
[to enter without delay and advance notice any place of employment during regular working hours and at other reasonable times in order to inspect such places, question privately any such employer, ... and investigate such facts, conditions, practices, matters deemed appropriate to determine the cause of, or to prevent the occurrence of, any occupational injury or illness.]
\end{quote}
\item\textsuperscript{47} Ky. Rev. Stat. § 338.101(2) (1977) permits the commissioner to "apply to the Franklin Circuit Court for an order to enforce the right of entry" if an employer refuses to allow an inspection of his premises.
\item\textsuperscript{48} Yocom v. Burnette Tractor Co., 555 S.W.2d 823 (Ky. Ct. App. 1977).
\item\textsuperscript{49} "The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." Ky. Const. § 10.
\item\textsuperscript{50} Yocom v. Burnette Tractor Co., 566 S.W.2d at 758.
\end{enumerate}
CONCLUSION

Administrative agencies regulate our lives in one way or another. But there is a move, especially in the recent past, to avoid giving an agency carte blanche with regard to that regulation. Although some compromise is necessary to allow agencies to operate efficiently and carry out necessary agency functions, a compromise that would let constitutional rights be ignored should never be permitted.

RAYMOND S. BOGUCKI
AN UNANSWERED QUESTION CONCERNING PLANNING AND ZONING IN KENTUCKY: MUST THE ENTIRE COMPREHENSIVE PLAN BE APPROVED BY THE FISCAL COURT AND THE LEGISLATIVE BODIES OF THE PLANNING UNIT?

This question, which might appear to be a relatively simple one, has been raised at various times in Kentucky since 1966, the year Kentucky's General Assembly revised its planning and zoning statutes. The question remains unanswered in spite of several recent decisions, articles, and reports on the subject. This article primarily concerns only certain sections of Kentucky's zoning statutes, Kentucky Revised Statutes sections 100.183-100.197 and 100.334, and one case which deals directly with the question of whether the entire comprehensive plan must be approved by the fiscal court and the legislative bodies of the planning unit to be valid.

In approaching this question, it is necessary to briefly examine a few sections of the Kentucky Revised Statutes, Chapter 100 and to define various terms peculiar to the zoning statutes. Section 100.183 requires that the planning commission of each planning unit prepare a comprehensive plan. The planning commission is a group of five to fifteen people who advise the legislative bodies of the city or county. These members are appointed by the mayor of the city and the county judge/executive of each county, with approval of their respective legislative bodies. A planning unit consists of “any city or county, or any combination of cities, counties, or parts of counties engaged in planning operations.” The comprehensive plan itself

2. E.g., City of Erlanger v. Hoff, 535 S.W.2d 86 (Ky. 1976); Daviess County v. Snyder, 556 S.W.2d 688 (Ky. 1977).
3. E.g., G. Luhr, Kentucky Local Planning Laws: Review and Analysis (1977); Tarlock, supra note 1.
4. Ky. REV. STAT. § 100.183 (1970) provides as follows:
   The planning commission of each unit shall prepare a comprehensive plan, which shall serve as a guide for public and private actions and decisions to assure the development of public and private property in the most appropriate relationships. The elements of the plan may be expressed in words, graphics, or other appropriate forms. They shall be interrelated, and each element shall describe how it relates to each of the other elements and to the statement of objectives, principles, policies and standards.
6. Id. § 100.141 (1970).
7. Id. § 100.111 (Supp. 1976).
can be most easily defined by stating its purpose—to serve as a guide for public and private actions and decisions to assure the development of public and private property in the most appropriate relationships and by stating its elements. Section 100.187 sets out the contents of the comprehensive plan, which must have a minimum of five elements: (1) a statement of goals and objectives, (2) a land use plan, (3) a transportation plan, (4) a community facilities plan, and (5) any additional elements such as community renewal, housing, flood control, pollution, conservation, natural resources, and other programs.¹

The Kentucky legislature further detailed research requirements for the plan.¹⁰ All elements of the comprehensive plan must be based upon

(1) [a]n analysis of the general distribution and characteristics of past and present population and a forecast . . . of future population . . . ;

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8. Id. § 100.183 (1970).
9. Id. § 100.187 (1970). The section provides as follows:

The comprehensive plan shall contain, as a minimum, the following elements:

(1) A statement of goals and objectives, principles, policies, and standards, which shall serve as a guide for the physical development and economic and social well-being of the planning unit.

(2) A land use plan element, which shall show proposals for the most appropriate, economic, desirable and feasible patterns for the general location, character, extent, and interrelationship of the manner in which the community should use its public and private land at specified times as far into the future as is reasonable to foresee. Such land uses may cover, without being limited to, public and private, residential, commercial, industrial, agricultural and recreational land uses.

(3) A transportation plan element, which shall show proposals for the most desirable, appropriate, economic, and feasible pattern for the general location, character, and extent of the channels, routes, and terminals for transportation facilities for the circulation of persons and goods for specified times as far into the future as is reasonable to foresee. Such channels, routes, and terminals may include, without being limited to, all classes of highways or streets, railways, airways, waterways; routings for mass transit trucks, etc.; and terminals for people, goods, or vehicles related to highways, airways, waterways, and railways.

(4) A community facilities plan element which shall show proposals for the most desirable, appropriate, economic and feasible pattern for the general location, character, and the extent of public and semipublic buildings, land, and facilities for specified times as far into the future as is reasonable to foresee. Such facilities may include, without being limited to, parks and recreation, schools and other educational or cultural facilities, libraries, churches, hospitals, social, welfare and medical facilities, utilities, fire stations, police stations, jails, or other public offices or administrative facilities.

(5) Comprehensive plan may include any additional elements such as, without being limited to, community renewal, housing, flood control, pollution, conservation, natural resources, and other programs which in the judgment of the planning commission will further serve the purposes of the comprehensive plan.

(2) [a]n economic survey . . . of the major existing public and private business activities and a forecast of future economic levels . . . ;

(3) [r]esearch and analysis as to the nature, extent, adequacy, and the needs of the community for the existing land and building use, transportation, and community facilities in terms of their general location, character and extent; [and]

(4) [a]dditional background information for the elements of the comprehensive plan . . . [that] will further serve the purposes of the comprehensive plan.11

After this brief background, an in-depth analysis of three sections of Kentucky Revised Statutes, Chapter 10012 and a Kentucky Supreme Court13 decision is necessary. Section 100.193 provides in part:

The planning commission of each planning unit shall prepare and adopt the statement of objectives and the principles to act as a guide for the preparation of the remaining elements and the aids to implementing the plans. The statement shall be presented for consideration, amendment and adoption by the legislative bodies and the fiscal courts in the planning unit.14

The italicized portion of the above statute gives a partial answer to the question of whether or not the entire comprehensive plan must be adopted by the fiscal court and legislative bodies of the planning unit. This statute explicitly states that the statement of goals and objectives, the first element of the comprehensive plan, must be adopted and approved by the fiscal court and legislative bodies of the planning unit. The statute sets this fact out very carefully and therefore there is no question as to the law regarding the adoption of the first element. Case law in Kentucky affirms this interpretation of the statute.15

It is with that case law that this article is, to a great extent, concerned. Daviess County v. Snyder16 was decided by the Kentucky Supreme Court on March 11, 1977, but was, because of some of the language used in the original opinion, later modified on Octo-

11. Id.
12. Id. §§ 100.193, .197, .334 (1970).
14. Ky. Rev. Stat. § 100.193 (1970). The final sentence provides: "During its preparation and that of the other plan elements, it shall be the duty of the planning commission to consult with public officials and agencies, boards of health, school boards, public and private utility companies, civic, educational, professional and other organizations, and with citizens."
15. Daviess County v. Snyder, 556 S.W.2d 688 (Ky. 1977).
16. Id.
ber 7, 1977 to clarify its meaning. In the original opinion the Supreme Court of Kentucky, at the very least, implied that the entire comprehensive plan must be adopted by the fiscal court and legislative bodies of the planning unit. To briefly summarize the pertinent facts of the case concerning the comprehensive plan issue, the cities of Owensboro and Whitesville and Daviess County, in April 1970, jointly established the Owensboro Metropolitan Planning Commission (OMPC). Prior to the creation of the OMPC, there existed the Owensboro-Daviess County Planning Commission, which, in February 1966, adopted a comprehensive land development plan known as the Baker plan. This plan did not provide zoning classifications. The property involved in the lawsuit was being used for agricultural purposes at that time and was left with that designation. However, this plan did designate the property's future use as low-density residential. In September 1970, the OMPC adopted the Baker plan as its interim development plan, pending a formation and adoption of the comprehensive plan.

The OMPC was authorized by statute to adopt rules and regulations to carry out proper planning and zoning. Also, the planning unit and the legislative bodies were given by statute five years from June 16, 1966 to adopt comprehensive planning and zoning regulations. During the interim period, the planning unit and the legislative bodies were authorized by statute to adopt temporary regulations to effectively permit the planning and zoning program to be carried out. The court stated:

The OMPC had adopted the Baker Plan as an interim regulation for land development; however, this plan was not submitted to or adopted by the Daviess County Fiscal Court or the cities of Owensboro and Whitesville, nor did these legislative units during the interim adopt any resolution which regulated land development. K.R.S. 100.334(1) provides that such interim regulations must be "submitted to each fiscal court and legislative body concerned for approval or rejection." Later in the opinion the court further charged:

There were no interim plans adopted by the legislative body for the guidance of the authorities in effectively zoning the use of property

18. Id. § 100.367 (1970).
19. Id. § 100.334 (1970).
The Daviess County Fiscal Court and the cities of Owensboro and Whitesville adopted an interim zoning ordinance on January 18, 1972, but they had not adopted a comprehensive plan, not even an interim plan.\textsuperscript{21}

The court then went on to hold that the zoning ordinance was invalid because there was no legally adopted comprehensive plan.

After the original opinion was written, an amicus curiae brief was jointly filed by the Kentucky Municipal League, the Municipal Attorneys Association of Kentucky, and the Kentucky Planning Association.\textsuperscript{22} The purpose of the brief was to explain ramifications of certain language of the original \textit{Daviess County} opinion upon the planning and zoning process of many Kentucky communities and to request clarification for proper and uniform application consistent with the legislative intent reflected in those laws.\textsuperscript{23} The amici contended that certain language in the original \textit{Daviess County} opinion indicated that city legislative bodies and fiscal courts had to formally and expressly approve the entire comprehensive plan required under Chapter 100.\textsuperscript{24} However, the brief went on to state that local officials had construed the statutes as requiring the adoption of such plans, except for the first element, the statement of goals and objectives, only by the planning commission.\textsuperscript{25} The argument set forth was that formal approval by fiscal courts and legislative bodies of the entire comprehensive plan adopted by the planning commission is not required under Chapter 100.\textsuperscript{26} It was argued that a clear delineation had to be made between the comprehensive plan and the zoning regulations as a related, but distinct part of the planning and zoning process. While a comprehensive plan is not defined in the general definition section of the statute, the term “regulation” is defined as “any \textit{enactment} by the \textit{legislative} body of a city or county whether it is an ordinance, resolution, or an order and shall include regulations for the subdivision of land adopted by the planning commission.”\textsuperscript{27} This definition of “regulation” is very important to the contention that the entire comprehensive plan must be approved by fiscal courts and legislative bodies to be valid.

\textsuperscript{21} Daviess County v. Snyder, No. 76-402, slip op. at 6.
\textsuperscript{22} Amicus Curiae Brief for Reconsideration, Daviess County v. Snyder, No. 76-402 (Ky. Sup. Ct. Mar. 11, 1977).
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} KY. REV. STAT. § 100.111(17) (Supp. 1976)(emphasis added).
The brief of amici also argued that only the first element, the statement of objectives and principles to act as a guide for the preparation of the remaining elements and the aids to implementing the plans, was required to be presented for consideration and adoption to the legislative bodies and fiscal courts in the planning unit. Next, the brief argued that section 100.183 clearly vests the comprehensive plan function in the planning commission alone (except for the one element of objectives and goals), whereas the implementation function is effected and controlled by the fiscal court and city legislative bodies through zoning and other regulations. Section 100.183 does not as clearly vest the comprehensive plan function in the planning commission alone as the amicus curiae brief argued. The statute states that the planning commission shall prepare a comprehensive plan which shall serve as a guide for public and private actions and decisions to assure the development of public and private property in the most appropriate relationships. All this statute clearly does is to state that the planning commission is to prepare the comprehensive plan; it does not speak to whether the plan then has to be adopted by the fiscal court and legislative bodies of the planning unit.

There are practical reasons for the entire plan not having to be adopted by the fiscal courts and legislative bodies. These are set out in the conclusion of the amicus curiae brief. The first is that the entire scheme of planning operations within many planning units which have construed the statutes as have the Kentucky Municipal League, the Municipal Attorneys Association of Kentucky, the Kentucky Planning Association, and many other local officials will be placed in legal jeopardy until entire comprehensive plans can be approved by legislative bodies and fiscal courts, and zoning regulations can be adopted thereunder. Another more serious reason is that comprehensive planning efforts may be frustrated, for while many cities and counties have joined regional and joint planning units and are apparently willing to do so, there is no existing mechanism by which they can be made to adopt elements of the comprehensive plan within their jurisdictions when it has been created for

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29. Id.
32. Id.
the good of the planning unit as a whole. More explicitly, comprehensive planning in a unit as a whole may be substituted by piecemeal planning based on parochial considerations of the individual cities and counties within the unit.  

Finally, in the brief, amici urged that language in the original Daviess County opinion should be modified to clarify a delineation between the comprehensive plan adopted by the planning commission, and zoning regulations adopted by the legislative bodies and fiscal courts, and to reflect clearly that approval of the entire comprehensive plan by those bodies is not required.  

In response to this brief, the Kentucky Supreme Court on October 7, 1977 modified the original Daviess County case in a per curiam opinion, but the court did not go quite as far as requested by the amicus curiae brief. In other words the court reached the same conclusion they had reached in the original case but merely clarified their reasons; they did not go so far as to say that the entire comprehensive plan did not have to be approved by the fiscal courts and legislative bodies of the planning units. Rather, what the court did was to restate the issue in the case and to decide that the facts of the case did not merit a determination of whether the entire comprehensive plan had to be approved by the fiscal courts and the legislative bodies of the planning units. The court stated:

Considering, however, the requirement of K.R.S. 100.193 that the statement of objectives and principles be adopted not only by the planning commission but also by the legislative bodies and fiscal courts in the planning unit as a prerequisite to preparation and adoption of the remaining elements, the planning unit has no authority to adopt the land use plan element unless and until the legislative bodies and fiscal courts in the planning unit have approved and adopted the statement of objectives and principles.  

Therefore, all the court really did was to follow the statute by stating that since the first element of the comprehensive plan, the statement of goals and objectives, had never been submitted to the fiscal court of Daviess County nor to the legislative bodies of Owensboro and Whitesville for adoption as is required by section 100.193, the zoning ordinance was invalid and the plaintiffs in the case were not bound by it. In effect, then, all that the new opinion did was to hold that section 100.193 was not complied with in the case, and, there-

33. Id.  
34. Id.  
35. Daviess County v. Snyder, 556 S.W.2d at 690.
fore, the entire ordinance was invalid. Although it did clarify some of the statements made in the original opinion, it did not hold that the entire comprehensive plan did or did not have to be approved by the fiscal court and legislative bodies of the planning unit, as amici had requested in its brief for reconsideration. Therefore, it appears that the answer to the question posed in the beginning of this article, whether or not the entire comprehensive plan has to be approved and adopted by the fiscal court and legislative bodies of the planning unit, has not been answered by the court as some observers had hoped it would.

There are many problems with Kentucky’s zoning laws, and the question of whether the fiscal court and legislative bodies have to adopt the entire comprehensive plan is one of those problems. But possibly, just possibly, the answer lies in the statute and has just been overlooked, either intentionally or unintentionally. Section 100.197 states that:

All elements of the comprehensive plan shall be prepared with a view towards carrying out the statement of objectives, principles, policies, and standards of the unit. The various elements may be adopted as they are completed, or as a whole when all have been completed. The planning commission shall hold a public hearing and adopt the elements by a regulation which may be carried only by a simple majority vote of the total commission membership. 36

It should be emphasized that the statute states that the planning commission shall hold a public hearing and adopt elements 37 by a regulation. This word “regulation” is the key to the interpretation of the statutes which requires that the entire comprehensive plan must be adopted by the fiscal court and legislative bodies of the planning unit. This interpretation can easily be made when section 100.334(1) is read in conjunction with section 100.197. Section 100.334(1) states that, “[t]he commission shall have the authority to adopt all rules and regulations necessary to carry out its functions under the provisions of this chapter.” 38 The rest of this statute is fundamental to the thrust of the argument that fiscal court and legislative approval of an entire comprehensive plan is required. It states that, “Every rule and regulation promulgated by the commission shall be submitted to each fiscal court and legislative body

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37. See id.
Thus, it appears that since the comprehensive plan must be adopted by the planning commission as a regulation and every regulation promulgated by the commission must be submitted to each fiscal court and legislative body concerned for approval or rejection, the question posed in the beginning of this article should be answered in the affirmative.

Of course, it can be argued that the definition of the word "regulation" given in the general definition statute will defeat this interpretation of the statutes. Section 100.111(17) defines regulation as "any enactment by the legislative body of a city or county whether it is an ordinance, resolution, or an order and shall include regulations for the subdivision of land adopted by the planning commission." Actually, this definition does little more than confuse the issue. It could be argued that the only regulations adopted by the planning commission included in the definition are those regulations for the subdivision of land adopted by the planning commission; but if that is the case, there is a definite conflict between sections 100.111(17) and 100.334(1), and it appears that this conflict cannot be reconciled.

Various conclusions can be drawn from attempting to answer the question of whether the entire comprehensive plan must be approved and adopted by the fiscal court and legislative bodies in the planning unit. But the most logical conclusion is that Kentucky's zoning statutes, at least in this one area, are not clear and that there are two interpretations to be made from a thorough reading of the statutes. This article concludes that the answer to the above question is an affirmative one when sections 100.197 and 100.334 are read together, but most planners and zoning attorneys in Kentucky appear to interpret the statutes differently from a practical point of view.

This problem will eventually come to its conclusion in one of two ways: (1) the legislature will clarify the answer to the above question by amending the statutes; or (2) when the proper case comes along, with facts that require the resolution of this problem, the courts will inevitably answer the question. In the meantime, however, there is one aspect of this problem that deserves much consideration by
those who interpret the zoning statutes to not require approval of the entire comprehensive plan by fiscal courts and legislative bodies: the possible havoc that would be wreaked upon the planning units that have operated under the impression that the entire comprehensive plan does not have to be adopted by the fiscal court and the legislative bodies of the planning unit if they are later proved to be wrong. If the statutes are interpreted to require the fiscal courts and legislative bodies to approve the entire plan, there would be many planning units throughout the state of Kentucky without any valid zoning ordinances at all. When one reads the modified opinion of the Daviess County case, it is very clear that if the first element of the comprehensive plan, the statement of goals and objectives, has not been adopted by the fiscal court and legislative bodies of the planning unit, then the ordinances of the planning unit are invalid because the planning unit has failed to follow the enabling legislation set forth by Kentucky’s General Assembly. Therefore, if the entire comprehensive plan must be approved by the fiscal court and the legislative bodies of the planning unit, and if it has, in fact, not been so approved, ordinances of many communities in Kentucky are totally invalid.

JEFFREY C. RALSTON

44. 556 S.W.2d 688 (Ky. 1977).
ONE PERSON, ONE VOTE

INTRODUCTION

"One person, one vote" is the simplistic phrase which has become the trademark of the complex area concerning apportionment of elected government bodies, a concept applied to virtually all levels of representative government in the United States. From the local board of education to the Congress of the United States, members have been elected by procedures based on the concept.

The purpose of this comment is to present a general history of state legislative apportionment cases and to provide a specific illustration of the application of apportionment standards in Ohio. The scope of this comment, however, is limited to apportionment of state legislatures and the involvement of federal courts in that apportionment based on the equal protection clause of the fourteenth amendment to the Constitution of the United States. Congressional apportionment, based on Article I, section 2 of the United States Constitution, will be analyzed here only to the extent that it is intertwined with state legislative apportionment. Apportionment concerning other government bodies, as well as exceptions to the "one person, one vote" concept, will not be discussed in this comment.

Once the United States Supreme Court decided that apportionment cases were within the jurisdiction of the federal courts, the legal frontier of apportionment was opened. On March 26, 1962 in Baker v. Carr, persons inadequately represented in the Tennessee state legislature were allowed to use the federal courts to effect a change to fair and equal representation. The first state legislative apportionment case to reach the Supreme Court on its merits came one year later, when the Court decided Gray v. Sanders. In Justice Douglas' opinion, the Court held that "political equality ... can

9. Id.
mean only one thing—one person, one vote.” Thus, the concept that every voter’s ballot should be of equal weight in deciding the outcome of an election became embodied in the phrase, “one person, one vote.”

For this principle to be applied, it was necessary that a numerical basis for the “one person” be established. Usually the Court holds that the basis necessary to insure equal protection is the general population, i.e., population as counted for the decennial census. The Court has, however, decided cases on other bases, but only minor deviations from the population basis are acceptable provided they are free from any taint of arbitrariness or discrimination.

In 1964 in Reynolds v. Sims, the Court adopted an equal protection standard for the districting of both houses of state legislatures. This standard required that members of both houses of state legislatures be elected by districts which were substantially equal in population. The standard required that the equality be just short of mathematical exactness.

For almost ten years, the test applied by district courts was that of Reynolds. Not until 1973 when the Court decided Mahan v. Howell, Gaffney v. Cummings, and White v. Regester were the stringent standards it had promulgated in Reynolds relaxed. It is this more relaxed standard that the states must follow in apportioning their legislatures today.

I. PRE-1964 CASES

An Illinois congressional scheme came before the Court in

11. Id. at 381.
16. Id. at 577.
Colegrove v. Green\textsuperscript{20} in 1946. In this case the plaintiffs sought to have the disparity between congressional districts declared to be a violation of the equal protection clause of the fourteenth amendment and that the Illinois Apportionment Act to be in direct violation of Article I of the United States Constitution.\textsuperscript{21} A four justice majority concurred in the result that the Court should not hear the case. The Court decided that apportionment of congressional districts was a political question. It stated, 

We are of the opinion that petitioners ask of this court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.\textsuperscript{22}

The Court held that the plaintiffs' remedy was not through the courts\textsuperscript{23} since "[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."\textsuperscript{24} It should have been evident to the Court that the remedy upon which it held the plaintiffs should rely was no remedy at all, because plaintiffs could not properly exercise their political rights since their votes were utterly debased.

The dissent in Colegrove was a better reasoned opinion. Justice Black stated that the lower court should have heard the case and noted that no denial was made of the allegations that the 1901 Apportionment Act denied plaintiffs the full right to vote and the equal protection of the laws. He concluded that "[u]nder these circumstances, and since there is no adequate legal remedy for depriving a citizen of his right to vote, equity can and should grant relief."\textsuperscript{25}

\textsuperscript{20} 328 U.S. 549 (1946).
\textsuperscript{21} Id. at 550.
\textsuperscript{22} Id. at 552.
\textsuperscript{23} Id. at 556, where Justice Frankfurter coined the renowned phrase, "Courts ought not to enter this political thicket."
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 569 (Black, J., dissenting).
In Gomillion v. Lightfoot, the Court heard a voting rights case in which black residents of the city of Tuskegee, Alabama had been deprived of their right to vote in municipal elections. The plaintiffs argued that the reapportionment by the Alabama legislature violated the due process and equal protection clauses of the fourteenth amendment and denied them the right to vote guaranteed by the fifteenth amendment. In finding for the plaintiffs, the Court concluded that the plaintiffs' right to vote guaranteed by the fifteenth amendment had been violated. The Court also distinguished this case from Colegrove by saying,

The appellants in Colegrove complained only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.

For years before the Court decided Gomillion, urban Tennessee politicians had been working to have the Tennessee legislature increase the number of its members who represented urban areas. After their lobbying effort failed, they looked to the Tennessee state courts for relief. However, in Kidd v. McCanless, the Tennessee Supreme Court denied relief holding that if the court were to grant them a remedy, the result would be the complete collapse of Tennessee state government. The United States Supreme Court granted the motion to dismiss the plaintiff's appeal from the Tennessee Supreme Court, further sealing the fate of the underrepresented urban areas. In the meantime, state money and services were being disproportionately doled out to rural areas of the state. So in July, 1959 Charles W. Baker, a politician in urban Shelby County (Memphis), and others filed suit against Joseph C. Carr, the Tennessee Secretary of State. The plaintiffs sought to "invoke the Constitution of the United States, particularly the equal protection and due process clauses of the Fourteenth Amendment, contending that the legislature of Tennessee in failing to comply with the state Constitution has subjected them to an invidious discrimination that consti-

27. Id. at 344-45.
28. Id. at 346.
29. 200 Tenn. 273, 292 S.W.2d 40 (1956).
tutes a denial of equal protection of the law and a deprivation of due process of Law." The plaintiffs won their first battle in the war against unfair and unequal representation when District Court Judge William E. Miller concluded that the case should be heard on its merits by a three judge panel. When the case was heard, the plaintiffs, in arguing that their rights were violated, asked the court to

either (a) require by injunction that the defendant take necessary steps to hold an election by means of which the members of the next legislature would be elected from the state at large, without regard to counties or districts, or (b) direct the defendants to hold an election by means of which the members of the legislature would be elected from counties and districts in accordance with the constitutional formula by applying mathematically the federal census of 1950.

The court, however, stated that "there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment." The court reasoned that the rule was sound because an appropriate judicial remedy could not be molded. The court admitted that the Tennessee legislature was guilty of violating the plaintiffs' rights when it agreed "that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs . . . [and] . . . that the evil is a serious one which should be corrected without further delay." Because it believed, however, that the remedy was not to be found in court, it dismissed the action.

Defeated only for the time being, plaintiffs appealed to the United States Supreme Court. Interest in the issue widened, and the Court allowed amicus curiae briefs to be filed. In a rather lengthy opinion, the Court addressed several issues including the basis of

32. Id. at 651.
33. Id. at 653.
35. Id. (citations omitted).
36. Id. at 828.
37. Id.
the district court's decision,\textsuperscript{40} jurisdiction of the subject matter,\textsuperscript{41} standing,\textsuperscript{42} and justiciability.\textsuperscript{43} In concluding that debasing the right to vote is not a "political question," the Court found that the district court had jurisdiction based on the fourteenth amendment. In discussing the political question doctrine, the court stated:

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy but simply arbitrary and capricious action.\textsuperscript{44}

Finally, urban voters were given the opportunity to have their votes restored to full value by establishing a violation of the equal protection clause of the fourteenth amendment.

The next major step in the Court's consideration of voting equality came in March, 1963 in \textit{Gray v. Sanders}.\textsuperscript{45} The plaintiff sought to have the Court declare Georgia's county unit voting system, used in primary elections for statewide offices, to be a violation of the equal protection and the due process clauses of the fourteenth and seventeenth amendments. The Court agreed with the lower court's injunction prohibiting the use of the county unit system.\textsuperscript{46} It distinguished \textit{Baker} by saying that \textit{Gray} "does not involve a question of

\textsuperscript{40} Baker v. Carr, 369 U.S. 186, 195 (1962).
\textsuperscript{41} Id. at 198.
\textsuperscript{42} Id. at 204.
\textsuperscript{43} Id. at 208.
\textsuperscript{44} Id. at 226 (citation omitted) (emphasis in original).
\textsuperscript{45} 372 U.S. 368 (1963). An amicus curiae brief was filed by Robert F. Kennedy, United States Attorney General, and Archibald Cox, United States Solicitor General, urging the Court to affirm the decision of the lower court.
\textsuperscript{46} Id. at 381.
the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives." The Court further stated that the case did not "include the related problems of *Gomillion v. Lightfoot*, where 'gerrymandering' was used to exclude a minority group from participation in municipal affairs." More emphatically, the Court stated that "the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislature or conventions are inapposite." The Court supported this reasoning by listing some of the reasons for the inequality in the federal scheme, noting that the same circumstances were not present in *Gray*.

In *Gray*, the Court recognized limitations on states, under the equal protection clause, when determining the qualifications of voters. Relying on the equal protection clause, the Court implied such limitations when it stated, "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." In Justice Stewart's concurring opinion, the concept is clearly stated: "Within a given constituency, there can be room for but a single constitutional rule—one voter, one vote."

II. THE 1964 CASES

In February, 1964 the Court decided *Wesberry v. Sanders*. The plaintiffs, citizens and qualified voters of metropolitan Atlanta, argued on the basis of the 1960 federal census that Georgia's congressional districting resulted in grave population disparities and that voters similarly situated were deprived of a right under the Federal Constitution to have their votes for Congressmen given the same weight as votes of other Georgians. The plaintiffs asked that

47. Id. at 376.
48. Id. (citations omitted).
49. Id. at 378 (citation omitted).
50. Id. at 379-80.
51. Id. at 382 (citation omitted).
52. 376 U.S. 1 (1964).
the districting be declared invalid and that elections under it be enjoined. The plaintiffs alleged
that [they] were deprived of the full benefit of their right to vote, in violation of (1) Art. I § 2, of the Constitution of the United States . . . ; (2) the Due Process, Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment; and (3) that part of Section 2 of the Fourteenth Amendment which provides that "Representatives shall be apportioned among the several States according to their respective numbers . . . ." 54

Although the Court relied on its *Baker* reasoning that it had the power to protect the full and beneficial right to vote, its decision was based on Article I, Section 2 of the Constitution of the United States 55 and not on the equal protection clause of the fourteenth amendment as is state legislative apportionment. Although Justice Clark's separate opinion was that congressional reapportionment should be based on the equal protection clause, 56 the Court would not again seriously consider the equal protection clause argument as a basis for congressional reapportionment.

Approval of *Wesberry* was given by the Court in *Reynolds v. Sims*, when it noted, "*Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." 57 In *Reynolds* the Court found Alabama's apportionment scheme to be completely lacking in rationality and invalid because it was a violation of the equal protection clause. 58 Emphasizing that the right to vote is personal 59 and constitutionally protected, 60 the Court stated that

the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial

53. Id. at 2-3.
54. Id.
55. Id. at 5-8.
56. Id. at 19.
58. Id. at 560-61.
59. Id. at 568.
60. Id. at 561.
61. Id. at 554.
fashion diluted when compared with votes of citizens living in other parts of the State. 62

In defining what was necessary under the equal protection clause, the Court stated

that the Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement. 63

By stating that mathematical exactness was not required, the Court left the door open for further deviations from a strict population standard. It said further that “divergences must be based on legitimate considerations incident to the effectuation of a rational state policy.” 64 Deviations based on maintaining compact districts of contiguous territory seem to be insufficient to meet the test of “rational state policy,” 65 while giving representation to political subdivisions would meet the Court’s test. 66 Further, the Court refused to uphold ill-apportioned legislatures which existed when Congress admitted a state to the Union. 67 Upholding a ten year review of apportionment schemes, the Court indicated that reapportionment every ten years was the minimum acceptable frequency. 68 “If apportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.” 69 In reviewing state apportionment schemes, the Court stated that district courts should attempt to “accommodate the relief ordered to the appropriate provisions of state constitutions insofar as possible.” 70 Finally, the Court found that “once a State’s legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.” 71

62. Id. at 568.
63. Id. at 577.
64. Id. at 579.
65. Id.
66. Id. at 580.
67. Id. at 582.
68. Id. at 583-84.
69. Id. at 584.
70. Id.
71. Id. at 585.
In *WMCA, Inc. v. Lomenzo*, decided the same day as *Reynolds*, the Court struck down a New York state reapportionment scheme which discriminated against the more populous areas of the state. It said,

However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant underevaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside. New York's constitutional formulas relating to legislative apportionment demonstrably include a built-in bias against voters living in the State's more populous counties. And the legislative representation accorded to the urban and suburban areas become proportionately less as the population of those areas increases. 73

In detailing the facts and figures which show discrimination, in *Reynolds* as well as *WMCA*, the Court used several tools. A population variance ratio was used to show that a particular under represented district contained a population many times the population in the most over represented district. 74 The Court also considered what minimum per cent of the population (in each house of the state legislature) could be represented by a majority of members. 75 For example, "When the New York Legislature was reapportioned in 1953, on the basis of the 1950 census figures, assemblymen representing 37.1% of the State's citizens constituted a majority of that body, and senators representing 40.9% of the citizens comprised a majority in the Senate." 76 Finding that New York's legislature was not sufficiently apportioned on a population basis to be constitutionally sustainable, 77 the Court "reverse[d] the decision below and remand[ed] the case to the District Court for further proceedings consistent with the views stated" in this case and in *Reynolds*. 78

In *Maryland Committee v. Tawes*, an attack, which originated in Maryland state courts, on the apportionment of the legislature was upheld. The Court scrutinized how apportionment was effected under the Maryland Constitution and, in doing so, again considered the population variance ratio and what minimum per cent of the

73. Id. at 653-54.
74. Id. at 641-52; Reynolds v. Sims, 377 U.S. at 545-50.
75. Id. at 647-52; Reynolds v. Sims, 377 U.S. at 545-50.
77. Id. at 653.
78. Id. at 655.
LEGISLATIVE APPORTIONMENT

population could be represented by a majority in the Maryland Legislature. The Court went on to say that in reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature.

The apportionment must be by population, and in this case it was not sufficiently based on population to meet the standards of the equal protection clause.

Virginia's legislative apportionment was struck down by the Court in Davis v. Mann. The Court addressed the applicable provisions of the Virginia Constitution and again utilized the maximum population variance ratio and the minimum per cent of the population which could be represented by a majority in the legislature. In apportionment cases prior to Davis, the absence of an adequate remedy was a condition to recovery. In Davis, however, the Court struck down an apportionment scheme even where the plaintiffs had a remedy in the state courts. This is a recognition by the Court of the probable futility of those other remedies. In Davis the Court applied the population test of Reynolds and concluded that the Virginia apportionment scheme did not meet equal protection clause standards. In Roman v. Sincock, the fifth case of this group, the Court used the maximum population variance ratio and the minimum per cent of the population which could be represented by a majority of representatives in the legislature, to conclude that the Delaware legislature did not meet the requirements of the equal protection clause. Specifically the Court held that "[n]either of
the houses of the Delaware General Assembly" was apportioned according to the standards of equal protection that were set out by the Court in *Reynolds*.

The Court discounted the State's argument that Congress consented to such apportionment, as the state legislature was apportioned similarly when Congress admitted Delaware into the Union. After praising the district court's decision in the case, the Court qualified its approval.

Our affirmance of the decision below is not meant to indicate approval of the District Court's attempt to state, in mathematical language the constitutionally permissible bounds of discretion in deviating from apportionment according to population. In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

The Court remanded the case to the district court for remedial action consistent with *Reynolds* and its opinion in this case.

In *Lucas v. Colorado General Assembly* the Court reviewed the constitutionality of the 1962 apportionment of the Colorado General Assembly using the same tools as it used in the previous cases. It distinguished this case, however, from the others by stating that: (1) at least one house of the General Assembly was apportioned substantially by population; and (2) the electorate of Colorado had approved the basis of the current apportionment in a general election; and (3) the remedies of initiative and judicial intervention by the state courts were available. Although the Court stated that arguments may be made on the basis of the above reasons, it discounted them. The Court stated that while the House appeared to be apportioned by population as nearly as possible, the apportionment scheme was unconstitutional, "since the apportionment of the

89. Id. at 708.
90. Id. at 710.
91. Id. at 712.
93. Id. at 724-29.
94. Id. at 730-34.
Senate seats... clearly involves departures from population-based representation too extreme to be constitutionally permissible. . . ."95 The argument that the apportionment was approved by a majority of the electorate and therefore was constitutionally permissible was also refuted. As to the initiative remedy, the Court concluded

the fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification only for a court or equity to stay its hand temporarily while recourse to such remedial device is attempted or while proposed initiative measures relating to legislative apportionment are pending and will be submitted to the State's voters at the next election.96

The Court noted that in this case, the court of equity had properly refrained by allowing the November, 1962 elections to first take place.97 Reviewing the state court remedy, the Court concluded it was inadequate since "the Colorado Supreme Court, in its 1962 decision . . . refused to consider or pass upon the federal constitutional questions, but instead held only that the Colorado General Assembly was not required to enact a reapportionment statute until the following legislative session."98 With the attempts at distinguishing the case refuted, the Court concluded that "the overall legislative representation in the two houses of the Colorado Legislature [was not] sufficiently grounded on population to be constitutionally sustainable under the Equal Protection Clause."99

Summarizing these cases, it is found that the Court in Reynolds set out the basic requirements in apportioning state legislatures, i.e., that the houses of a state legislature must be based on population. It qualified this requirement stating that mathematical exactness is not the sole criterion nor is it a constitutionally acceptable standard. Deviations from this standard may be allowed only if they are based on a rational state policy. A court must look to all the circumstances of an apportionment, i.e., a court must consider the whole apportionment scheme. In reviewing a scheme, a court may utilize the maximum population variance ratio and the minimum per cent of population which a majority of representatives in the legislature could represent, as aids in arriving at its decision. The

95. Id. at 734-35.
96. Id. at 737.
97. Id. at 738.
98. Id. at 733-34 (footnotes omitted).
99. Id. at 735 (footnote omitted).
Court further decided that the fact that other remedies may be available is not a sufficient reason for a court to refrain from equitable action, because in apportionment cases such remedies are often futile. Further, even where such remedies are used, a court still has a duty to review them to insure that an individual’s rights under the equal protection clause have not been violated.

III. Post-1964 Cases

The apportionment of the Florida Legislature had been challenged in the courts for nearly five years before the case came before the Supreme Court in Swann v. Adams. In this case the Court used the maximum population variance ratio and the minimum per cent of the population which could be represented by a majority of members of the legislature, which it used extensively in the 1964 apportionment cases. More important, the Court added another aid to be used in reviewing apportionment schemes: the per cent of deviation from the average population per member of the legislature in conjunction with the per cent of the population that was over or under represented by at least 10%. The Court, recognizing that de minimis deviations are unavoidable, disallowed variations of 30% among senate districts and 40% among house districts since neither the state nor the district court presented a satisfactory explanation grounded on acceptable state policy.

"[T]he Court in Roman v. Sincock stated that the Constitution permits ‘such minor deviations only as may occur in recognizing certain factors that are free from any taint or arbitrariness or discrimination.’" The Court concluded that since deviations in this case were not "unavoidable or justified upon any legally acceptable ground" the apportionment scheme did not meet the equal population requirements of the equal protection clause.

Six weeks after Swann, the Court decided Kilgarlin v. Hill, in which the constitutionality of the apportionment of the Texas Legislature was attacked. The Court upheld the district court’s holding allowing the 1966 elections to be held under an unconstitutional...
scheme and agreed that the multi-member districts were allowed, but reversed the district court's holding concerning the sufficiency of the apportionment plan under the equal protection clause.\textsuperscript{107} The Court utilized the maximum population variance ratio (1.3 to 1) and the percent (26.48\%) deviation from the average population per representative in conjunction with the number of districts (20 involving 67 representatives) that were so over or under represented, in analyzing the plan, and as aids in arriving at its decision.\textsuperscript{108} The district court had held that the burden of showing deviations from the Reynolds standards fell upon the challenging party, a burden which the plaintiffs failed to meet. The Court stated, however, "that unless satisfactorily justified by the court or by evidence of record, population variances of the size and significance evident here are sufficient to invalidate an apportionment plan."\textsuperscript{109} The Court, however, stated that it was doubtful that these deviations would meet the Reynolds test but did not decide that question because it was "not convinced that the announced policy of the State of Texas necessitated the rage of deviations . . . which is evident here."\textsuperscript{110} Thus, the Court reinforced its holding in Swann that any deviations from the Reynolds standard must be "based on legitimate considerations incident to the effectuation of a rational state policy."\textsuperscript{111}

In Kirkpatrick v. Preisler\textsuperscript{112} and Wells v. Rockefeller,\textsuperscript{113} the Court reviewed congressional apportionment schemes for Missouri and New York, respectively. Although these cases involved congressional apportionment based on Article I, Section 2 of the United States Constitution, they are helpful in showing the Court's reasoning on apportionment. The Kirkpatrick Court stated that "only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown"\textsuperscript{114} would be allowed. The Court found that in both cases, the deviations were avoided and that no justification was shown.\textsuperscript{115}

Multi-member districts were challenged in Whitcomb v. Chavis\textsuperscript{116} when residents of Marion County, Indiana (Metropolitan Indianap-

\textsuperscript{107} Id. at 122-26.
\textsuperscript{108} Id. at 122-24.
\textsuperscript{109} Id. at 122.
\textsuperscript{110} Id. at 123.
\textsuperscript{111} Swann v. Adams, 385 U.S. at 444.
\textsuperscript{112} 394 U.S. 526 (1969).
\textsuperscript{113} 394 U.S. 542 (1969).
\textsuperscript{114} Kirkpatrick v. Preisler, 394 U.S. at 531.
\textsuperscript{115} Id. at 531-36 (Missouri); Wells v. Rockefeller, 394 U.S. at 544-46 (New York).
\textsuperscript{116} 403 U.S. 124 (1971).
challenged the multi-member legislative district in which they were required to vote. After setting out the case law on multi-member districts, the Court stated,

Plaintiffs level two quite distinct challenges to the Marion County district. The first charge is that any multi-member district bestows on its voters several unconstitutional advantages over voters in single-member districts or smaller multi-member districts. The other allegation is that the Marion County district, on the record of this case, illegally minimizes and cancels out the voting power of a cognizable racial minority in Marion County.\textsuperscript{117}

The Court found that both of these allegations were not sustainable given the facts in the case.\textsuperscript{118}

A most interesting offshoot from the evidence taken in the case is that the district court found the whole Indiana legislative apportionment scheme to be unconstitutional.\textsuperscript{119} The Court reiterated some of that evidence and analyzed it by using the per cent deviation from the average population per member of the legislature and the maximum population variance ratio, noting that the variations involved here "were in excess of, or very nearly equal to, the variation of 25.65\% and the ratio of 1.30 to 1 which [it] held excessive for state legislatures"\textsuperscript{120} in \textit{Swann}. The Court disallowed the state's contention that these variances were within ranges previously allowed by the Court when they were reviewed by the district court in 1965 and so should not be set aside as it would require apportionment more than once in a ten year period, the interval set out in \textit{Reynolds}. The Court stated that this was a misinterpretation of \textit{Reynolds} and upheld the district court's action regarding apportionment of the Indiana legislature.\textsuperscript{121}

In \textit{Abate v. Mundt},\textsuperscript{122} the companion case to \textit{Whitcomb}, the Court upheld the apportionment scheme of the board of county supervisors of Rockland County, New York. Even though the scheme used to elect the county supervisors had a population deviation of 11.9\% from the standard district in the county, the Court held that it met the requirements of \textit{Reynolds} and \textit{Swann}. The Court reviewed the history of the interrelationship between Rockland County and its cities and concluded that the deviations were allowable as they were

\textsuperscript{117} Id. at 144.
\textsuperscript{118} Id. at 154-60.
\textsuperscript{120} Whitcomb v. Chavis, 403 U.S. at 162.
\textsuperscript{121} Id. at 162-63.
\textsuperscript{122} 403 U.S. 182 (1971).
based on a legitimate state interest. The Court stated its basis for allowing these particular deviations: "We emphasize that our decision is based on the long tradition of overlapping functions and dual personnel in Rockland County government and on the fact that the plan before us does not contain a built-in bias tending to favor particular political interests or geographic areas." By implication, therefore, if a state legislative apportionment scheme deviated by 11.9% and such deviation were based on a legitimate state interest, the Court would uphold it against challenges based on the equal protection clause.

A further refinement or qualification of the 1964 apportionment cases came in April, 1972 when the Court announced its decision in Sixty-Seventh Minnesota State Senate v. Beens. In this case, the Court reversed a three judge district court's holding concerning the apportionment of the Minnesota state legislature. After refuting the contention that the Minnesota Senate had no standing to sue in behalf of the entire legislature, the Court concluded that the district court had over-extended itself when it significantly changed the size of the Minnesota legislature in attempting to construct a constitutionally sufficient apportionment scheme. The Court summarized its reasoning by stating,

> The number of a State's legislative districts or the number of members in each house of its legislature raises no issue of equal protection unless the number so prescribed occasions significant and invalidating population deviations. "Determining the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums on the size of state legislative bodies."

Thus, the Court held that the federal courts have the duty and power to apportion state legislatures whose apportionment violates the equal protection clause of the fourteenth amendment, but that such duty and power is limited by the allowable provisions of the individual state's apportionment scheme whether set out in its constitution or statutes provided it is not unconstitutionally limited.

123. Id. at 186-87.
124. Id. at 187.
126. Id. at 200-01.
127. Id. at 193-94.
128. Id. at 200.
129. Id. at 199-200 (quoting Reynolds v. Sims, 377 U.S. 533, 587 n.63 (1964)).
130. Id. at 195-201.
In *Mahan v. Howell*, the apportionment of the Virginia legislature was held sufficient to meet the requirements of the equal protection clause even though there existed a maximum population variance of 16.4%. The Court found that the district court had applied the Article I, Section 2 standards for congressional districting to Virginia's state legislature apportionment and not the equal protection clause standard as announced in *Reynolds*. The Court rendered a superb analysis of the two standards and concluded that the constitutionality of Virginia's legislative redistricting plan was not to be judged by the more stringent standards that *Kirkpatrick* and *Wells* make applicable to congressional reapportionment, but instead by the equal protection test enunciated in *Reynolds v. Sims*. We reaffirm its holding that "the Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." We likewise reaffirm its conclusion that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." In *Mahan* the state based its divergences from the strict population standard on the policy of maintaining the integrity of political subdivision lines. After holding that Virginia's plan advanced the rational state policy of honoring political subdivision boundaries, the Court went on to conclude that it also met the constitutional limits of equal population as required by the equal protection clause. The Court distinguished earlier decisions, in which it had struck down other plans, by noting that in this case there was a rational state policy and that the state met its burden in proving it as such. In finalizing its review of the plan as a whole, the Court's concluding words clearly set out its position.

Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the

132. Id. at 318-25. Not only did the Court use the maximum population variance, it also used the population ratio (1.18 to 1.0), the average per cent variance (3.89%), and the minimum population per cent necessary to elect a majority of the House (49.29%).
133. Id. at 324-25 (citations omitted).
134. Id. at 325.
135. Id. at 328-29.
136. Id.
Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not. The 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the reapportionment of the House is substantially less than the percentage deviations that have been found invalid in the previous decisions of this Court. While this percentage may well approach tolerable limits, we do not believe it exceeds them. Virginia has not sacrificed substantial equality to justifiable deviations.

The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature, the policy consistently advanced by Virginia as a justification for disparities in population among districts that elect members of the House of Delegates, is a rational one. It can reasonably be said, upon examination of the legislative plan, that it does in fact advance that policy. The population disparities that are permitted thereunder result in a maximum percentage deviation that we hold to be within tolerable constitutional limits.\(^\text{137}\)

The Court separately reviewed the district court’s apportionment of the area encompassing the cities of Norfolk and Virginia Beach. It upheld the district court’s remedial action of combining three single-member districts into one multi-member district because Virginia’s plan resulted in significant population disparities and discriminated against military personnel,\(^\text{138}\) which the Court held to be impermissible in \textit{Davis v. Mann}.

An attack on the 1971 apportionment of Connecticut’s General Assembly was not sustained in \textit{Gaffney v. Cummings}.\(^\text{140}\) After noting that the population deviations in both the house (a maximum of 7.83%) and senate (a maximum of 1.81%) did not make out a prima facie violation of the equal protection clause which would support a decision to grant relief to plaintiffs, the Court reiterated its oft pointed out distinction between the bases for state legislative apportionment and congressional apportionment.\(^\text{141}\) The state argued that the deviations did not “in and of themselves demonstrate an equal protection violation and that the State was not required to justify them, absent further proof of invidiousness . . . .”\(^\text{142}\) by the party challenging the apportionment scheme. The Court agreed with the

\(^{137}\) \textit{Id.} at 329.

\(^{138}\) \textit{Id.} at 330-33.

\(^{139}\) 377 U.S. 678, 691 (1964).

\(^{140}\) 412 U.S. 735 (1973).

\(^{141}\) \textit{Id.} at 740-42.

\(^{142}\) \textit{Id.} at 743.
state's argument stating the qualification of the Reynolds test, i.e., that mathematical exactness is not a workable constitutional standard; that flexibility in state legislative apportionment is desirable; and that the equal protection test is population equality. The Court noted that in previous apportionment cases the deviations struck down were comparatively greater than those in this case. The Court, nine years after setting out standards in the 1964 apportionment cases, stated that Mahan v. Howell demonstrates that population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable. It is now time to recognize, in the context of the eminently reasonable approach of Reynolds v. Sims, that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.

In recognizing the inherent inaccuracy in the process upon which the statistics reflecting apportionment deviations were based, the Court noted that the goal of substantial equality of population among districts would not be further served by "unrealistic overemphasis on raw population figures." The Court continued, "nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan."

The Court stated that this is exactly the type of case that should not be heard in federal courts and, after restating the maximum population deviation of 8% in the house and 2% in the senate, found "that a prima facie case of invidious discrimination under the Fourteenth Amendment was not made out."

In White v. Regester, a companion case to Gaffney, the Court, in reviewing an apportionment scheme for Texas, further clarified

143. Id. at 743-44.
146. Id. at 745-49.
147. Id. at 749.
148. Id. at 750-51.
its position on what percentage deviations were allowable and whether justification was required by the state. The Court found that the district court had erred insofar as it based its decision on the assumption that a 9.9% population deviation made out a prima facie violation of the equal protection clause, absent justification by the state.\(^{150}\) The Court stated, "For the reasons set out in *Gaffney v. Cummings*, we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation.\(^{151}\) The Court noted that "larger differences (than 9.9%) between districts would not be tolerable without justification ‘based on legitimate considerations incident to the effectuation of a rational state policy.’"\(^{152}\) In other words, the Court was saying that for any deviation under 9.9%, the state will not be required to justify the deviation and that anyone attacking such a scheme will probably not be successful in having it overturned. Before this case, the Court had not been so specific in promulgating guidelines for apportionment cases.

In concluding its opinion, the Court upheld the district court's decision that the multi-member districts in Dallas and Bexar County were violative of the equal protection clause,\(^{153}\) stating that "[t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."\(^{154}\) In this case, the Court held that the plaintiffs had met their burden and thus, were entitled to relief.

In *Chapman v. Meier*,\(^{155}\) the Court put the finishing touch on the "one person, one vote" principle that it had conceived more than a decade before in its review of the apportionment plan for the legislature of North Dakota. The Court analyzed the multi-member districts used by the district court in fashioning an apportionment scheme, recognizing that different standards are to be applied to legislatively created multi-member districts and multi-member dis-

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150. *Id.* at 763.
151. *Id.* at 764 (citation omitted).
152. *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)).
153. *Id.* at 765-70.
154. *Id.* at 766.
districts created by federal courts. The Court agreed with the state, holding that the district court failed to articulate any reasons for the departure from single member districts. The Court further stated that "[a]bsent particularly pressing features calling for multimember districts, a United States district court should refrain from imposing them upon a state." The population variance in the North Dakota senate was also considered. The maximum population variance was 20.14% and the population ratio was 1.23 to 1 for a plan which contained 51 senate districts. The Court reviewed the cases which were the basis of its present standard noting that in Swann, variances of 25.65% and 33.55% in the houses of Florida’s legislature were violative of the equal protection clause as they were not justified by the state. The Court noted that in congressional districting, equal population had become the sole criterion on which to base constitutionality, but "when state legislative districts are at issue we have held that minor population deviations do not establish a prima facie constitutional violation. For example, in Gaffney v. Cummings, we permitted a deviation of 7.83% with no showing of invidious discrimination. In White v. Regester . . . a variation of 9.9% was likewise permitted." Here, in Chapman, the three grounds which were said to be the basis of this deviation were not "explicitly shown to necessitate the substantial population deviation embraced by the plan." The Court previously noted that these tests applied to legislatively ordered apportionment, but stated that higher standards will apply to court ordered plans. "With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features." In concluding its opinion, the Court made it very clear that unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than de minimis variation. Where important and significant state considerations rationally mandate de-

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156. Id. at 18.
157. Id. at 19.
158. Id.
159. Id. at 22.
160. Id. at 22-23.
161. Id. at 23 (citations omitted).
162. Id. at 24.
163. Id. at 26.
parture from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variances cannot be adopted.\textsuperscript{164}

In summarizing the standard to be used in apportionment cases, the Court in \textit{Chapman}, lifted any fog that remained in the valleys of legislative apportionment. The \textit{Reynolds} test of equal population per district had been growing since its conception by the Court and reached maturity in \textit{Chapman}. In reviewing an apportionment scheme to determine if it is violative of the equal protection clause, it is important to remember that the Court will take a comprehensive view of the scheme, not just a part of it, not just one house of a bicameral legislature. If a significant per cent of a state's legislative districts deviates from the average population per representative, the Court will apply, as its primary criteria, the following standards: (1) Any scheme with a maximum deviation from the ideal district which is less than ten per cent will be upheld without any justification being required on the state's part; (2) A scheme with a maximum deviation from the ideal district which is more than ten per cent but something less than twenty per cent, (at least 16.4%, but maybe more) must be justified by the state. The state must also show that the apportionment scheme pursues a rational state policy and that the means chosen rationally advanced such policy; (3) Any scheme which has a maximum deviation from the ideal district of more than twenty per cent shall be held to be invidious discrimination and violative of the equal protection clause whether the state attempts to justify the deviation or not. While the Court employed the above standards, it did not completely abandon the tools it had developed over the years, such as the maximum population variance ratio and the minimum per cent of the population which could elect a majority of the members of the legislature. If the Court continues to use the maximum deviation from the ideal district as its primary tool, there will be little use for the other methods developed for analyzing a scheme. The deviation from the ideal district appears, however, to be the only tool needed to determine whether an apportionment scheme is violative of the equal protection clause.

\textbf{IV. AN OHIO ILLUSTRATION}

On June 12, 1963 the Federal District Court for the Southern
District of Ohio, sitting as a three judge panel in *Nolan v. Rhodes*, considered a plea by plaintiffs from two of Ohio's large metropolitan areas, Cleveland and Cincinnati. The plaintiffs argued that both houses of Ohio's legislature "must be apportioned in accordance with population and any substantial deviation therefrom in either house results in an invidious discrimination against them in violation of the equal protection clause of the Federal Constitution," and that such deviation did exist in that Ohio's population had shifted markedly since Article XI of the Ohio Constitution was amended in 1903. After stating that Ohio's senate was apportioned according to population, the court acknowledged that a population variance ratio of 15 to 1 existed between Vinton and Lake Counties. The court reasoned, however, "[w]hat is rational for the federal government ought not to be condemned as irrational and invidious for Ohio." This so-called "federal analogy argument," it should be noted, has been repeatedly discredited by the Supreme Court. Other reasons the court accepted for upholding the apportionment scheme were: (1) that "[t]here does not seem to be much reason for a bicameral legislature if both houses are required to be apportioned on the same basis," and (2) that the people of Ohio change the constitution easily by convention, initiative or through the General Assembly; and (3) that about one-half of the states in the Union have legislatures apportioned by population and area. The court found that the burden of proof was on the plaintiffs and that "Ohio's Constitution does not discriminate invidiously against the plaintiffs nor does it deprive them of the equal protection of the laws." Finally, the court slammed the judicial door in the plaintiffs' faces by stating, "Plaintiffs' remedy is at the polls and not in the courts."

On June 22, 1964, only one week after it decided *Reynolds* and its companion cases, the Supreme Court, in a memorandum opinion, reversed the judgment of the district court and remanded the case "for further proceedings consistent with the views stated in our

166. Id. at 956.
167. Id.
168. Id. at 957.
169. Id.
170. Id. at 958.
171. Id.
172. Id. at 959.
173. Id.
opinions in *Reynolds v. Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds.*"174

The district court issued an order stating that Article XI, Section 2 of the Ohio Constitution was void, and the General Assembly met to draft a constitutional amendment establishing an apportionment plan to be presented to Ohio voters in the May, 1965 elections.175 The voters rejected the General Assembly’s proposal, so the district court called for the parties in the case and all other interested parties to submit plans to the court for the apportioning of both houses of the General Assembly.176 In October, 1965 the Ohio Board of Apportionment submitted a plan to the court and published in accordance with statutory requirements.177 In a matter of days, the district court announced its decision in *Nolan v. Rhodes,*178 setting out the basics of the Board’s plan:

In essence, that plan as filed and published divides the state of Ohio into 99 districts and provides for the election to the House of Representatives of one member from each House District so formed, and then provides for 33 Senate Districts, from each of which one senator is to be elected, and each of which is comprised of three House Districts. In determining the “ideal” population for a House District the population of the state was divided by one hundred. . . . Under the plan, no House District has less than 85% of such population, nor more than 115% thereof. No county was divided which fell within the 85 to 115% range, and in establishing the districts pre-existing political boundary lines (i.e., county lines, township, municipal, ward or precinct boundaries, etc.) were followed. The population figures used were of the last census, and since 1960 population figures were used 1960 boundaries were also followed, since there is no more recent official determination of such population shifts as may have occurred.

As above stated, each Senate District is composed of three contiguous House Districts. In determining the “ideal” population of such districts, the 1960 population of the state was divided by 35. . . . While the populations of the Senate Districts do not in every instance fall within the range of 85-115% of the quotient arrived at by dividing the population by 35, every Senate District is well within that range if a divisor of 33 (the number of Senators) is used. A variance within that range is here held not to be violative of constitutional standards.179

176. Id. at 586.
178. Id. at 586-87 (citations omitted).
The Court applied to the Board's action the presumption that action taken by a lawfully constituted government agency is valid, even though the Board's validity was being challenged in the state courts.

After finding that the plan was not violative of the equal protection clause and that elections could no longer be held under the existing apportionment plan as it had been earlier declared invalid, the court noted that chaos would result unless some plan was set out immediately. The court proceeded to temporarily approve, for the 1966 elections, the plan which the Board had submitted. If the state courts later, however, held that the Board had no authority to act, the district court would give consideration to the additional plans it received in October, 1965.

While the court spoke of a range of 85-115% from the "ideal district," the deviations more specifically were: House District number 29 was under represented by 15% and House District number 32 was over represented by 13%, a maximum deviation from the ideal district of 28%; Senate District number 20 was under represented by 15% and Senate District number 19 was over represented by 5%, a maximum deviation of 20%. The deviation in the Senate Districts would have been somewhat lower had the state's population been divided by 33 instead of 35.

Applying the standards set out in Reynolds and its companion cases, where the population deviations were enormous, the district court's decision, even though it allowed deviations of 28% and 20%, was within those standards. Applying today's standards, however, the plan approved in 1965 would be held violative of the equal protection clause. Since the Board's plan, approved by the district court, met the Supreme Court's standards at that time, it was affirmed by the Supreme Court on February 21, 1966 in Nolan v. Rhodes.

In May, 1967 voters rejected a proposed constitutional amendment which would have included the Board's apportionment scheme of October, 1965 until a new scheme was devised in 1973.

180. Id. at 587.
181. Id.
182. Id. at 588.
183. Id. at 586.
184. Id. at 591.
185. Id. at 597.
186. Id. at 586-87.
In June, 1967 the Ohio Supreme Court decided State v. Rhodes, determining that the Board had the implied power to apportion the legislature and that such implied power included the apportionment of the legislature under a valid plan. Therefore, the court held that the Board had the power to adopt the October, 1965 plan even though the federally revised Article XI called for apportionment every ten years. As a result of the federal district court’s and the Ohio Supreme Court’s decisions, the Board had power to apportion the legislature even though the voters had earlier rejected the Board’s plan.

Two months after the court decided State v. Rhodes, the General Assembly adopted Senate Joint Resolution 24 which proposed a new apportionment article for the Ohio Constitution. The amendment was submitted to the voters on November 7, 1967, and by a vote of 1,315,736 to 908,010, it was adopted. That amendment, adopted after the Supreme Court had struck down a plan with a deviation of 25% and before the Court had finished defining the equal protection clause standards for apportionment cases, still meets the Court’s present standards. Article XI, Section 1 establishes the Apportionment Board and requires a decennial apportionment. Section 2 established the ratio for the “ideal districts” for the House and Senate. The House Districts were created by dividing the state’s entire population as stated by the federal decennial census by 99. The Senate Districts were created by dividing the same population by 33. Section 3 limits any deviation from this “ideal dis-
strict” to not less than 95% and not more than 105% except where an effort is made to avoid dividing a county line.\textsuperscript{195} Section 9, moreover, limits these additional deviations to not less than 90% nor more than 110%.\textsuperscript{196} The deviations of 95-105% are well within the Supreme Court’s standards. The further deviations of 90-110% approach the far limits of the Court’s “no reasons required” standard, but probably would be upheld. Section 4 establishes the same allowable deviations for the Senate as Section 3 does for the House.\textsuperscript{197} Had the amended Article XI not met the Supreme Court’s standards concerning equal protection, more legal proceedings would have resulted. More importantly, since Article XI as amended meets the Court’s equal protection standards, voters have been sufficiently protected and have had no cause to invoke judicial assistance to protect their voting rights.

The apportionment scheme in effect today was based on the 1970 decennial census and adopted on December 20, 1971\textsuperscript{198} and was subject to the provisions of Article XI, as amended in 1967. The ideal House District contained 107,596 people, with House District number 65 being over-represented by 1.0% (106,578 people), and House

\begin{footnotesize}
\begin{itemize}
\item[195.] The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article.
\item[196.] In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district consisting of the whole county.
\item[197.] The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article.
\end{itemize}
\end{footnotesize}
District number 64 being under represented by 1.0% (108,671 people), a total deviation of 2.0%.\footnote{Id. at 133.} The ideal Senate District contained 322,788 people, with Senate District number 29 being over represented by 0.6% (320,837 people) and Senate District number 3 being under represented by 0.7% (325,005 people), a total deviation of 1.3%.\footnote{Id. at 140.} Both these total deviations are well within the Court’s standards. They would not need to be justified by the state if challenged in federal courts and would not violate the equal protection clause of the fourteenth amendment.\footnote{See Chapman v. Meier, 420 U.S. 1 (1975).}

The harmony on the apportionment scene in Ohio since 1967 must be attributed to its unique scheme which takes apportionment of the General Assembly out of its own hands, and places it in the hands of the Apportionment Board.\footnote{Ohio Const. art. XI, § 1 (1851, amended 1967).} It is further due to the Apportionment Board’s remaining well within the standards of Article XI of the Ohio Constitution and the equal protection clause of the fourteenth amendment. It should be a peaceful wait until 1981 when the General Assembly is again due to be apportioned.

\textit{Mark A. Gabis}
NOTES


Richard L. Swihart was indicted with others by a federal grand jury. He was charged in six counts of a twenty-six count indictment. Evidence was seized in a search of Swihart’s gun shop by agents of the Bureau of Alcohol, Tobacco, and Firearms acting under a search warrant issued by a U.S. magistrate upon an affidavit of one of the agents. Attached to the affidavit was a sworn statement of the informant, identified to the magistrate as Paul Davis, owner of an explosives distributing center from which the evidence seized at Swihart’s shop had allegedly disappeared.

The agent’s affidavit recited that he had received a call from Davis informing him that a check of his inventory had revealed that a large quantity of gun powder was missing. Davis also informed the agent of a suspicious phone conversation which he had had with Swihart earlier that week. Swihart had phoned Davis, identified himself as the owner of a gun shop, and asked about the price, quantity, and availability of one of the items missing from Davis’s inventory. Posing as a customer, Davis visited Swihart’s shop and observed a large quantity of gun powder, one keg of which bore the same production-lot numbers as one of Davis’s missing kegs. Swihart informed Davis that he had gotten a bargain on the powder and would sell it for $65.00 plus tax. Davis provided the agent with retail price information and further informed him that the price Swihart had quoted to him was the same price at which he sold this type of powder to wholesalers in his area. The agent checked other sources for retail price information and drove by Swihart’s shop to obtain a physical description of the premises.

1. Specifically, the indictment alleged violations of 18 U.S.C. §§ 922(i), (j), (m) and 924(a) (1976).

2. The affidavit of special agent Louis M. Halkins and the sworn statement of the informant are appended to the court’s opinion. United States v. Swihart, 554 F.2d 264, 270 (6th Cir. 1977).

3. The agent’s affidavit gave February 26, 1976 as the date of the call. Davis did not visit Swihart’s shop until February 27. Davis’s statement gave the latter date as the date of both the call and the visit. The court discounted this inconsistency as immaterial. Id. at 266 n.2.

4. Davis was unaware that the lot numbers matched until after he visited Swihart’s shop. He made the discovery when he rechecked his inventory with the county sheriff. The court found this fact immaterial. Id. at 267, 266 n.3.

5. A description is necessary because the place to be searched and the items to be seized
Two days later the agent obtained a sworn statement from Davis and rechecked his inventory with him. This check confirmed Davis's earlier report and disclosed the absence of the keg bearing the lot number he had seen and recorded at Swihart's shop.6 A check of Davis's records indicated that he had sold none of this type of powder since his last delivery.

The agent's affidavit also stated that Davis informed him that he was one of only nine distributors of this particular type of powder, handling three quarters of its total distribution in the eastern half of the United States and further that Davis had informed him of the manner in which he had come to realize that the production lot numbers on his missing keg matched those on the keg in Swihart's shop.

Upon Swihart's motion the district court suppressed the evidence seized under the search warrant. The district court found the affidavit for the search warrant defective under the second prong of the test established for testing the sufficiency of affidavits in Aguilar v. Texas,7 in that it failed to state any facts to support the credibility of the informant.8 The government appealed.

The Sixth Circuit agreed with the district court in finding Aguilar's first prong satisfied, but disagreed as to the determination on the second prong. The Sixth Circuit, while acknowledging that none of the usual means of proving the informant's credibility were present, held that there were "other indicia of reliability in the affidavit . . . from which the magistrate could conclude that Davis was credible or his information was reliable."9 The case was reversed and remanded with directions to deny the motion to suppress.10

Since this case presents a recurring issue and concerns a complex area in criminal procedure, a review of the guidelines established by the Supreme Court for testing the sufficiency of an affidavit for a search warrant where the basis for the affidavit is an informant's tip will show the problems in this area. The last section of this note will focus on the Sixth Circuit's approach to this issue in this case. Finally a brief comment will offer suggestions to deal with affidavits, informants, probable cause, and the other factors that come together to generate the issuance of a search warrant.

8. United States v. Swihart, 554 F.2d at 268.
9. Id.
10. Id. at 270.
I. AGUILAR/SPINELLI

It is fundamental in American law that no search warrant shall issue except upon a showing of probable cause and supported by a sworn affidavit.\textsuperscript{11} To guarantee this protection there are numerous procedural safeguards to suppress evidence seized in derogation thereof.\textsuperscript{12} Since courts are only a part of the whole criminal justice system, there also exists a desire to encourage proper and fair police procedures. However, the courts must walk a taut wire balancing the fourth amendment rights of individuals on one side without thwarting effective police investigation on the other.\textsuperscript{13}

The law requires that a determination of probable cause be made by a detached and disinterested magistrate.\textsuperscript{14} In determining the existence of probable cause, the magistrate is concerned with "probabilities not certainties."\textsuperscript{15} The standards for finding a showing of probable cause from an affidavit based on an informant's tip are measured by rules less constraining than those for the admission of evidence at trial.\textsuperscript{16} A search warrant may clearly issue upon an affidavit that is hearsay.\textsuperscript{17} Overall, there is a guiding principle that affidavits for search warrants are to be judged by realistic and common sense standards.\textsuperscript{18}

Reviewing courts will give great deference to the determination of probable cause by a magistrate.\textsuperscript{19} However, on review, a court can

\textsuperscript{11} U.S. CONST. amend. IV.

\textsuperscript{12} The issue in this case was raised by a motion to suppress pursuant to FED. R. CRIM. P. 41(e):

\begin{quote}
A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property . . . . If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.
\end{quote}

\textsuperscript{13} See generally Comment, Controverting Probable Cause in Facially Sufficient Affidavits, 63 J. CRIM. L.C. & P.S. 41 (1972).

\textsuperscript{14} FED. R. CRIM. P. 41(c). The Supreme Court has stated that "important safeguards . . . assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry." Spinelli v. United States, 393 U.S. 410, 419 (1969). A general discussion of the magistrate's functions can be found in Burnett, Evaluation of Search Warrants: A Practical Guide for Federal Magistrates, 64 J. CRIM. L.C. & P.S. 270 (1973).

\textsuperscript{15} United States v. Ventresca, 380 U.S. 102 (1965).

\textsuperscript{16} McCray v. Illinois, 386 U.S. 300, 311 (1967).

\textsuperscript{17} See Jones v. United States, 362 U.S. 257 (1960).

\textsuperscript{18} United States v. Ventresca, 380 U.S. 102 (1965); see Spinelli v. United States, 393 U.S. 410, 438 (1969) (Fortas, J., dissenting): "A policeman's affidavit should not be judged as an entry in an essay contest."

\textsuperscript{19} Jones v. United States, 362 U.S. 257 (1960).
only weigh the evidence that was properly before the magistrate.  

Since the affidavit and informant’s tip are generally the only records of this evidence before the magistrate, a reviewing court must make its determination solely upon this material.

The critical inquiry then becomes: What are the standards by which a magistrate may determine that probable cause exists for the issuance of a search warrant, where the basis of the supporting affidavit is an informant’s tip?

The Supreme Court considered this question in *Aguilar v. Texas*. The Court promulgated a “two prong” test, stating:

"[The magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed was “credible” or his information “reliable” . . . ."

This analysis is comprised of two tests: 1) the basis of knowledge test, and 2) the informant trustworthiness test.

The “basis” test goes to the subject matter of the informant’s tip. This test considers the question of the manner in which the informant obtained his information: Is his knowledge of the alleged criminal conduct that of an eye-witness or participant, i.e. is the information peculiar to the informant, or is his information general underworld gossip? The basis test usually presents little difficulty. The best way to satisfy this test is the most direct—give the magistrate an exact recital of the manner in which the informant obtained his information. The clearest example of this direct approach is where the informant is a participant in the crime and describes the wrong-doing in minute detail. The basis of knowledge test can also

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23. Id. at 114 (citations omitted).
25. Id.
26. “[The informant’s] meager report could easily have been obtained from an offhand remark heard at a neighborhood bar.” Spinelli v. United States, 393 U.S. 410, 417 (1969).
27. See LaFave, Probable Cause from Informants: The Effects of Murphy’s Law on Fourth Amendment Adjudications, 1977 U. Ill. L.F. 1.
be satisfied in an indirect fashion. The usual method of this indirect approach arises where the informant provides police officers with a wealth of detail concerning the alleged wrongful activity. This indirect approach differs from the minute detail method in that the former provides only a large quantity of circumstantial evidence.

The trustworthiness test requires a measuring of the informant’s character. It must be shown that, even though the informant is not identified, it is more likely than not that the informant is truthful. The informant trustworthiness test can be viewed as the composite of two subtests: 1) a reliability test; and 2) a credibility test. Clearly, the credibility test is satisfied where the tip comes from a repeat informant who has previously provided reliable information. However, where the informant has not previously proven himself, having no established “track record,” the reliability test should be utilized. Satisfaction of this analysis requires a determination that, all pertinent facts considered, the informant’s tip is reliable at the time.

These tests, though concededly not set out as intricately in Aguilar, were sternly criticized by Justice Clark:

The court seems to hold that what the informer says is the test of his reliability. I submit that this has nothing to do with it. The officer’s experience with the informer is the test and here the two officers swore that the informer was credible and the information reliable . . . . The totality of the circumstances upon which the officer relied is certainly pertinent to the validity of the warrant . . . .

The Court considered this totality of the circumstances approach in Spinelli v. United States. The Eighth Circuit, testing the sufficiency of an affidavit for a search warrant, had utilized this approach. The Court found such approach overbroad. “Where . . . the informer’s tip is a necessary element in a finding of probable cause, 

29. LaFave, supra note 27, at 6.
31. LaFave, supra note 27, at 5.
32. Id. at 4. See text accompanying note 23 supra.
34. LaFave, supra note 27, at 5.
35. See, e.g., United States v. Mahler, 442 F.2d 1172 (9th Cir.), cert. denied, 404 U.S. 993 (1971).
its proper weight must be determined by a more precise analysis."

This "more precise analysis" involved its own two step procedure. First, the informant's tip must be tested by Aguilar's standards. Secondly, should the tip fail under Aguilar, "the other allegations in the hearsay report should then be considered." Viewed in this manner, Spinelli establishes a three step process, having incorporated Aguilar's two step procedure. Independent corroboration of the allegations constitutes the third step.

The independent corroboration requirement was criticized by Justice Black in his dissent, as going "very far toward elevating the magistrate's hearing for issuance of a search warrant to a full-fledged trial." He also claimed that the Court was moving nearer to requiring that, before a magistrate issue a search warrant, the magistrate must be persuaded the accused is actually guilty of the crime.

Further qualifications upon the analysis developed in Aguilar and modified by Spinelli were given in United States v. Harris. In Harris the Sixth Circuit had utilized the Aguilar/Spinelli tests and found an affidavit for a search warrant insufficient. The Court condemned the circuit court's approach as a "hypertechnicality." The plurality opinion by Chief Justice Burger found additional grounds for crediting the informant's tip as reliable considering the fact that his tip amounted to a declaration against his penal interest which carried its own indicia of credibility. By implication the Court appeared to hold that there may arise instances in which an informant's tip will be self-corroborating.

II. UNITED STATES v. SWIHART: AGUILAR/SPINELLI IN THE SIXTH CIRCUIT

This concept of self-corroborating was one of the principles for the holding in United States v. Swihart. The holding is actually quite

38. Id. at 415.
39. Id.
40. Id.
41. If Professor LaFave's analysis were accepted, this is a three-step process. See LaFave, supra note 27.
43. Id. at 435.
44. 403 U.S. 573 (1971).
45. Id. at 575.
46. Id. at 579.
47. Id. at 583.
48. 554 F.2d 264 (6th Cir. 1977).
ing awareness "that the Court has substituted a rigid academic formula for the unrigid standards of reasonableness and 'probable cause' laid down by the Fourth Amendment itself—a substitution of technicality for practicality."  

CONCLUSION

Probable cause and reasonableness are the only necessary considerations in determining whether a search warrant should issue. Both are, at best, nebulous terms. The intervention of courts merely serves to confound and burden their determination. If any test other than the constitutional one is to be used, it should be a general guideline, not a rigid analysis of tests, subtests, and spurs. This guideline is suggested by the language in Aguilar v. Texas. Perhaps the most suitable test, more properly only a general requirement, is that the affidavit contain a concise and clear recital of the underlying circumstances. This recital could take the form of an informal statement of facts which lead the officer to believe that a crime was being committed.

A broad guideline would be suited for all occasions and would not require resort to strained analysis to fathom the thought processes of the issuing magistrate. These thought processes, i.e. the determination of probable cause, are not quantifiable. A magistrate's determination should not be set aside unless a blatant abuse of discretion exists.

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narrow. It states that where a tip comes from an identified, non-professional informant who is also the victim of the crime, and contains particulars of the underlying details, the tip tends to take on its own “intrinsic indicia of reliability.” A rigid application of *Aguilar/Spinelli* was not utilized.

The appellee, Swihart, argued that the affidavit for the search warrant under which the evidence was seized was defective under a strict application of *Aguilar* and *Spinelli*. The government countered this argument, advocating that *Aguilar/Spinelli* was limited to testing search warrants issued upon hearsay reports from either unidentified or professional informants, citing *United States v. Darensbourg* and *United States v. Burke*. The Sixth Circuit, while acknowledging that there were dicta in those cases to support the government’s argument, refused to limit the *Aguilar/Spinelli* test. The court seemed to indicate that such a restriction would be an unwarranted resort to “hypertechnical or rigorous standards.”

Although not following a strict application of *Aguilar/Spinelli*, the court indicated that where the informant is an identified non-professional and also the victim of the crime, there are less stringent standards for complying with the second prong of *Aguilar/Spinelli*. The court found that the “particularization of the underlying circumstances” in Davis’s statement assumed their “own intrinsic indicia of reliability” so far that they substantiated both of the *Aguilar* tests. The degree of particularization was so great that it would be nonsensical, if not impossible, to separate out those facts that went to satisfy either prong. In essence then, without so holding, the court felt that Davis’s statement was so particularized as to be self-corroborating, regardless of the fact he was a first time informer.

While such an approach may be attacked as an impermissible resort to a totality of circumstances approach, disallowed by *Spinelli*, the *Swihart* decision could be cited as representing a grow-

On February 14, 1976 from about 8:00 p.m. until midnight, the appellant Danny Hamilton was in Paducah, Kentucky at the Blue Ribbon Lounge. During this period Hamilton consumed several beers, pretended to be a narcotics agent, and threatened to pull out a gun in order to make a “bust.” When Hamilton attempted to call the police to report what he fancied to be a drug transaction, John Teas, the manager of the lounge, grabbed the telephone. After checking Hamilton for the gun which he claimed to have, Teas pulled out his own gun and told Hamilton to leave, whereupon Hamilton left the lounge in his truck.

Approximately one-half hour after Hamilton left the lounge, he was traveling east on the one-way street of Broadway in Paducah. According to the testimony of the witnesses, he was approaching Thirteenth Street at a speed of at least fifty miles per hour. At the same time, Patsy Ann Davidson was driving her car on Thirteenth Street through the intersection of Thirteenth and Broadway. When Hamilton reached the same intersection, in order to avoid hitting a car stopped in the right lane, he veered into the left lane and continued through the intersection despite the red traffic light on Broadway. Hamilton collided with Ms. Davidson who was thrown from her car onto the curb. She died later that night from a crushed skull.

After the collision, Hamilton's behavior was described by one of the prosecution's witnesses as unruly and boisterous. Such a conclusion was evidenced by his attempt to flee from the police before being apprehended and his saluting and calling out serial numbers as if he were in the military service.

Two hours after the incident Hamilton was given a breathalyzer test which registered a blood alcohol level of 0.20%. A blood sample tested by chemists for the Kentucky State Police Crime Laboratory indicated a blood alcohol level of 0.18%. Kentucky law considers a

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2. *Id.*
3. Brief for Appellant at 5.
4. 560 S.W.2d at 540.
5. *Id.* at 541.
6. *Id.*
person to be under the influence of intoxicating beverages where
there is 0.10% or more by weight of alcohol in the blood. 7

Hamilton was indicted for the murder of Ms. Davidson and was
tried before a jury in the McCracken Circuit Court. The trial court
instructed the jury on murder, second degree manslaughter, and
reckless homicide. 8 Hamilton was found guilty of murder and sent-
tenced to 20 years imprisonment 9 pursuant to Ky. Rev. Stat. §
507.020(1)(b) which states:

A person is guilty of murder when: [u]nder circumstances manifest-
ing extreme indifference to human life he wantonly engages in con-
duct which creates a grave risk of death to another person and
thereby causes the death of another person. 10

On direct appeal, 11 the Supreme Court of Kentucky, while recogniz-
ing that this was a case of first impression under the statute, af-
firmed the judgment of the trial court, construing this statute to be
broad enough to include the situation where a driver in an intoxi-
cated state causes the death of another. 12 The majority commended
the legislature for enacting such a statute aimed at deterring use of
alcohol by drivers. 13 Chief Justice Palmore, who was joined by Jus-
tices Lukowsky and Clayton, dissented, stating that he believed
neither "the drafters of the Kentucky Penal Code [nor] members
of the General Assembly . . . had any intention of placing the reck-
less act of an automobile driver, whether drunk or sober, in the same
category as that of a deliberate murderer." 14

Under Kentucky's Penal Code which went into effect on January
1, 1975, the law of homicide is completely statutory in form and
substance 15 and is limited to four crimes: murder; 16 manslaughter in

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8. 560 S.W.2d at 542.
9. Id. at 541.
11. Appeals from circuit court judgments that impose a sentence of death or imprisonment for twenty years or more are taken to the supreme court. Ky. R. Crim. P. 12.02.
12. 560 S.W.2d at 544. This construction of the statute is in concert with the views of the various legislators who drafted the Penal Code, with whom this author has communicated.
13. Id.
15. Under prior law, the statutes prescribed only the punishments for murder and voluntary manslaughter, Act of Apr. 10, 1893, Ky. Acts ch. 182, §§ 22, 23 (repealed 1974), and the common law provided the elements of the crimes.
the first degree; manslaughter in the second degree; and reckless homicide. Even with these recent statutes, the pre-Code case law is useful in interpreting and defining their applicability. Particularly useful are those cases which deal with an unintentional or negligent killing, where death is not a conscious objective of the defendant.

In Brown v. Commonwealth the court of appeals was confronted with a situation where the defendant killed a man when he fired a gun into a room full of people. The court recognized, in affirming the defendant’s murder conviction, that such conduct established a “general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of just sense of social duty, and fatally bent on mischief.” In such killings where “the fatal act is committed deliberately, or without adequate provocation, the jury has a right to presume that it was done with malice.”

The court reaffirmed its position with respect to such conduct in Hill v. Commonwealth. Hill involved a death caused when the defendant fired a shot into a car which he knew was occupied by people. In reversing and remanding the case for instruction to the jury on voluntary manslaughter, thereby leaving open the possibility of negligent voluntary manslaughter, the court referred to the conduct constituting the offense of negligent murder as “reckless . . . without lawful excuse, and without regard for human life. . . .” Thus, Brown and Hill upheld the common law offense known as negligent murder. Convictions for the seemingly contradictory crime of negligent voluntary manslaughter were upheld in numerous cases before 1962, where the defendant’s drunken driving caused the death of another person.

Negligent voluntary manslaughter and murder were viable as common law offenses until the enactment of Ky. Rev. Stat. § 17.
435.022, which became effective on June 14, 1962.\textsuperscript{28} Subsequent to this date, one who negligently killed a person was prosecuted under this statute which provided for two degrees of involuntary manslaughter.\textsuperscript{27} In \textit{Hemphill v. Commonwealth}\textsuperscript{26} the court ruled that the crime of voluntary manslaughter could no longer be used to impose punitive sanctions upon an individual who had unintentionally or negligently caused the death of another. Also, in \textit{Lambert v. Commonwealth},\textsuperscript{29} the court stated that there was an intent on the part of the legislature to abolish this contradictory crime of negligent voluntary manslaughter. Accordingly, immediately prior to the enactment of the 1975 Penal Code, one who caused death by drunken driving could be convicted of no worse an offense than first degree involuntary manslaughter and be sentenced to a maximum fifteen year confinement.

Even with the enactment of the Code, at least one noted author, Professor Robert G. Lawson of the University of Kentucky Law School, who was one of the persons most responsible for the Code, felt that this section (507.020(1)(b)) did not change the law.\textsuperscript{30} Now, however, in light of the majority's interpretation of Ky. Rev. Stat. § 507.020(1)(b) in \textit{Hamilton}, one who causes a death by drunken driving and is therefore convicted of murder will be sentenced to a minimum of twenty years. The majority, in deciding the applicability of this statute to death-causing drunken driving, cited Justice Holmes:\textsuperscript{31}

To explode a barrel of gunpowder in a crowded street and kill people is murder, although the actor hopes that no such harm will be done.

\textsuperscript{26} The court of appeals noted as late as February 23, 1962 in \textit{Bentley v. Commonwealth}, 354 S.W.2d 495 (Ky. 1962), that one who shoots into a crowd not actually intending to injure anyone may be guilty of wilful murder.

\textsuperscript{27} Ky. Rev. Stat. § 435.022 provided as follows:

1. Any person who causes the death of a human being by an act creating such extreme risk of death or great bodily injury as to manifest a wanton indifference to the value of human life according to the standard of conduct of a reasonable man under the circumstances shall be guilty of involuntary manslaughter in the first degree and shall be confined in the penitentiary for not less than one nor more than fifteen years.

2. Any person who causes the death of a human being by reckless conduct according to the standard of conduct of a reasonable man under the circumstances shall be imprisoned in the county jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both. Act of Mar. 9, 1962, Ky., Acts, ch. 90 (repealed 1974).

\textsuperscript{28} 379 S.W.2d 223 (Ky. 1964).

\textsuperscript{29} 377 S.W.2d 76 (Ky. 1964).

\textsuperscript{30} Address by Prof. Robert G. Lawson, Seminar on the Kentucky Penal Code, University of Kentucky (Sept. 26, 1974).

\textsuperscript{31} 560 S.W.2d at 542.
But to kill a man by careless riding in the same street would commonly be manslaughter. *Perhaps, however, a case could be put where the riding was so manifestly dangerous that it would be murder.*

Chief Justice Palmore agreed in his strong dissenting opinion that such conduct calls for stern punishment, but that the majority's reliance on Holmes for such a proposition was misplaced since, "there is simply a difference in culpability between committing an act that endangers people whose presence is known and an act that endangers people whose presence should be anticipated but in fact is not known."

Various offenses in the Penal Code require particular mental states as described in *Ky. Rev. Stat.* § 501.020. The mental state described as "wantonly," used in section 507.020(1)(b) and section 507.040, is defined by section 501.020(3) as follows:

A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

Where a defendant kills a person while exhibiting the foregoing conduct, he is subject to a conviction for manslaughter in the second degree. And where the added element of a manifestation of extreme indifference to human life is present, a murder conviction results, subjecting the defendant to a prison term of from 20 years to life imprisonment and possibly a death sentence. However,”

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33. 560 S.W.2d at 544.
35. *Ky. Rev. Stat.* § 507.040 (1975), provides that "[a] person is guilty of murder in the second degree when he wantonly causes the death of another person. Manslaughter in the second degree is a Class C felony."
36. Under the Penal Code the offense of murder is a capital offense, and pursuant to *Ky. Rev. Stat.* § 532.035 (Supp. 1977), the sentence for a capital offense shall be death or a sentence of life not less than twenty years. *Ky. Rev. Stat.* § 532.060(2) (1975) prescribes the sentences for felonies:

(a) For a Class A felony, not less than twenty (20) years nor more than life imprisonment;
(b) For a Class B felony, not less than ten (10) nor more than twenty (20) years;
(c) For a Class C felony, not less than five (5) years nor more than ten (10) years;
(d) For a Class D felony, not less than one (1) year nor more than five (5) years.
where drunken driving causes the death of another and the defendant is convicted of murder for such activity, problems arise with respect to application of the language of the statutes.

A person who is intoxicated, even though unaware of the risk, may act wantonly while driving a vehicle. But if a person is unaware of a risk, his unawareness would specifically preclude an ability to manifest extreme indifference to human life. Assuming, however, that intoxication does not preclude this, does the manifestation of extreme indifference to human life occur when a person begins to drink, when he gets behind the wheel of a vehicle while intoxicated, or does it occur immediately before the death-causing collision? The majority in *Hamilton* never specifically indicated what point the defendant exhibited this extreme indifference to human life. As a practical matter, the jury may have been persuaded of the defendant's indifference by his bizarre behavior after the fatal incident occurred.

The majority seemed to stress the jury's finding that the defendant's failure to stop at the red light was at least a contributing factor to manifest this indifference. But is this conduct more dangerous than running a stop sign, or crossing the yellow line, or failing to yield the right of way, or simply failing to stop when there is a duty to do so? If not, then in all cases where death results from drunken driving, a jury question may be raised as to the manifestation of extreme indifference to human life. The majority did not state that a person who causes death while driving under the influence of alcohol should be indicted for or even convicted of murder. They did feel, however, that the intent of the legislature in enacting this statute was to deter the use of intoxicants by drivers.

This deterrence factor is of questionable value. It is doubtful whether a person considers a murder or even a manslaughter prosecution when having a "few drinks" before driving. Assuming arguendo that the threat of such a prosecution could deter a person from drinking, it is questionable that even if a person reads the verbiage of these statutes, he would be able to glean from them the dire consequences which could result from death-causing drunken driving. The decision in this case does not adequately provide the knowledge to deter such conduct because of the lack of specificity. If it is indeed the intent of the legislature to deter drunken driving

37. 560 S.W.2d at 543.
38. *Id.* at 544.
by making death caused by drunken driving thereby equivalent to murder, they should do so in clear, concise language.

As presently written, the statutes lend themselves to disparate results where death-causing drunken driving is concerned, depending upon the particular commonwealth attorney, the judge, and the jury. The commonwealth attorney, as in other cases, but especially in a case where death is caused by drunken driving, has a great deal of latitude within which to obtain an indictment. He may obtain an indictment for murder, manslaughter in the second degree, or reckless homicide. However, he may wish to forego the murder indictment and concentrate on one of the latter two offenses. Also, when instructing the jury, the judge may either allow or disallow the instruction concerning murder. If the judge instructs on murder, since the jury has wide discretion and is faced with unclear language of the statute, a disparate result will not be unlikely. A defendant, while intoxicated, who runs a red light in one county may be convicted of murder and be sentenced to twenty-five years imprisonment while another defendant in another county or even the same county who engages in the same type of conduct could be convicted only of reckless homicide and be sentenced to only three years in the penitentiary.

Other jurisdictions have recently enacted legislation comparable to section 507.020(1)(b). As of this date, the appellate courts in these jurisdictions have not had occasion to examine these statutes with regard to the intoxicated driver. Whether this indicates lack of prosecution under these statutes for death-causing drunken driving is not certain, but had there been murder convictions under these statutes, an appeal would more than likely have been taken. Another factor which may account for the paucity of such cases may well be the statutes’ youth.

39. KY. REV. STAT. § 507.050 (1975) provides that “[a] person is guilty of reckless homicide when, with recklessness he causes the death of another person”. Reckless homicide is a Class D felony. Id.

40. For discussions of the exercise of prosecutorial discretion see K. Davis, Discretionary Justice, A Preliminary Inquiry (1971); M. Freedman, Lawyers’ Ethics in an Adversary System (1975). Although the exercise of such broad discretion has generally been acknowledged to be frightening, courts have been unwilling to impose restraints. See, e.g., Bordenkircher v. Hayes, 98 S. Ct. 663 (1978).

41. COLO. REV. STAT. § 18-3-102(d) (Supp. 1976) (first degree murder results in minimum sentence of life imprisonment, maximum sentence of death); N.H. REV. STAT. ANN. § 630:1-b (1974) (second degree murder punishable by imprisonment for life or for such term as the court may order); N.D. CENT. CODE § 12.1-16-01(2) (1976) (Class A felony punishable by maximum confinement of 20 years or a fine of ten thousand dollars, or both).
On the other hand, Wisconsin, while not employing the same wording in its statute,\(^{42}\) has long held that death caused by an intoxicated driver may constitute murder. This was recognized in Montgomery v. State.\(^{43}\) But Wagner v. State\(^{44}\) recently limited the applicability of such a statute for prosecuting Hamilton-type offenses to situations where the defendant is conscious of the presence of individuals before hitting them, thereby indicating a constructive intent to kill. In Wagner the defendant was drag racing at a high rate of speed down a main street at 11:00 p.m. when he struck a pedestrian.\(^{45}\) The court held the evidence insufficient for a second degree murder conviction.\(^{46}\) In still other jurisdictions, it has been held that a person who kills another while under the influence of alcohol may be convicted of second degree murder.\(^{47}\)

Nevertheless, it is apparent that Kentucky has taken a hard line stance with respect to death caused by drunken driving. Whether such punishment for similar conduct will be followed is unclear.\(^{48}\) However, the presence of the deterrent effect sought by the legislature and advanced by the court, given the lack of clarity in the murder statute, is questionable. Equally questionable is the consistent and fair application of these statutes to the motorists using the highways of the Commonwealth.

**Gary Jon Davis**

\(^{42}\) Wis. Stat. § 940.02 (1977): "Whoever causes the death of another human being by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life, may be imprisoned not less than 5 nor more than 25 years."

\(^{43}\) 178 Wis. 461, 190 N.W. 105 (1922).

\(^{44}\) 76 Wis. 2d 30, 250 N.W.2d 331 (1977).

\(^{45}\) Id. at 31, 250 N.W.2d at 333.

\(^{46}\) Id. at 48-49, 250 N.W.2d at 339.

\(^{47}\) Nestlerod v. United States, 122 F.2d 56 (D.C. Cir. 1941); Nixon v. State, 268 Ala. 101, 105 So. 2d 349 (1958); Kemp v. State, 214 Ga. 558, 105 S.W.2d 582 (1958); Staggs v. State, 210 Tenn. 175, 357 S.W.2d 52 (1962).

\(^{48}\) Recently, in Commonwealth v. Justice, Kenton Circuit Court, 78-CR-159, Joseph Justice was indicted under section 507.020(1)(b), for allegedly driving a car under the influence of alcohol and causing the death of two persons.
CONSTITUTIONAL LAW—HARMLESS CONSTITUTIONAL ERROR—POST-
ARREST SILENCE OF ACCUSED USED BY PROSECUTOR FOR IMPEACHMENT
PURPOSES—Darnell v. Commonwealth, 558 S.W.2d 590 (Ky. 1977).

INTRODUCTION

Appellants Charles Darnell and Michael Nickel were each convicted of murder and two counts of robbery in the first degree¹ and were sentenced to life imprisonment and two twenty-year terms pursuant to a jury verdict in the Greenup Circuit Court. On appeal to the Kentucky Supreme Court,² appellants sought reversal based on seven assignments of error.³ This note, however, will focus primarily on their first argument: "The use for impeachment purposes of appellants’ silence at the time of their arrest deprived appellants of due process in violation of the fifth and fourteenth amendments to the United States Constitution."⁴

At the trial during direct examination of the arresting police officer, the prosecutor asked if either of the appellants had made any statement after being advised of his constitutional rights. The officer replied, "No," whereupon appellants’ counsel objected and moved for a mistrial. The court overruled the motion, but admonished the jury to disregard the question and answer.⁵

Appellant Nickel was asked on cross-examination if he had said, after being advised of his rights, "Me and this other fellow . . . (nodding to Charles Darnell) . . . have nothing to say. We want a lawyer."⁶ Again, Nickel’s counsel objected and moved for a mistrial. The court overruled the motion, but admonished the jury to disregard the question and answer.⁷

Appellant Nickel was asked on cross-examination if he had said, after being advised of his rights, "Me and this other fellow . . . (nodding to Charles Darnell) . . . have nothing to say. We want a lawyer."⁸ Again, Nickel’s counsel objected and moved for a mistrial, and was overruled.⁹ The arresting officer was recalled for rebuttal testimony and was asked by the prosecutor if appellant, Mike Nickel, had made the above statement. The officer replied, "Yes sir."¹⁰ Once again, counsel for the appellants objected and was overruled.¹¹

The principal issue confronting the Kentucky Supreme Court was whether the prosecutor’s questions concerning the appellants’ post-arrest silence violated due process requirements by infringing upon

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² Darnell v. Commonwealth, 558 S.W.2d 590 (Ky. 1977).
³ Brief for Appellants at 1.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ Id.
⁹ Id.
¹⁰ Id.
¹¹ Id.
appellants' fifth amendment rights, and, if so, required reversal of the trial court's decision. The court held that while the prosecutor's questions constituted error, it was only harmless error, and the appellants' convictions were thus affirmed.

BACKGROUND

A recent decision concerning the issue presented in the Darnell case is Doyle v. Ohio. In Doyle the petitioners were properly given Miranda warnings following their arrest. Thereafter they chose to remain silent. During their trial they gave their exculpatory story for the first time. As part of a wide-ranging cross-examination for impeachment purposes, the prosecutor asked each petitioner why he had not told this story to the officers at the time of arrest. Defense counsels' timely objections were overruled.

The Supreme Court of the United States held in Doyle, "that the use for impeachment purposes of petitioners' silence, at the time of arrest, and after receiving Miranda warnings, violated the Due Process clause of the Fourteenth Amendment." However, the Court recognized the possibility of harmless error in cases of this type, but since the issue was not raised, did not consider it.

The use of a defendant's post-arrest silence by a prosecutor is an obvious attempt to suggest to a court or jury that an innocent man would have spoken in his own defense. Indeed, it is a reasonable possibility that a juror may be influenced by the fact that a defendant did not talk at his arrest, but then presented an exculpatory story at his trial. The Court in Miranda said:

In accord with our decision today, 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 he stood mute or claimed his privilege in the face of accusation.

10. Id.
11. Id. at 590.
15. Id. at 613.
16. Id. at 614.
17. Id. at 619.
18. Id. at 619-20.
The *Doyle* Court recognized that silence in the wake of the *Miranda* warnings may be nothing more than the defendant's exercise of these *Miranda* rights.\(^{21}\) As the court in *U.S. v. Brinson*\(^{22}\) points out, quoting from *McCarthy v. United States*,\(^{23}\) if the rule were otherwise, a warning would be required to say, "If you say anything it will be used against you, if you do not say anything, that will be used against you."\(^{24}\)

In *United States v. Hale*,\(^{25}\) the defendant was properly advised of his *Miranda* rights, and when confronted by the police with incriminating evidence, offered no explanation of its source. On direct examination, the defendant attempted to explain, but on cross, the federal prosecutor attacked his testimony and asked why he did not tell this story to police during the interrogation. The Supreme Court reversed the conviction, holding that the defendant's silence was not inconsistent with his trial testimony, and, thus, the use thereof by the prosecutor was improper.\(^{26}\) The Court also stated 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.\(^{27}\)

*Hale* was not decided on constitutional grounds, however, but on evidentiary grounds alone, under the Supreme Court's supervisory authority over the lower federal courts. In effect, the Court in *Doyle* adopted the evidentiary holding of *Hale* as a constitutional mandate enforceable against the states through the fourteenth amendment.

In 1971 in *Harris v. New York*,\(^{28}\) the Supreme Court held that prior inconsistent statements obtained in violation of *Miranda* may be used for impeachment purposes so long as such statements are trustworthy and inconsistent with the testimony to be impeached.\(^{29}\) In *Minor v. Black*,\(^{30}\) a case arising on a writ of habeas corpus from the Kentucky state courts\(^{31}\) to the Sixth Circuit Court of Appeals, the prosecutor used the defendant's previous silence as a prior inconsistent act for impeachment purposes. The issue presented to the court was whether such cross-examination was proper. The court

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\(^{21}\) *Doyle v. Ohio*, 426 U.S. at 617.  
\(^{22}\) 411 F.2d 1057 (6th Cir. 1969).  
\(^{23}\) 25 F.2d 298 (6th Cir. 1928).  
\(^{24}\) *Id.* at 299.  
\(^{25}\) 422 U.S. 171 (1975).  
\(^{26}\) *Id.* at 180.  
\(^{27}\) *Id.*  
\(^{28}\) 401 U.S. 222 (1971).  
\(^{29}\) *Id.*  
\(^{30}\) 527 F.2d 1 (6th Cir. 1975).  
\(^{31}\) See *Minor v. Commonwealth*, 478 S.W.2d 716 (Ky. 1971).
cited Harris which required the prosecution to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial.\textsuperscript{32} The Minor court found "error of Constitutional magnitude"\textsuperscript{33} in the prosecutor's cross-examination because the petitioner's silence was not sufficiently inconsistent with his trial testimony. Since the Harris standard of inconsistency was not met, the court reversed the petitioner's conviction.\textsuperscript{34} However, even where this type of error is present, the Sixth Circuit stated that it would not reverse a conviction if harmless error could be found.\textsuperscript{35}

As the cases above illustrate, the harmless error rule may be applied where the prosecutor violates a defendant's right to due process by commenting on his silence in the face of accusation. The paramount decision concerning harmless constitutional error is Chapman v. California.\textsuperscript{36} With Mr. Justice Black writing for a majority of seven, the Supreme Court held that: (1) "[w]hether a conviction for a crime should stand when a State has failed to accord federal constitutionally guaranteed rights"\textsuperscript{37} is a federal question to be decided under federal law; (2) a rule of automatic reversal shall not apply to all federal constitutional errors because "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution be deemed harmless;"\textsuperscript{38} and (3) "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."\textsuperscript{39}

The Chapman Court held that where the prosecutor's argument to the jury was filled from beginning to end with numerous references to defendants' post-arrest silence, thus inferring guilt, such error could not be harmless.\textsuperscript{40} The Chapman Court recognized that all fifty states, as well as Congress, had fashioned harmless error rules or statutes.\textsuperscript{41} However, none of these rules or statutes distinguishes between federal constitutional errors and violations of state  

\begin{footnotesize}
\begin{enumerate}
\item Minor v. Black, 527 F.2d at 3.
\item Id. (citing United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969)).
\item Minor v. Black, 527 F.2d at 3.
\item Id. at 5.
\item 386 U.S. 18 (1967).
\item Id. at 20-21.
\item Id. at 21-22.
\item Id. at 24.
\item Id. at 19.
\item Id. at 22. See 28 U.S.C. § 2111 (1976) (federal harmless error statute); Ky. R. CRIM. P. 9.24 (Kentucky harmless error rule).
\end{enumerate}
\end{footnotesize}
laws or federal statutes and rules.\textsuperscript{42} Apparently deciding that the federal harmless error statute\textsuperscript{43} was inadequate for federal constitutional errors, the Court fashioned the "harmless beyond a reasonable doubt test."\textsuperscript{44}

The Chapman Court posited that there is little, if any, difference between this standard\textsuperscript{45} and the standard set forth in Fahy v. Connecticut,\textsuperscript{46} where "[t]he question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction."\textsuperscript{47} As McCormick points out, there seem to be two interpretations of this criterion: "One would hold that an error contributed to the conviction within the meaning of Chapman if it played any part in the jury's determination."\textsuperscript{48} This literal reading of the rule would essentially be a rule of automatic reversal. Under the other interpretation, the harmless nature would depend on two factors: "(a) the probative value of the inadmissible evidence, considered in light of (b) the amount and probative value of the other evidence in the record tending to sustain the finding of guilt. Only if (b), when compared to (a), is 'overwhelming' can a court conclude that the admission of (a) was harmless beyond a reasonable doubt."\textsuperscript{49} The latter interpretation seems to be the one accepted in Kentucky.

In Niemeyer v. Commonwealth,\textsuperscript{50} the Kentucky Supreme Court held that the admission of evidence pertaining to the defendant's post-arrest silence in the face of accusations, and comments of the Commonwealth's Attorney concerning such evidence, constituted serious error, but that in light of the "overwhelming" evidence indicating defendant's guilt, the errors were harmless.\textsuperscript{51} The Niemeyer court cited Harrington v. California,\textsuperscript{52} in support of its opinion.

In Harrington, the Supreme Court found harmless error to exist because the evidence against the defendant was "so overwhelming."\textsuperscript{53} Mr. Justice Brennan's dissent stated, however, that the

\textsuperscript{42} Chapman v. California, 386 U.S. at 22.
\textsuperscript{44} Chapman v. California, 386 U.S. at 24.
\textsuperscript{45} Id.
\textsuperscript{46} 375 U.S. 85 (1963).
\textsuperscript{47} Id. at 86-87.
\textsuperscript{48} C. McCormick, Evidence § 183, at 431 (2d ed. 1972) (footnotes omitted).
\textsuperscript{49} Id.
\textsuperscript{50} 533 S.W.2d 218 (Ky. 1976).
\textsuperscript{51} Id. at 222.
\textsuperscript{52} 395 U.S. 250 (1967).
\textsuperscript{53} Id. at 254.
"overwhelming evidence" standard applied by the majority was expressly rejected by the Chapman Court.\(^{54}\) He further stated that the Court was, in effect, overruling Chapman, although the majority expressly stated that it was affirming it.\(^{55}\) While Mr. Justice Brennan was bothered by what he saw as an apparent inconsistency between Harrington and Chapman, the Court essentially negated such a view by its statement that Harrington affirms Chapman.\(^{56}\)

The Court in Harrington, decided two years after Chapman, is in essence saying, "This is what we meant by Chapman."\(^{57}\)

### The Holding in Darnell

The Kentucky Supreme Court affirmed the appellants' convictions in a six-to-one decision.\(^{58}\) The court recognized that the appellants relied on Doyle v. Ohio\(^{59}\) for their contention that the use of their post-arrest silence, for impeachment purposes, violated their fifth amendment rights.\(^{60}\) While never affirmatively stating that Doyle was proper precedent, the court emphasized that portion of the Doyle holding where the United States Supreme Court recognized the possibility of harmless error.\(^{61}\) In a succinct one-sentence statement, the court said, "A majority of this court is of the opinion that the three isolated questions here constitute only harmless error which does not require reversal."\(^{62}\) The court based this holding on its Niemeyer\(^{63}\) decision, in which error was found where the Commonwealth's Attorney inundated the trial court with accusations and comments about the defendant's post-arrest silence. However, the Niemeyer court found the error to be harmless because of the overwhelming evidence sustaining the defendant's guilt.\(^{64}\)

The Darnell court stated that "reversible error would arise under the Doyle rule if the prosecutor's remarks or questions focused on Chuck's and Mike's silence so as to strike at the heart of their

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54. Id. at 256 (Brennan, J., dissenting).
55. Id. at 255.
56. Id. at 254.
57. In Chapman, there had been no overwhelming evidence against the defendants. On the contrary, the Court said, "(A)sent the constitutionally forbidden comments, honest fair-minded jurors might very well have brought in not-guilty verdicts." 386 U.S. at 25-26.
58. Darnell v. Commonwealth, 558 S.W.2d 590 (Ky. 1977).
60. Darnell v. Commonwealth, 558 S.W.2d at 593.
61. Id. (citing Doyle v. Ohio, 426 U.S. 610, 619-20 (1976)).
62. Darnell v. Commonwealth, 558 S.W.2d at 593.
64. Id. at 222.
The court gave no indication of what, if any, authority it relied on for this statement. The court summed up its reasoning as follows:

[T]he prosecutor did not focus on their silence by repetitive questioning, nor did he mention it in his closing argument. Secondly, the answer which was obtained was that they desired the services of an attorney before making a statement. Thus, an inference of guilt was negated by the explanation of their silence. Finally, the evidence against Chuck and Mike was overwhelming. For these reasons, the court concluded that the error, "if any", was harmless beyond a reasonable doubt, citing Chapman in support of its position.

In a strong and vociferous dissent, Justice Lukowsky advocated reversal and remand of the case for a new trial. Recognizing that the majority opinion may be correct according to the Niemeyer ruling, Justice Lukowsky felt that the Niemeyer decision has fathered the deliberate commission of error: "Having seen this error pass in review so many times, I am compelled to conclude that prosecutors are deliberately disregarding the teachings of Niemeyer in the hope of finding salvation in the harmless error doctrine." In calling for a more prophylactic approach, Justice Lukowsky said, "We should exercise our supervisory authority over the lower courts of Kentucky and hold that whenever this error is committed it will result in reversal and a new trial."

ANALYSIS

In recognizing the appellants' contention that Doyle v. Ohio should be controlling, the Darnell court never cited Doyle as precedent. The court's opinion did include the phrase containing the holding in the Doyle opinion, but underlined for emphasis the next sentence, which recognized the possibility of harmless error, seemingly underscoring the holding. Further evidence of the court's reluctance to accept the teachings of Doyle is in the final sentence of the court's holding on these issues, where it stated, "the error, if
Why the court would question Doyle is confusing, however, because Doyle is directly in line with Niemeyer: “The efforts of the prosecution to impeach each appellant by reference to his silence at the time of identification and at the time of arrest plainly violated his fifth amendment right to remain silent.”73 Paramount, however, is the fact that whether the court agrees with Doyle or not, it must be applied in cases like Darnell by virtue of the United States Supreme Court’s power under the supremacy clause of the Constitution.74

Thus, the court summarily treated the due process question in order to address the question of harmless error. The court decided that the three isolated questions by the Commonwealth’s Attorney concerning the appellants’ post-arrest silence constituted only harmless error, citing its Niemeyer decision as its authority. Certainly if Niemeyer is constitutionally correct, then so is Darnell, for the prosecutorial misconduct was far greater in the former than in the latter. The constitutionality of these opinions is measured by the Chapman holding: “[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”75

Determining whether the Darnell decision meets the Doyle standard requires an analysis of the court’s three-pronged reasoning. First, the court reasoned that “the prosecutor did not focus on their silence by repetitive questioning, nor did he mention it in his closing argument.”76 The court obviously thought that the seriousness of the error in Darnell was lessened because the prosecutor asked but three isolated, error-producing questions, as opposed to the Chapman situation, where the prosecutor’s arguments and the judge’s instructions continuously and repeatedly impressed the jury with the fact of the defendant’s silence.77

Secondly, the court reasoned that any inference of guilt which might be ascertained from the fact of appellants’ silence was negated by their answers that they remained silent because they desired the services of an attorney before making a statement.78

72. Darnell v. Commonwealth, 558 S.W.2d at 594 (emphasis added).
73. Niemeyer v. Commonwealth, 533 S.W.2d 218, 221 (Ky. 1971).
74. U.S. Const. art. VI.
76. Darnell v. Commonwealth, 558 S.W.2d at 594.
78. Darnell v. Commonwealth, 558 S.W.2d at 594.
the court was convinced that such answers would effectively negate any inference of guilt, whether the average juror would be so convinced is highly debatable. It is certainly arguable that if a juror would infer a defendant's guilt from his silence, such a juror might also infer that the reason a defendant wanted the services of an attorney was because he needed one, i.e., he is guilty. Ideally, a juror properly instructed would not so infer. Practically, however, one might.

The third prong of the court's reasoning was that, "the evidence against Chuck and Mike was overwhelming." 3 This was the same rationale used by the court in Niemeyer, 80 and was, to some degree, part of the United States Supreme Court's reasoning in Harrington v. California. 81 The concept of "overwhelming evidence" really strikes at the heart of the harmless error doctrine. The harmless error rule provides a way for appellate courts to affirm convictions, avoiding retrials and subsequent appeals while still guaranteeing individual rights. A reversal and remand is an empty gesture if the new trial, conducted in the proper manner, will clearly have the same result. Thus, judicial economy is served when an appellate court can affirm a conviction despite error of this kind when the evidence is so overwhelming that the decision would be the same in a new trial. Justification for permitting any harmless error rule must rest upon a judgment that the dangers to individual rights are too slight to outweigh the advantages which harmless error rules purportedly provide.

In his dissent, Justice Lukowsky, in essence, said that when errors of the type in Darnell are committed, they should warrant an automatic reversal. 82 However, in light of Chapman, constitutional errors of this type will most likely not be automatically reversed, unlike cases where certain other constitutional errors are committed. 83 Bothered by the deliberate commission of this type of error by prosecutors, Justice Lukowsky further suggested, "[T]o eliminate this form of gamesmanship we should assess the costs of appeal and the new trial against the Commonwealth's Attorney." 84 While this

79. Id.
82. Darnell v. Commonwealth, 558 S.W.2d at 596.
84. Darnell v. Commonwealth, 558 S.W.2d at 596.
spent on appeals in cases like *Darnell* would continue to be a needless burden.

The third, and perhaps best, course to follow, would be for the court to continue to find harmless error in those cases where it would be a waste of judicial energy to remand for a new trial. If the evidence is so overwhelming against the defendant, a new trial would certainly be a waste. However, to avoid having to continually decide whether a new trial is warranted because of the questioning of the defendant, the court should devise a way to penalize a prosecutor who deliberately disregards a defendant's constitutional rights. It is the judiciary's responsibility to the citizens of the Commonwealth to insure that individual rights are not trampled. As the head of the judicial system in Kentucky, it is the duty of the Kentucky Supreme Court to take a stand to curtail prosecutorial abuse.

**Douglas C. Wilson**
BOOK REVIEWS


Reviewed by Jasper B. Shannon*

The Bicentennial year of 1976 stimulated great interest in Kentucky's past as well as that of the nation. The Kentucky Historical Society has undertaken to publish four volumes covering the life of two centuries of the Blue Grass state. The first volume, Chinn, Kentucky: Settlement and Statehood 1750-1800, (1975) was reviewed in this Journal. A second study, Kentucky: Decades of Discord 1865-1900, (1978. $18.00) by Hambleton Tapp and James C. Klotter now appears. Another suitable title might have been "The Dark Ages in Kentucky: An Account of Terrorism and Assassination." This account runs from the assassination of a Republican president in April, 1865, to the assassination of a Democratic governor in January, 1900. Guerrilla warfare and near anarchy characterized years of the era. Life in many parts of the commonwealth could well be described by the trenchant phrase of Thomas Hobbes, as "nasty, brutish and short." The aftermath of the War Between the States was a real civil war, bloody, vicious, and personal. The sins of the fathers in establishing African slavery in 1792 were visited upon the sons for more than three generations.

Most Kentuckians remained loyal to the Union in 1861 because of the long education process carried on by the great Whig statesman, Henry Clay, and John J. Crittenden. However, some Kentuckians, especially younger ones, including John C. Breckinridge, former vice president of the United States, joined the Confederacy. A famous and glamorous cavalryman, John Hunt Morgan, led Confederate invasions into the Commonwealth in a vain hope of arousing Kentucky sentiment for secession.

Lincoln's early promise not to free slaves in the Border States was made on the eve of secession but was outmoded before civil conflict ended. Martial law administered by harsh Union officers left a bit-

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ter taste in the mouths of loyal Whigs, many of them slaveholders who merged into opposition to the national Republicans then under the control of the vindictive Radical Republican leadership of Sumner and Stevens. Kentuckians stubbornly refused to accept the thirteenth, fourteenth, and fifteenth amendments. In Reconstruction days Kentucky leaders were the spokesmen for the prostrate southern states under military occupation. In sentiment, Kentucky seceded after the war was over when the Radicals refused to recognize duly elected Congressmen from the Blue Grass. Congress even threatened to expel the recalcitrant Kentucky states rights advocates. The violent emancipationist, Cassius M. Clay, became a Democrat. Seventy-five percent of the electorate voted Democratic, and returning Confederate officers were the new governing class. For thirty years the governorship was filled by former Confederate army officers and one Confederate physician.

Kentucky did not officially try to outlaw Negro voting when the fifteenth amendment granted the former slaves the vote. Fifty thousand Blacks, many of them refugees to the cities, furnished an important element in the Republican party in such counties as Bourbon, Christian, Fayette, and Woodford. Voting was oral and public. When intimidation did not succeed, fraud, dishonest counts, bribery, and the use of whiskey were employed as subterfuges. Violence at the polls frequently accompanied elections. Homicide gave the political process an ugly name and lent acceptance to the doggerel verse that politics was the "damnedest" in Kentucky. However, political activity was probably more illegal and more violent in Maryland, Missouri, and West Virginia. Suffice it to say that local animosities growing out of the Civil War led to outbreaks of feuds in mountain areas, and vendettas were not unknown in the central Blue Grass. Violence sometimes emerged inside political parties such as the Swope-Goodloe reciprocal murder among Republicans in Lexington and the Goebel-Sanford murder in Covington.

Locally elected officials were no match for lynch mobs, night riders, the Ku Klux Klan, and neighborhood gangs of outlaws. All the governors were lawyers but two, one a physician, and the other a West Point general turned Confederate. Only by the use of the National Guard were these governors able to subdue local warfare. Courts were helpless and the jury system totally ineffective because witnesses were fearful to testify. Pre-Nazi Germany in a post war situation (1920-1932) and contemporary Italy offer recent examples of the reconstruction turmoil.

Finally, internecine dissention among Democrats in the formation
of farm organizations and the development of a third party paved the way for a Union Republican to be elected governor thirty years after Appomattox. However, a gerrymandered Democratic legislature paralyzed the arm of the Republican governor.

Northern Kentucky was in the center of the conflict that came to the fore in 1899. Though William Goebel had been trained in the conservative law offices of former Governor John W. Stevenson and Speaker of the House John G. Carlisle, he was a radical. The son of German immigrants with a father who had fought with the Union, challenged the Bourbon party establishment. By manipulating the 1899 Democratic convention with a friend as presiding officer and through control of the credentials committee, Goebel nominated himself for governor. The notorious Music Hall convention sounded the knell of the convention nominating procedure. Dissident Democrats supported a former governor, and Goebel’s own dominant election commission declared Taylor, likewise an unlikely Republican candidate and openly opposed for nomination by the incumbent Republican Governor, to be elected. Taylor was duly sworn in, but the Democratic legislature under the 1890 constitution was the final judge of the contested elections. In the midst of threatened violence with armed men present in Frankfort, Goebel was shot, dying shortly after he was sworn in on his death bed. He left a thirty year old Lieutenant Governor, J. C. W. Beckham, belonging to the establishment, to take over for seven years.

Fortunately, not all Kentucky life was preoccupied with politics. In the literary world, Kentucky’s foremost creative writer, James Lane Allen, was making a national reputation for himself and the state by writing regional novels depicting a somewhat romantic and sentimental account of Kentucky’s antebellum culture. The Blue Grass was central to his theme but a protege of his, John Fox, Jr., won national recognition for his short stories covering the neglected mountain region of the commonwealth. This period was the golden age of personal journalism, and Henry Watterson attracted national attention by his often inflammatory editorials and political activities. “Marse Henry” was a national figure. Kentucky oratory was at its peak with its often florid yet empty rhetoric.

The industrial revolution came to Kentucky with the beginning of the exploitation of Kentucky’s natural resources, especially coal and timber. The broad form deed probably reached its heyday, leaving a residue of economic problems to plague later courts and harass small home owners in the days of energy shortage. Railroads were part and parcel of technological changes as was the motor car
to be a century later. The corporate structure began its centralizing influence, and one railroad, the Louisville and Nashville, exerted great political power. In fact, the troubulous politics of the 1890's, with the creation of the Populist backlash that wrote the 1890 constitution and set the stage for Republican victory and the Goebel episode, arose from the impact of railroads. Kentucky remained an agricultural economy with tobacco occupying a larger and larger role in the Commonwealth's income. The disappearance of slavery was followed by the growth of farm tenantry with legal efforts to drive non-owners into desperate poverty, though Kentucky never developed the cotton belt share-cropping system. Manufacturing grew, but much of it in the distilling business subject to federal control.

Illiteracy and alcoholism were rampant. One in five voters could neither read nor write. Two movements started, one to improve education and the other to eliminate alcohol. The latter produced a small but active political party, the Prohibitionists, while the move for improved education was used by all parties. However, the reluctance to pay taxes combined with a farm depression made the gates open slowly. In the midst of it all population grew from 1,321,011 in 1870 to 2,147,174 in 1900. Outward migration brought on by the fragmentation of farms in the 1880's reversed itself in the 1890's during the panic years. The decades of disorder were marked by great ferment, and the seeds for change in the 20th century were sown.

The authors have amassed enormous materials and presented them with force and stylistic clarity. However, one would have like more than ten pages given to the Constitutional Convention of 1890. The historians have depended upon contemporary electoral statistics though more accurate studies were available. There are fewer typographical errors than in the Chinn volume but more careful proof reading would have eliminated all. Thoughtful citizens will welcome this account of the grim period our ancestors managed to survive. It is a real contribution to an understanding of Kentucky. All Kentuckians will profit from studying this significant reappraisal of the last half of the nineteenth century.

Lawyers will note how slowly due process of law was accepted in Kentucky. Traces of the efforts to control violence linger in the law much as the use of the banding and confederating statute against collective bargaining in the 1930's. One is tempted to conclude with Machiavelli that, in Kentucky, good arms make good laws.
It is widely known that Louis Nizer is an eminently successful attorney and counselor at law. But I had not read any of Mr. Nizer's books; so it was with polite respect for a successful man that I sat back to listen to him address the 24th National Conference of Law Reviews at Wake Forest University on his latest book, *Reflections Without Mirrors.* At the conclusion of those remarks concerning the contents of the book, I wanted to read Nizer's, *Reflections Without Mirrors* to experience the events and meet the personages that were there so vividly described. I was not disappointed.

Mr. Nizer subtitled this book "An Autobiography of the Mind," and so it is. *Reflections Without Mirrors* is not an autobiography of Louis Nizer, nor is it a collection of "war stories." It is, rather, a mosaic of the thoughts of a vigorous and successful man in the prime of his maturation. The book is formed from vignettes, profiles of notable men, and narrations of historic occasions from the experiences of Mr. Nizer. Too often in this fast-paced and innovative society of modern-day America we fail to seek the answers to the problems which we confront from those who have met them before us. A reading of *Reflections Without Mirrors* is a chance to benefit from wise counsel.

A quick glance at the table of contents will reveal to the reader what Mr. Nizer has in store for him. Chapter titles like "There is Nothing in the World so Much Like Prayer as Music," "He Took Success Like a Gentleman and Defeat Like a Man," "One Who Brags That He is a Self-Made Man Relieves God of an Awful Responsibility," and "There are Many Echos but Few Voices," tempt the reader to dart ahead through the pages. But this book is not to be read lightly as a novel; there are thoughts polished by experience throughout the work. One should read this book in the same frame of mind that he would sit before an eminent professor.

Mr. Nizer commits only a few pages of his book to a remembrance of his personal life. The first chapter contains an account of a boyhood encounter with a bully which Nizer uses to illustrate how he

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learned the value of willpower—how “he who will not be beaten can't be beaten.” 3 A later discussion of Mr. Nizer's experiences immediately following law school graduation is particularly appropriate in view of the competitive job market for law graduates. 4 Any person whose ambition, industry, or maturity was fostered or developed through the efforts and guidance of a dedicated teacher will identify with Mr. Nizer as he recalls how Professor Thaddeus C. Terry of Columbia University Law School “made you understand the majesty of the law and its philosophical striving for justice.” 5 The pages of Reflections Without Mirrors reveal a myriad of notable subjects and personalities. The recollections of two of New York City's most famous mayors, James J. “Jimmy” Walker and Fiorello H. LaGuardia, depict divergent styles and characters. The chapter about President Harry S. Truman contains an account of how Truman came to be selected for the Vice Presidency under President Roosevelt. And the chapter entitled “Tycoons” will cause the reader to marvel at the drive and successes of Dr. Armand Hammer, who seemingly can turn all that he touches into gold. Other chapters of the book contain Mr. Nizer's reflections on defamation actions, conflicts between different guarantees under the Constitution, pornography and obscenity, impeachment or censure of a President, a child abuse case, and “How to Tell a Liar.”

Although the topics upon which this book is based are varied, Louis Nizer himself is the strand which binds them together. Reflections Without Mirrors is a reflection itself, which should be read and pondered.

3. Id. at 7.
4. Id. at 77-101.
5. Id. at 15-16.
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