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   A. Introduction

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I. INTRODUCTION

On August 3, 1977, President Jimmy Carter signed into law the Surface Mining Control and Reclamation Act of 1977, almost 40 years after the first bill to regulate strip mining was introduced into Congress. The Act sets up federal minimum standards for the regulation of mining by the states. Each state in which there is or will be surface mining of coal is expected to pass legislation which will meet or exceed the standards of the federal law. The federal government will regulate surface mining in the states that fail to do so.

Based on the assumption that mining should be a temporary land
use activity, the Act was designed to change the coal mining practices which had caused severe social and environmental costs and to prohibit operations in areas that will not be reclaimed. To accomplish this end, the Act granted government inspectors substantial enforcement powers to assure compliance.

The Act, moreover, provides one of the most extensive citizen participation schemes ever enacted. Congress believed that if there were to be any chance of successful enforcement, citizens must play a significant role in implementation of the Act. The subject of this article, administrative adjudication, is a key area for citizen participation.

While the legislation was under consideration of Congress, legislators and witnesses repeatedly referred to the legislation as a "lawyer's dream," and with good reason. The Act is extraordinarily complex. When considered with the lengthy interim regulations and the 389 pages of draft permanent regulations, it is apparent that considerable legal skill is necessary to weave coal operators, coalfield states, or affected citizens through the maze. In addition to these factors, there was another reason for calling the Act a "lawyer's dream"—the significant number of administrative proceedings, informal and formal, adjudicative and legislative, that the Act authorized.

This article will examine the administrative adjudication proceedings authorized by the Act. Several factors make it inevitable that these proceedings will play a crucial role in determining the success of the Act. First, the Act grants citizens numerous rights, the exercise of which will often result in either formal or informal administrative adjudication. Second, inspectors are required to determine if operators are complying with the Act's performance standards, and where there is disagreement over the action or inaction of the inspector, the Act provides numerous administrative remedies which the aggrieved citizen or coal operator can pursue. Third, administrative adjudication will often determine whether action is to be taken to correct violations, to remedy environmental abuse, and in certain instances to close down mines.

Any examination of the nature of these administrative proceedings before any significant administrative adjudications have occurred is bound to be incomplete. There are many unresolved legal questions, the answers to which will affect considerably both the

procedure and the substantive issues in the various proceedings.

Despite this lack, the statute and regulations are in place and enforcement has begun. Some basic explanation of the proceedings is necessary because of their number and complexity and because of the numerous pitfalls awaiting the unwary in the Interior Department's Office of Hearings and Appeals [hereinafter OHA], and in informal proceedings before Office of Surface Mining [hereinafter OSM] officials.

We will first examine the structure of the Office of Hearings and Appeals which will handle formal adjudication and then identify those OSM officials who will be involved in informal review of administrative action. We will next turn to each major administrative proceeding under the Act and explain the statutory and regulatory framework and the likely issues in each proceeding. Where appropriate, we will discuss the history behind the key statutory and regulatory provisions in order to provide a basis for argument on the underlying of these provisions.

II. FORMAL ADJUDICATION

A. Office of Hearings and Appeals

All formal administrative adjudication and all appeals from informal administrative adjudication under the Act will take place in the Office of Hearings and Appeals within the Department of the Interior. OHA is located in the immediate office of the Secretary of the Interior and handles all adjudication matters entrusted to the Secretary of the Interior. Thus, OHA has jurisdiction over such diverse areas as contracts, public lands, and Indian matters, as well as surface mining. OHA is headed by a Director, who is "an authorized representative of the Secretary for the purpose of hearing, considering and determining as fully as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary." 3

OHA is divided into two major components: (1) a Hearings Division, composed of Administrative Law Judges [hereinafter ALJ's], and (2) an Appeals Board with jurisdiction over various substantive areas such as surface mining. The Board in charge of surface mining appeals is imaginatively named the Board of Surface Mining and Reclamation Appeals. The Hearings Division, headquartered in Arlington, Virginia, is composed of approximately twenty-five ALJ's. Five ALJ's are assigned to surface mining and will be located in

various parts of the country.

With certain exceptions, discussed infra, initial proceedings are before the ALJ's. The Board is composed of a Chairman and two members. The Board hears appeals from the decisions of ALJ's, from certain decisions of OSM, and in areas such as citizens' complaints and small operator exemptions. The Board and ALJ decisions can be obtained by writing the Appeals Board. The Board and ALJ have substantial powers delegated to them by the Secretary.

In performing its review functions, the Board is authorized to order hearings and issue orders to secure the just and prompt determination of all proceedings. This rather vague grant of authority includes the power to modify, vacate, or terminate notices of violation or orders of cessation and to make its own findings of fact. The

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4. There is a provision in the interim regulations for appeal by an operator of the denial by OSM of his application for a small operator exemption. A small operator exemption is essentially a limited exemption from the environmental performance standards of the interim program (except spoil in the outalope, imminent dangers and significant imminent environmental harm) until December 31, 1979. 42 Fed. Reg. 62,680 (1977) (to be codified in 30 C.F.R. § 710.12(h)). Since most of these appeals have already been decided, this proceeding is not discussed in the article.

5. The Board's jurisdiction is established in 43 C.F.R. § 4.1101(a):

The jurisdiction of the Board, set forth in 43 C.F.R. 4.1(4), and subject to 43 C.F.R. 4.21(c) and 43 C.F.R. 4.5, includes the authority to exercise the final decisionmaking power of the Secretary under the Act pertaining to—

(1) Applications for review of decisions by OSM regarding determinations concerning permits for surface coal mining operations pursuant to section 514 of the act;

(2) Petitions for review of proposed assessments of civil penalties issued by OSM pursuant to section 518 of the act;

(3) Applications for review of notices of violation and orders of cessation or modifications, vacations, or terminations thereof, issued pursuant to section 521(a)(2) or section 521(a)(3) of the act;

(4) Proceedings for suspension or revocation of permits pursuant to section 521(a)(4) of the act;

(5) Applications for review of alleged discriminatory acts filed pursuant to section 703 of the act;

(6) Applications for temporary relief;

(7) Petitions for award of costs and expenses under section 525(e) of the act;

(8) Appeals from orders or decisions of administrative law judges; and

(9) All other appeals and review procedures under the act which are permitted by these regulations.

43 Fed. Reg. 34,387 (1978) (to be codified in 43 C.F.R. § 4.1101(a)).

6. 43 Fed. Reg. 34,387 (1978)(to be codified in 43 C.F.R. § 4.1101(b)).

7. In Apache Mining Co., 1 I.B.S.M.A. 14 (1978), the Board held that when an appeal of a decision of the OSM is filed with the Board, OSM loses jurisdiction and has no authority to take any action on the subject of the appeal. There is considerable confusion regarding the interpretation and scope of this ruling. Among the questions raised are the following:

(1) When a notice of violation is under review, may OSM issue a cessation order for failure to abate the violation cited? It seems clear from § 521(a)(3) that OSM is required to issue such a cessation order "immediately" upon finding that the original notice has not been
Board also can order the suspension and revocation of mining permits. The Board cannot "enjoin" OSM from future conduct. Of course, a Board ruling establishes a precedent which could be relied upon by a private party to request a federal court to enjoin OSM from a certain course of conduct. Normally, however, OSM can be expected to follow Board decisions. The Board does not have the power to invalidate Department of Interior [DOI] regulations on the grounds they are arbitrary or capricious, improperly promulgated, or unconstitutional. These are issues for the federal courts.

The Board is authorized to award attorney's fees in all administrative proceedings, and has its own procedural rules, setting forth such things as burden of proof, filing deadlines, amendments to pleadings, and so forth. In addition, there are OHA rules applicable to hearings before ALJ's and appeals to the Board. The ALJ's authority is similar to that of the Board.

B. Office of Surface Mining

Informal adjudication will occur before field or regional officials of OSM. Review of citizen complaints will be before the OSM Regional Director in the Region in which the mine is located. Mine site review of cessation orders will (in all likelihood) be conducted by a supervising inspector or by the head of the field office of OSM that has responsibility for the particular mine where the dispute arises.

timely abated. Also under § 525(a)(1), the filing of an application for review "shall not operate as a stay of any order or notice;" (2) When a citation is under review, may OSM modify, vacate, or terminate the citation? Yes—It is implicit in § 525(a)(1), and 43 C.F.R. § 4.1170 requires the filing of modifications, vacations, or terminations regarding any citation already under review; (3) May OSM settle a case under review without the approval of the ALJ or Board? Probably not, particularly where the interests of citizen intervenors would be affected.

8. There is a general provision in the OHA regulations in which the Secretary reserves the right to take original jurisdiction of any case and render the final decision in the matter, after holding whatever hearing is required. The Director may exercise the same authority 43 C.F.R. § 4.5 (1977). This power has been rarely invoked in other areas of regulation, and it is unlikely to be invoked often in surface mining. When it has been invoked, it has caused confusion and it has not worked well. The regulation was recently changed in order to clarify when the Secretary can take jurisdiction of a case.

9. The Board in other words, is bound by the Department’s regulations. If the Board accepts the reasoning of the now defunct Board of Mine Operations Appeals, it would be bound by Department Policy statements as well. See Republic Steel Corp., 5 I.B.M.A. 306, 82 Interior Dec. 607 (1975).


C. Federal Court Litigation

Numerous provisions in the Act authorize federal litigation, including, among other proceedings, review of rulemaking, review of final administrative decisions, citizen suits, and damage actions.

Federal court litigation is generally beyond the scope of this article; however, a comment is appropriate on the major causes of action created by the Act. Under section 520, any person who is or may be adversely affected may commence a civil action against the United States, any government agency, or any other person alleged to be in violation of any rule, regulation, order, or permit. Such a suit is allowed as long as the Secretary, the state regulatory authority, and the operator are given sixty days notice, and neither the Secretary nor the State has commenced and are diligently prosecuting a federal or state court action to require the operator’s compliance with the law. If the Secretary or the State has begun a civil action for compliance, however, “any person may intervene as a matter of right; . . .”

The statute also authorizes an interested person to bring suit against the Secretary or a state regulatory authority to compel compliance, where there is an alleged failure to perform any non-discretionary act or duty. Again, there is a sixty day notice requirement, but this may be dispensed with where the citizen’s complaint involves an imminent danger to his health or safety, or where a legal interest of the citizen will be affected “immediately” by the Secretary’s or the state’s failure to act.

Section 520(f) establishes a federal cause of action for damages caused by strip mining, which should prove valuable to the citizen adversely affected by strip mining. To prevail under section 520(f), a person must prove that his person or property was injured through the violation by any operation of any rule, regulation, order, or permit issued pursuant to the Act. Since it is necessary to prove a violation in order to prevail, it may be wise to pursue administrative remedies, prove a violation and thereafter file a damage claim in

14. Id.
federal court, where the administrative finding at least should constitute prima facie evidence of a violation for the purposes of the damage action.

Finally, some operators who receive cessation orders under section 521 may ignore their administrative review rights and attempt to go directly to federal district court for injunctive relief against the cessation orders. This tactic has been opposed successfully under the Mine Safety Act. In ruling on such a maneuver by a coal operator, the Fourth Circuit held that the operator must exhaust his administrative remedies before he could get to federal court. Under the Surface Mining Act he could do this by filing for administrative review and asking for temporary relief. If temporary relief were denied, he probably could appeal then to the United States District Court for the area where the mine is located.

III. INFORMAL PROCEEDINGS BEFORE OSM

A. Informal Administrative Review of Citizen Complaints Under Section 517

Any citizen with a reasonable basis for believing that there is a violation of the Act, regulations, or permit conditions, that any imminent danger to public health or safety, or that any significant imminent environmental harm exists, may obtain an inspection by a federal surface mine inspector under section 517 of the Act and 30 C.F.R. section 721.13 of the interim regulations. The citizen may make his initial complaint orally to any OSM office, but always must follow up with a written report containing a signed statement and a telephone number at which he can be contacted.

The citizen has the right to have his identity kept confidential upon his request, to be notified of the time the inspection is to occur, and to accompany the inspector during the inspection of the suspect mining and reclamation operation. OSM must make an inspection

20. It is possible that an operator might try to evade this ruling by bringing a “citizen suit” under § 520, claiming that the government was in violation of the law because the disputed cessation order was improperly issued. Courts have not allowed such collateral attacks under the “citizen suit” provisions of other environmental legislation, where the statute specifically designates another forum for judicial review of the particular agency action. The courts deem Congress’ intent to be that the specified judicial review procedure be exclusive. See, e.g., City of Highland Park v. Train, 519 F.2d 681, 688-89 (6th Cir. 1975), cert. denied, 424 U.S. 927 (1976). Such a position under the Strip Mine Act, however, may be weakened by the statement in § 526(a)(2) that the availability of review of the Secretary’s decisions or orders established under the judicial review section “shall not be construed to limit the operations of rights established in Section 520 [on citizen suits].” Act § 526(a)(2), 30 U.S.C.A. § 1276(a)(2) (Supp. 1978).
unless it has reason to believe that the information is incorrect or that the information does not constitute a violation. If the citizen alleges an imminent hazard, the inspection must take place "promptly." If the citizen alleges a violation, the inspection must be conducted within fifteen days of receipt of the complaint.

A complaint should be a clear and simple statement resting on the best factual evidence available. Photographs on issues such as spoil, or scientific test results on issues such as water quality, are particularly valuable. The complaint should contain:

(a) A statement of the problem that concerns the citizen.
If possible, a reference to the specific provision of the Act, regulations or permit conditions which have been or are being violated.
(b) A statement of the factual basis of the violation.
A clear statement of the observed facts, conditions, and practices which would constitute evidence of the violation and which would support a reasonable belief that a violation exists. The complaint has a reasonable basis if the alleged facts would constitute a violation. Documentation is especially useful, as are photographs and test results.
(c) Explicit Request for Inspection.
Even though OSM is required to conduct an inspection any time a citizen files a plausible complaint of a violation or danger, it is a good idea to request explicitly an inspection. The complaint has a reasonable basis if the alleged facts, if true, constitute a violation or danger. In the case of an imminent danger or significant imminent environmental harm, the complaint should include a request for an immediate inspection.²¹
(d) Right to Accompany Inspector.
A citizen who makes a complaint concerning a surface mine condition or practice has the right under the Act to accompany the inspector on the inspection, if the citizen so desires.²² During the inspection, the citizen can request that specific areas be investigated, tests be made, documents be inspected, or corrective action be taken. If the inspector refuses, the citizen can appeal the decision informally as is discussed in Section III A(1), infra. While on the mine site, however, the citizen is in the control of the inspector and cannot require him to take particular action.

²¹. Assuming that there is no allegation of imminent harm, the complainant should contact OSM a few days after submitting the complaint to determine when OSM plans to inspect. If the citizen believes that there is an imminent harm, he or she should insist on an immediate inspection.
1. **Citizens’ Rights if OSM Response is Unsatisfactory**

If the OSM response to the citizen complaint is inadequate for any reason, the citizen has several remedies, depending upon the facts of the particular case.\(^{23}\)

If OSM took no action because the complaint was not adequately documented, the citizen can ask what more is needed and resubmit the complaint, properly documented. Alternatively, the citizen can ask for review by the Regional Director.\(^ {24} \)

A more complex question is raised when the inspector takes some action, e.g., issues a notice of violation or order of cessation, but the action does not satisfy the citizen.\(^ {25} \) There is no question that the citizen can invoke formal administrative review before an ALJ under section 525 of the Act.\(^ {24} \) What is not clear is what informal relief the citizen may request. There are three possibilities:

1. He may invoke citizen complaint review under section 721.13(d);
2. Request mine site review of unabated cessation orders under section 722.15;
3. Or both.

There is no settled answer to this question; it must await a Board decision. However, the citizen might want to consider several points. It may be that the power of the Regional Director to change notices and orders will be limited in citizen complaint review cases because the operator cannot participate. Such a restriction does not apply to mine site review proceedings. Moreover, there is the right at mine site review hearings to make an oral presentation.\(^ {27} \) It is not settled, however, that a citizen can initiate mine site review.

Let us assume for a moment that a citizen files for informal re-

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23. As the regulations are written, there is nothing to foreclose the citizen from choosing either the informal review or the formal review, or invoking the informal review first, and if unsuccessful, invoking formal review within 30 days. If this approach is allowed, the citizen would in effect have two “bites” at the apple of review. This can be defended since the mine operator will have two bites at challenging the citation, mine site review § 521(a)(5) and formal review § 525. Section 723.13(d) appears to provide explicitly for the two bite approach.


25. Typically, acting under § 521(a)(3) of the Act, an inspector might issue a notice of violation instead of the desired cessation order, might grant the operator too much time to abate a violation, or might not impose tough enough affirmative obligations in a cessation order.

26. While there is no regulation on point, it is likely that, if § 525 review is invoked, the Board will rule that OSM has lost jurisdiction to review the issue, either under mine site review or citizen complaint review.

27. There is no right to make an oral presentation in citizen review proceedings. Oral presentations are within the Regional Director’s discretion.
view, either as the only avenue for review (no action taken by the inspector) or as an initial review (prior to a formal review if an inadequate citation issued). Review by the Regional Director is governed by 30 C.F.R. section 723.13(d) which states:

_Review of action of local offices._ A person who does not agree with the action taken by the Office on their report may request the Regional Director to review the complaint and actions taken. The Regional Director shall advise the person in writing, within 30 days, of the results of the review. Informal review under this subsection shall not affect any rights to formal review or a citizen's suit.

There are no formal procedures for instituting review by the Regional Director, or for presenting the appeal to the Regional Director. If there is an imminent hazard, a phone call might be the best means, or a visit if the office is reasonably close. If a visit is chosen, a citizen should bring all the relevant documentation. If there is more time, the citizen should reduce the request to writing, and include the following:

1. A statement of the case, giving any appropriate background information about the mine and describing the sequence of events leading to the request for review.
2. A copy of the original complaint and request for inspection, including documentation and supporting evidence.
3. Any additional facts of which the local OSM was aware. This would include, among other things, anything observed and/or recorded by the citizen while accompanying an inspector. Note whether such observations were brought to the inspector's attention at that time.
4. A complete copy of OSM's response to the complaint.
5. A reply to OSM's response, setting forth clearly why it is believed that OSM's actions were inadequate or incorrect.
6. A request for relief, stating clearly what action you wish OSM to take. Remember, there may be a dispute over what power the Regional Director has in these reviews. However this issue is determined, there is no question that OSM itself can change notices or orders.

While circumstances will vary, the citizen and his lawyer might well keep in mind two key facts. One, the strongest possible factual case should be made for a suspected violation. Two, the appeal should stress the nondiscretionary nature of OSM's enforcement authority. Citizens have a _right to an inspection_ if they supply facts supporting a reasonable belief that a violation has occurred; it is not, for instance, an acceptable legal ground for refusal to inspect that the local office feels itself too busy or that the operator is taking
informal measures to correct the violation. Similarly, if an inspector makes an inspection he must cite each and every violation he observes and he must issue cessation orders if an imminent danger or significant imminent environmental harm exists. However, the citizen might wish to forego the full exercise of his rights and not force an understaffed OSM office to take on yet another mine whose violations, while significant, might pale beside those of other operations. This is a matter for the judgment of individual citizens and citizens' groups in particular situations.

The citizen and his lawyer should be aware that a single citizen's complaint can result in numerous administrative review options. A citizen's complaint may cite several conditions or practices which constitute violations and/or dangers. In responding, OSM may refuse to inspect certain aspects of the complaint, and it may issue notices or orders on other parts which the citizen feels are inadequate for different reasons. Each separate citation could be the basis of either a section 525 proceeding, a citizen review proceeding or a mine site review proceeding, or of a combination thereof. The citizen, therefore, should analyze the OSM response carefully when several issues are involved. He may decide to seek formal review on some, informal review on others, or utilize both methods on some or all of the issues.

2. **Appeal to Board of Surface Mine Appeals**

Should the Regional Director fail to give satisfaction on the citizen's request for review of the OSM action or inaction, the citizen may attempt to appeal formally to the Board of Surface Mine Appeals of the Office of Hearings and Appeals. This appeal is available only where the Regional Director, in his decision, specifically grants such a right of appeal.

If the citizen is challenging a failure to inspect, such an appeal is the only way to get to the Board. However, if the citizen is challenging the adequacy of an order of notice, there are two ways to get to the Board. The citizen can appeal to the Board under the procedures for citizen complaint review where the Regional Director has granted the right of appeal, or file an application for review under

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section 525 with an administrative law judge. In choosing between the two avenues, the citizen should understand that:

1. the scope of review by the Board of the Regional Director's decision under section 4.1280 is more restricted than formal review under section 525;
2. there is no right to de novo factual findings in section 4.1280 review as there is in section 525;
3. there is no right to discovery, cross-examination, or the like in section 4.1280 review.

If section 4.1280 is selected, a notice of appeal must be filed within twenty days of receipt of the Regional Director's decision with the Board of Surface Mining and Reclamation Appeals. The original and one copy are required, as are with all subsequent filings. The notice of appeal should identify:

1. The decision being appealed;
2. The person who made it;
3. Office address;
4. The date on which it was formally issued;
5. Any identification numbers carried on the decision.

Furthermore, the appellant must file a written statement of reasons for the appeal and any supported arguments. Such statement may be filed with the notice of appeal or any time within twenty days of filing the notice, and may be supplemented at any time during the twenty day period. Should the appellant seek an accelerated appeals schedule, he should file a motion to that effect.

The brief or statement of reasons which the appellant will wish
to submit will contain much the same material as the request for review by the Regional Director. It should, however, be more formally presented, with a statement of facts, an argument, exhibits consisting of the original complaint, OSM response, photographic evidence, and other supporting materials.

If factual questions are raised by the appeal, the citizen may move the Board pursuant to section 4.1286 to remand the case to an ALJ for a fact finding hearing. The Board also may order such a hearing on its own motion. In either case, the Board will specify the issues upon which the hearing is to be held.

Where a citizen is appealing an action of OSM to the Board under section 4.1280, the issues will commonly concern whether certain conditions or practices existed, and/or whether these constituted a violation or danger. There also may be a question whether an inspection was adequately rigorous, or whether OSM had adequate grounds to refuse an inspection. 3

The issues, then, will normally concern three areas:

(1) **Nature of inspection.** The citizen should seek to establish precisely what the inspector did and saw. What did he specifically check? What tests did he make?

(2) **Conditions and Practices on the Minesite.** The citizen must prove the existence of illegal conditions or practices.

(3) **Effects of conditions and practices.** What threat was posed to the public health and safety, or to environmental resources? What probability was there that the threatened harm would occur?

3. **Appeal to Court**

There is no appeal, as such, to the federal courts of citizen complaint review decisions. However, relief from the agency’s decision—either immediately after the Regional Director’s decision or following the Board’s review of his decision—may be obtained through the citizen suit provision 34 on the grounds that the Secretary’s decision is contrary to a rule or regulation, or that the Secretary has thereby failed to perform a nondiscretionary duty owed the

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33. If OSM fails to inspect, the issue before the Regional Director will be whether the complaint provided a reasonable basis for an inspection. If a notice or order was issued, a citizen might wish to raise one or more of the following points:

(a) A notice should have been an order of cessation;
(b) The time for abatement in the notice should not have been extended;
(c) The time for abatement in the notice was too long;
(d) The affirmative obligations in a cessation order were not strong enough;
(e) The cessation order should have contained more violations.

citizen. Other bases for relief may be found in 28 U.S.C. sections 1337\textsuperscript{35} and 1361.\textsuperscript{36}

B. Informal Mine Site Review of Unabated Cessation Orders\textsuperscript{37}

Section 521(a)(5) of the Act provides that any notice or order issued under section 521 which requires cessation of mining will expire within thirty days of actual notice to the operator, unless a public hearing is held at the site or within reasonable proximity to the site. The hearing required is an informal one, not a formal adjudicative hearing before an administrative law judge. The mine site hearing is simply a review by an OSM supervisory official of a cessation order issued by an inspector.

The rules governing mine site review hearing are set out at 30 C. F. R. section 722.15. Under these rules, a representative of OSM, upon the request of the permittee, may conduct an informal hearing at or near the mine site within thirty days of the issuance of the notice. Requesting a mine site hearing does not affect the right to request formal review under section 525. No hearing is required if the condition, practice or violation has been abated. Notice of the time, place and subject matter of the hearing will be:

1. Given to the permittee;
2. Given to any citizen who filed a report which led to the cessation order;
3. Posted at the local OSM district or field office;
4. Posted at the mine site;
5. Published in the newspaper, to the extent which is possible.

At the hearing, the representative of the office may accept oral or written arguments and other relevant information from any person attending the hearing. Following the close of the hearing, the office must, within fifteen days, affirm, deny, or vacate the order in writing.

There are several unresolved questions surrounding the section 521 mine site review hearing. First, may a citizen request mine site review under section 525 and section 722.15? The statute itself is unclear, and the regulations do not answer the question. Section

\textsuperscript{35} "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337 (1976).

\textsuperscript{36} "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1976).

722.15(a) merely provides that a hearing may be held within thirty days. It does state that no hearing is required where the permittee waives his right to a hearing, implying that only permittees can initiate mine site review. However, section 722.15(b) states that any request for a substantial modification of a cessation order must be deemed a request for an informal hearing under section 722.15. Second, questions arise as to how the operators will utilize the mine site review hearing. Since the mine site review does not affect formal rights to review under section 525, operators have two opportunities for review: (1) informal mine site review under section 521; and (2) formal review under section 525. Consequently, operators may choose to ask for mine site review while they are preparing their formal section 525 case. Where OSM appears hostile to informal relief, operators may simply file with OHA for temporary or expedited relief under section 525. A citizen should be prepared for either approach.

There is no administrative appeal from the decisions of OSM in mine site review. Instead, the aggrieved party may contest the notice or order itself under section 525.

IV. Formal Review Before OHA
A. Section 525 — Review of Notices of Violation and Orders of Cessation

Section 525 of the Act and 43 C.F.R. sections 4.1160-.1171 provide for formal APA-type review of notices of violation and order of cessation issued by inspectors under section 521 of the Act:

(1) Notices of violations are issued under section 521(a)(3) whenever an inspector encounters a violation of any requirement of the Act, regulations, or of any permit conditions required by the Act.
(2) A cessation order is issued under section 521(a)(3) where the permittee fails to abate a notice in the time given, if there is no reason to extend time of abatement.
(3) Orders of cessation are issued under section 521(a)(2) whenever there exists either an imminent danger to public health or safety or a significant imminent environmental harm.

Whenever any of these three citations is issued by an inspector, the permittee or any person having an interest which is or may be ad-
versely affected may apply to the Secretary for formal review of the sanction.

Before turning to the issues and procedures in particular proceedings, it is worthwhile to consider for a moment a few common principles concerning all section 525 proceedings. Any given section 525 proceeding may be initiated by either a permittee or a citizen. Both may file applications challenging the same citation on different grounds. Temporary relief pursuant to section 525(c) may be requested by one or both parties. A section 525 proceeding may or may not be preceded by a mine site review proceeding under section 521 of the Act and/or a citizens complaint under section 517.

As one of its first decisions, Apache Mining Co., the Board held that when an appeal of a decision of OSM is filed with the Board, OSM loses jurisdiction and has no authority to take any action on the subject of the appeal. The Board noted that to hold otherwise would result in "obvious chaos." However, because the decision dealt with a small operator exemption application, it did not settle whether a party may pursue mine site review and formal review at the same time. It is possible that the Board will rule that invoking informal rights results in a waiver of informal review rights. This is what occurred in Apache Mining. If this is how the Board ultimately rules, it would make sense in some cases for the citizen to invoke informal review first, and upon losing, to seek formal review.

In choosing the proper approach for a citizen who is unhappy with a particular action of an inspector, e.g., the notice includes too long an abatement time, the citation was wrongfully terminated, a notice should have been a cessation order, etc., the citizen must decide whether to invoke informal review or formal review. If formal section 525 review is invoked, the citizen must next decide whether to invoke temporary relief, expedited consideration of the claim, advanced scheduling, or some combination of these. These issues are discussed in Section VIII, infra.

B. Review of Section 521(a)(3)—Notice of Violations

Should the citizen wish to challenge the issuance of a notice of violation, he must file an application for review under 43 C.F.R.

40. This approach might be defeated by the opposing party invoking formal review of the disputed citation and arguing that OSM thereby lost jurisdiction to hear informal claims for relief on the citation. The issue is unsettled.

In any event, it is clear that OSM retains the power to modify, vacate, or terminate a citation even though the citation is the subject of review proceedings, and whether or not it is engaged in informal review. Act § 525(a)(1); 30 U.S.C.A. § 1275(a)(1) (Supp. 1978).
section 4.1160 within thirty days of receipt of the notice, or the modification, vacation, or termination of the notice. Any person not served with a copy of the citation may file within forty days of its issuance. 41

The application for review of a section 521(a)(3) notice under section 4.1160 must contain four elements:

1) A statement of facts entitling the citizen to relief. This should clearly state the specific harm which the citizen is suffering from the violation and its continued non-abatement.

2) A request for specific relief. The citizen should state the number of days he believes reasonable for abatement, or state that he believes a cessation order imposing affirmative obligations should have been issued.

3) A copy of the notice or order challenged. If the citizen cannot immediately obtain such a copy, he should so note and then file it as an amendment to his pleading as soon as possible, under section 4.1168. The copy may be obtained by a request to OSM.

4) A statement that the applicant either waives or requests the opportunity for an evidentiary hearing. The citizen may wish to seek a decision on stipulated facts, if he can obtain a stipulation from OSM on the necessary facts. In appropriate cases, a stipulation will save an enormous amount of time and expense.

5) Any other relevant information. 42

All filings should be made with the Hearings Division, Office of Hearings and Appeals. The case will be assigned to an Administrative Law Judge, with whom all further papers should be filed.

Section 525 applications for review of notices may be filed after the issuance of the notice or after any modification, vacation, or termination of a notice. Normally, when the operator challenges the issuance of a notice, he will argue that there was no violation and/or that the time given for abatement is too short. On the other hand, the citizen, in initiating review, will usually contend that the notice should have been an order, 43 that the abatement period was too long, should not have been extended, or the notice terminated, or that the inspector did not impose the appropriate remedial action.

Proving that an abatement period was unreasonably long may be

41. Every effort should be made to file within 30 days. It is unclear whether the 30 day filing deadline is a statute of limitations ban or whether it can be waived for good cause. It would seem that since OHA has extended the 30 day filing deadline to 40 days for review of notice of violation in certain circumstances, the 30 day statutory filing period is not jurisdictional. However, final resolution of the issue must await a Board decision.


43. It is not settled that OHA has the authority to change notices to orders.
attempted in several ways. The citizen will normally want to offer proof that the operator has been less than diligent in abating the violation. The citizen should, by discovery or other means establish what efforts the operator has made to abate. In addition, the citizen might present evidence as to the time ordinarily necessary to correct a similar condition or practice. This could be done through (a) testimony of experienced people, or (b) OSM records and past experience as to time required by other operators to correct similar violations. If there is time, the citizen should utilize discovery to determine the permittee’s efforts to abate. Discovery rules are set out at 43 C.F.R. section 4.1130.

If the inspector granted an extension of the abatement period which the citizen wishes to contest, the question will concern whether there was good cause to grant the extension. Under 30 C.F.R. section 722.12 (b) an authorized representative of the Secretary may extend the time for abatement if the failure to abate was not caused by the permittee's lack of diligence. In this situation, the citizen should seek to determine:

(a) What the operator did to comply;
(b) How many men, hours and what resources he allocated to abating the violation;
(c) Whether coal production was affected;
(d) Whether any event or condition outside the operator's control prevented abatement.

The test is essentially one of due diligence.

The citizen may wish to press this cause of action even if the operator has abated the notice by the time of hearing, since the finding of a lack of diligence could be an element in later efforts to take away the operator's permit for a pattern of willful or unwarranted violations.

44. Such proof will only be relevant, of course, if the operator is not contesting the fact of violation. In a § 525 review of a notice of violation, OSM must make a prima facie showing on the validity of the notice, or modification, termination, or vacation, but the initiator, either the citizen or the operator, must bear the ultimate burden of persuasion. 43 Fed. Reg. 34,394 (1978) (to be codified in 43 C.F.R. § 4.1171).

45. The citizen should be aware that he will probably have the right, once a formal § 525 or § 518 proceeding is initiated, to examine the inspector's notes concerning the inspection and citation. These notes can be extremely valuable in preparing a case, both for substantive and impeachment purposes. While the regulations do not speak to this issue, a ruling under the Mine Safety Act makes such notes routinely available. Amigo Smokeless, Inc., 3 I.B.M.A. 139, 81 Interior Dec. 235 (1974).

46. It seems clear that a citizen can challenge a notice even though it has been abated, and it appears from the language of § 4.1162 that the operator also may challenge the validity of an abated notice. 43 Fed. Reg. 34,393 (1978) (to be codified in 43 C.F.R. § 4.1162).
The citizen may ask that the Secretary impose interim steps in an abatement period. This is most appropriate where the abatement period is relatively long—thirty to ninety days. If the permittee fails to meet an interim step in the abatement of a notice, a cessation order can be issued.\(^{47}\) Finally, the inspector must indicate in the notice of violation what remedial action is required by the operator to abate the violation. If no remedial action is imposed or if it is inadequate, the citizen may contest it.

Where a notice of violation is contested, OSM has the burden of establishing a prima facie case on the validity of the notice, and the fact of violation.\(^{48}\) The burden will normally be met through the inspector’s testimony or other documentary evidence as to the conditions or practices he found,\(^{49}\) plus why such condition or practice constituted a violation of the regulations or permit conditions. Thereafter, the applicant for review has the ultimate burden of persuasion—that is, the described condition or practice was not present or that it could not reasonably be construed to be a violation.\(^{50}\)

When the length of the abatement period is at issue, OSM must first make a prima facie case that the time allowed by the notice or any subsequent written extensions was reasonable, while the applicant for review must then establish that it was not reasonable. The citizen should be aware that in no event can an abatement period last for more than ninety days, either as originally fixed or subsequently extended. It is no defense that the operator cannot abate in ninety days—it is an absolute deadline. There is an appeal of right on a decision of an ALJ in a section 525 review of a notice of violation.\(^{51}\)

C. Application for Review of section 521 Cessation orders

As noted earlier, three types of summary administrative cessation orders may be issued under section 521:

(a) Failure to abate a notice of violation;

\(^{47}\) 42 Fed. Reg. 62,701 (1977) (to be codified in 30 C.F.R. § 722.12(c)).

\(^{48}\) There is little question but that the operator can contest the fact of violation in § 525 Application for Review of a Notice. In section 525(a) and (c) a different result was reached under the Mine Safety Act, See U.M.W.A. v. Andrews, D.C. Cir. No. 76-1208, May 9, 1978. However, the language of the Surface Mining Act does not appear to permit this conclusion.

\(^{49}\) It is assumed that the citizen will leave this to OSM. As defendant-intervenor in this half of the proceeding, however, he may wish to present proof if OSM does not appear to be making an adequate effort.


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(b) Imminent danger to public health and safety;
(c) Significant imminent environmental harm.

All three orders are reviewable under section 525—by the permittee or the affected citizen. The issues in the resulting administrative proceeding will differ markedly depending on the type of cessation order under review.

(1) Section 521(a)(3)—Failure to Abate Cessation Orders

A Failure to Abate Cessation Order must be issued whenever a notice of violations has not been abated within the time set by the inspector, and the inspector determines that no extension of time is warranted. If an inspector determines that a violation has not been abated within the time set and there is not good cause for extension of time, he must immediately order a cessation of mining for the area of the mine affected by the violation. This order remains in effect until the violation is abated. In addition, the inspector must determine the steps necessary to abate the violation in the most expeditious manner physically possible and include this in his order.

The operator can be expected to challenge a Failure to Abate Order either on the grounds that he should have been given an extension of time to abate the violation, or that no violation existed at all. He may also contest the nature of the affirmative obligations imposed, arguing that they are too stringent and/or will not result in faster abatement, and are therefore arbitrary. Finally, the operator may contest the area of the mine the inspector indicated to be affected by the violation. The citizen will often contest the same issues from the opposite perspective. That is, the citizen may argue that the order should have contained more stringent affirmative obligations, that more of the mine is affected by the violation, and similar points. Validity of the initial notice has been discussed in Section IV B., supra.

(2) Reasonableness of Abatement Time

The general legal standard for determining whether to extend the abatement time or issue a failure to abate order is set out in 30 C.F.R. section 722.12(b)—OSM must issue the order “if the failure to abate within the time set was caused by the permittee’s lack of diligence.” In other words, the standard is the reverse of that used

52. If the notice was valid, it is irrelevant that the operator failed to abate because he was contesting the notice in good faith. He disobeys at his own peril. Act § 525(a)(1); 30 U.S.C.A. § 1275(a)(1) (Supp. 1978).
to determine whether to extend the time for abatement of a notice of violation, discussed in Section IV B., supra. The diligence required is less than that required by an affirmative obligation cessation order. In the majority of cases, the issue will largely be one of good faith—was the operator making the steady reasonable efforts, which would be made by one sincerely trying to comply with the resources available? Was there something not within his control which prevented compliance?

The ultimate burden of proof on this issue rests on the permittee who challenges the order. OSM must only make a prima facie showing. For all practical purposes, to prevail, a permittee must show that he, with diligent efforts, could not have abated the violation within the time set.

In determining whether due diligence was exercised, the citizen should examine several factors:

(a) What precisely did the operator do to abate the violation?
(b) Did he begin immediately?
(c) Did he work steadily (every day? every hour?)
(d) What percentage of resources did he devote (man-hours, machine hours, operating costs?)
(e) Did coal production decline?
(f) Did income exceed operating costs during the period?
(g) How serious was the potential harm to the environment or public health or safety?

Whether or not the operator was diligent, an inspector cannot extend an abatement period for more than ninety days.

(3) Affirmative Obligations

The second key issue on review of section 521(a)(3) orders will be the nature of the affirmative obligations imposed by the inspector to achieve abatement “in the most expeditious manner physically possible,” when the violation is not completely abated by the cessation of mining. In all cessation orders where cessation of mining does not abate the violation, the inspector must order the permittee to abate the violation in the shortest possible time, and must set out the steps to accomplish this end. Such powers are necessary under the Strip Mine Act because the mere cessation of mining activities

53. 43 Fed. Reg. 34,394 (1978) (to be codified in 43 C.F.R. § 4.1171(b)).
54. Two situations can be imagined where one could argue that a further extension would be unreasonable, even though the operator has acted with diligence. One is where the harm had become significant and imminent; here a cessation order would be appropriate under § 521(a)(2). The other is where the operator, even though diligent, was incompetent or ineffective in his efforts.
does not always remove the danger to the environment or to public health and safety. Unlike the Mine Safety Act, where it is sufficient to halt operations and to withdraw personnel, it is necessary under the Strip Mine Act to take affirmative measures to prevent further harm and to rectify harm already done.

What constitutes appropriate affirmative obligations must be determined on a case-by-case basis. However, the basic principles concerning affirmative obligations are clear. The efforts required to abate are clearly greater than the remedial action an inspector will impose in abating a violation when a notice of violation has been issued. Under a section 521(a)(3) order, the operator must be required to do everything within his power, including transferring men and equipment from other sites or hiring extra help to abate the violation.\(^{55}\) It is no defense that such steps are uneconomical or threaten profitability. If the operator challenges the affirmative obligations imposed as unreasonable, he will have to prove that the obligations are (a) beyond his capabilities, or (b) will abate the violation no faster than lesser measures.\(^{56}\)

Relevant factors on the issue of affirmative obligations may be:

(a) cash reserves of the operation;
(b) expected revenues;
(c) possibility of loans to the operator;
(d) time required by less onerous abatement measures;
(e) difference of cost between measures ordered and those proposed, taking into account the fact that coal mining can resume faster under strict abatement measures;
(f) equipment on hand, men on payroll, skills of men;
(g) availability of and efforts made to obtain more men and/or equipment.

D. Section 525 Review of Imminent Danger Orders

Section 525 also provides for review of section 521(a)(2) imminent danger cessation order. An inspector must issue such an order whenever he finds a condition, practice, or violation which creates an

\(^{55}\) Section 722.11(d) reads, in part, "the authorized representative of the Secretary shall require abatement . . . in the most expeditious manner physically possible. The affirmative obligation shall include a time by which abatement shall be accomplished and may include, among other things, the use of existing or additional personnel and equipment."

\(^{56}\) The regulation is clear that cost cannot be considered in determining the means chosen to abate a violation or danger in the most expeditious manner physically possible. In the normal case, then, there should be no evidence presented on cost. However, there could be extreme situations, where cost would be prohibitive, and decrease abatement time only marginally, in which a judge would consider cost to avoid a patently arbitrary result.
imminent danger to the health or safety of the public. No violation need exist. In the order, the inspector must order a cessation of surface coal mining and reclamation operations relevant to the condition, practice, or violation. The order remains in effect until the danger has been removed. In cases where the cessation of mining and reclamation activities does not completely abate the danger, the inspector must in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the danger.

The Act defines imminent danger to the health and safety of the public as:

the existence of any condition or practice, or any violation of a permit or other requirement of this Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril would not expose himself or herself to the danger during the time necessary for abatement.57

The legislative history on the level of harm for the issuance of an imminent danger order is strong. The Senate Report establishes the will of Congress with respect to the level of harm required to reach imminent danger—miners or those affected by the mining activity should not be subjected to greater dangers because of their occupation or the location of their homes than the dangers faced by the average American worker or citizen.58

The level of harm for any particular violation, practice or condition, will usually be a key issue in the review of any imminent danger order. Typically the permittee first will attempt to minimize the level of harm, and then will argue that the level of harm does not justify an imminent danger cessation order. The definition of imminent danger in the Surface Mine Act and the legislative history supporting the definition represents a conscious attempt by Congress to lower the level of harm necessary for the issuance of such an order from the level of harm established under the Mine Safety Act. The imminent danger provision was drawn from the Federal Coal Mine Health and Safety Act of 1969. It did not change during the first six years the strip mine legislation was before Congress.

However, in 1977, testimony was presented to both the House and Senate Committees that the Department of the Interior had interpreted the “reasonable expectation” test in the Mine Safety Act to require far too high a level of harm. Under administrative interpretations of the Mine Safety Act, the feared harm had to be more likely than not to occur before the imminent danger order could be issued—in effect, a one in two test. This, of course, was unconscionable—no person should have to expose himself or herself to a one in two chance of death in return for a daily wage before the production of coal can be halted. To remedy the problem, a citizen's group presented to Congress a test to redefine “reasonable expectation” and lower the harm level required to cease mining operations and remove the danger. The proposed test was adopted word for word by both committees and is the definition in section 521.59

Level of harm is only one issue which will arise during review of imminent danger orders. The nature and scope of the affirmative obligations imposed by the inspector is likely to be a disputed issue as well. The standards for judging the propriety of affirmative obligations are the same as those for judging affirmative obligations for failure to abate cessation order section 521(a)(3), discussed earlier.60

A background note on the origin of affirmative obligations should prove helpful in litigation involving obligations imposed under either section 521(a)(2) or section 521(a)(3). There was no provision for the imposition of affirmative obligations until the 1st Session of the 95th Congress. In 1977, a citizens' group presented testimony which sought to illustrate that merely ordering the cessation of mining often will not abate the danger or violation in surface mining operations. The testimony also pointed out that under the Mine Safety Act the Department of the Interior ruled that inspectors of ALJ's had no authority to impose affirmative obligations despite a clear need.61

Responding to this testimony, Congress included affirmative obligations in the statute itself and made them mandatory.

E. Section 525—Review of Significant Imminent Environmental Harm Cessation Orders

Under section 521, an inspector must issue a cessation order and

61. See Hearings on S.7, supra note 59 at 1044-47.
impose affirmative obligations where he encounters conditions, practices, or violations causing or reasonably expected to cause significant imminent environmental harm. Significant imminent environmental harm is not defined in the statute. However, legislative history found in Senate Report Number 95-128 at page 91, served as the framework from which OSM defined the concept in the interim regulations:

1) An environmental harm is any adverse impact of land, air, or water resources, including but not limited to plant and animal life. The citizen should show that mining conditions or practices have caused a change in the environment which is adverse, i.e., which threatens living organisms or makes resources less useful or valuable to men.

2) An environmental harm is imminent if a condition, practice or violation exists which (a) is causing such harm or (b) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under Section 521(a)(3) of the Act.

3) An environmental harm is significant if that harm is appreciable and not immediately reparable.

The test is certain to be the subject of litigation, which will center around the following questions:

(a) What constitutes an adverse impact on land, air, or water resources?
(b) When can a particular condition or practice reasonably be expected to cause harm?
(c) What is a reasonable abatement period for a particular condition, violation, or practice?
(d) What is an appreciable harm?
(e) When is a harm not immediately reparable?

In litigation on significant imminent environmental harm cessation orders, proof should be offered on each of these points. In almost all situations in a section 525 proceeding where the definition is involved, OSM and the citizen will be on the same side and should work together. Affirmative obligations to abate significant imminent environmental harm cessation orders will be hotly contested. The same principles will apply to these orders as to imminent danger and failure to abate cessation orders. We will not repeat

62. This is true where cessation does not abate the potential or actual harm.
64. This will not be true in citizen complaint review, where the inspector has failed to issue a significant imminent environmental harm order.
the earlier discussion here. We should note, however, that where the citizen seeks to impose a different or more stringent affirmative obligation than that imposed by the inspector, the obligations should be clearly spelled out in his application for review.

V. CIVIL PENALTY PROCEEDINGS UNDER SECTION 518

A. Introduction

Following the issuance of a notice of violation or cessation order, OSM will usually assess a civil penalty. Depending on the circumstances, the penalty may be a discrete sum or it may be separately assessed for each day of the violation, thus providing an incentive to abate. Because the amount of the penalty will affect not only the abatement efforts of the individual violator but also the entire enforcement climate and the compliance efforts of all operators as well, it is vitally important for citizens to ensure that adequate penalties are assessed. Thus, citizens should participate in both the informal and formal hearings on the imposition of civil penalties.

The civil penalty process involves several administrative stages. These are:

1. assessment of penalty;
2. informal conference;
3. informal review if penalty is reduced;
4. formal appeal and administrative hearing under section 518; and
5. discretionary review by Board.

While the citizen generally does not have the broad rights of initiation he enjoys elsewhere under the Act, he usually will be able to intervene as a party in the proceeding. See discussion in Section VIII C., infra on how to intervene.

65. It should be noted that the definition of "imminence" is more liberal with regard to environmental hazards than to public health and safety hazard. A danger to the public is imminent if there is a reasonable expectation that the harm will occur before the condition or practice can be abated. An environmental harm is imminent if the condition or practice is causing or reasonably be expected to cause the harm before the end of the "reasonable abatement time" which would be set in a § 521(a)(3) notice of violation, in which case a cessation order is necessary to ensure that the harm does not occur.


68. The only occasion where a citizen may initiate a penalty proceeding is where he seeks Board review of a penalty decision reached in an OHA hearing to which he was a party. 43 Fed. Reg. 34,398 (1978) (to be codified in 43 C.F.R. § 4.1270).
The citizen should be aware that even where the penalty is imposed as a result of his complaint, he will not be personally notified of any resulting penalty proceedings. To participate in penalty proceedings, it will be necessary to check with the appropriate offices periodically to learn of upcoming proceedings in which he or she might wish to participate.  

B. Initial Establishment of Penalty

1. Procedures

Under the Act, the Secretary may fine an operator whenever he violates any applicable performance standard. By regulation the Secretary has established a point system which takes into account four factors—negligence, seriousness of violations, history of previous violations, and good faith in abatement of violations. Any time a company receives more than thirty points, out of a possible ninety-five for a violation, the Secretary will fine the operator—the amount of the fine depends on the number of points. Additionally, the Secretary must fine a company that has failed to abate a violation after receiving a notice of violation.

When a notice of violation or order of cessation is issued, the Assessment Office of OSM will make a decision within thirty days whether to assess a penalty. While neither the Act nor the regulations explicitly provide for public input at this stage, the citizen might influence a decision by providing the office with information concerning the violation. Such information, which must be submitted within ten days of the citation’s issuance, should identify the mine, the date, and the type of citation. A copy of the submission must be sent as well to the inspector who issued the order.

Once the proposed penalty assessment is sent to the operator, the operator has fifteen days to request a “conference.” If the operator within that time requests in writing a conference, OSM must schedule one, and post a notice of the time and place of the conference at the local field office of OSM at least five days prior to the confer-

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69. The citizen may move to consolidate the penalty assessment review with other review proceedings on the same citation or citations (e.g., validity of a notice or order) to which the citizen is already a party. See text accompanying notes 129-31, infra on consolidation.


71. 42 Fed. Reg. 62,702 (1977) (to be codified in 30 C.F.R. § 723.12(a)).

72. 42 Fed. Reg. 62,703 (1977) (to be codified in 30 C.F.R. § 723.14(a)).

73. These procedures are applicable to the mine operator as rights under 30 C.F.R. § 723.16(a). Under § 723.19, the citizen may inspect all worksheets used in the assessment process.

74. 42 Fed. Reg. 62,703 (1977) (to be codified in 30 C.F.R. § 723.17(a)).
ence. At the conference, the conference officer will review all relevant information presented to him and may vacate, lower, increase, or leave unchanged the proposed penalty. He may not, however, depart from the point schedule. The citizen or his representative has a right to attend this conference and to participate fully.

At the conference, the citizen should be prepared to make arguments based on the point schedule for maintaining or raising the proposed penalty. While there is no particular requirement for a lawyer to represent the citizen in this informal conference, legal assistance might be helpful in the preparation and submission of testimony, either oral or written.

2. Substantive Standards

Comments at the informal conference should be structured around the four factors which the conference officer must consider in setting the penalties.

(i) History of Previous Violations

The citizen should request that OSM produce its printout or work sheet of violations by the permittee in the past year to ensure that each violation is counted, except those currently under review or vacated subsequent to issuance. One point must be assigned for each notice of violation issued, and five points for each cessation order. A maximum of thirty points may be assigned under this category. A cessation order must be counted fully and separately even if it followed an unabated violation.

A potentially difficult question may arise when the operator argues that certain violations were not incurred by “the particular coal mining operation” which is now being penalized, but by some separate entity. The citizen should insist that OSM look not only to geographic contiguity but also to interrelatedness of management and control at the everyday level (whether the two operations are financially independent and deal with each other as independent businesses), interrelatedness of functions (whether the two operations are part of a chain of production, i.e., mining and processing), sharing of equipment, and so forth.

75. 42 Fed. Reg. 62,704 (1977) (to be codified in 30 C.F.R. § 723.17(b)).
76. See text accompanying notes 86-88, infra, for when the point schedule may be waived.
77. 42 Fed. Reg. 62,704 (1977) (to be codified in 30 C.F.R. § 723.17(e)).
78. 42 Fed. Reg. 62,702 (1977) (to be codified in 30 C.F.R. § 723.12(b)).
(ii) **Seriousness**

Up to fifteen points may be assigned for "probability of occurrence" of the event or harm which a standard is designed to prevent, according to the following schedule:

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<th>None or insignificant</th>
<th>0 - 5 points</th>
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<tr>
<td>Unlikely</td>
<td>5 - 10 points</td>
</tr>
<tr>
<td>Likely</td>
<td>10 - 15 points</td>
</tr>
<tr>
<td>Occurred</td>
<td>15 points</td>
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</tbody>
</table>

If harm has already occurred, the permittee must receive the full fifteen points. If the harm has not occurred, either technical literature or the testimony of people with some degree of expertise (e.g., a farmer to testify about soil erosion) should be used to prove likelihood and type of harm feared from a particular violation. It should be remembered that the *extent or intensity* of the feared harm is not the issue here, only the *likelihood* that the harm will occur or the fact that it already has occurred. The citizen should thus know what harms violations of a standard may produce.

Another fifteen points are assigned based on the extent of actual or potential damage. If the adverse effects of the actual or potential damage and violation would concern only the permit area itself, no more than seven points may be assigned. If, however, there are or might be adverse effects on land or resources outside the permit area, eight to fifteen points must be assigned. The crucial question is the *degree of harm if the event occurred*. Whatever the location of the harm, OSM will look at the *duration* and the *extent* of the damage that either did occur or could have occurred.

The citizen, then, should present evidence on (a) the amount of time necessary for the damage to be repaired, whether by the operator or by the nature itself; and (b) the gravity of the harm that could have been done to natural resources, living organisms and ecological chains, and to the safety, health, or economic livelihood of people in the area. An operator's failure to keep records, give notice, or conduct measuring or monitoring permits OSM to ignore the questions of probability and damage and assess up to fifteen points, depending on how seriously the violation obstructed enforcement efforts.

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80. 42 Fed. Reg. 62,702 (1977) (to be codified in 30 C.F.R. § 723.12(c)).
81. For example, mishandling of topsoil is a violation, while failure of revegetation and consequent environmental harm are the events which the rule was designed to prevent. 42 Fed. Reg. 62,684 (1977) (to be codified in 30 C.F.R. § 715.16).
(iii) **Negligence**

This subsection deals with the issue of the presence or absence of negligence. As many as twenty-five points may be assessed in this area.

The operator may be assigned up to twelve points for violations caused by indifference, lack of diligence, or lack of reasonable care. From thirteen to twenty-five points may be assigned if the violation occurred through reckless, knowing, or intentional conduct.

Two points are significant in determining fault. All persons working on the mine site are to be considered agents of the operator and their own state of mind are to be imputed to the operator. Thus, the citizen should determine whether some individual—a manager, a worker, a hired contractor, or someone else—knew or must have known of the existence of the illegal condition or practice. Negligence is imputed if the operator or his agent should have known of the condition or practice, although they were or claimed to be unaware that a condition or practice was harmful or illegal.

(iv) **Good Faith**

Finally, OSM may *add or subtract* ten points based on the violator's effort to achieve compliance. To achieve the ten point reduction for rapid compliance, the operator must do more than simply satisfy the abatement period; he must make *extraordinary* efforts to abate in the *shortest possible* time. In the case of a cessation order, then, the reduction should never be granted since the operator is always required to abate as rapidly as physically possible. A workable standard for an operator given a notice of violation would be the effort which would have been required had he been given a cessation order. If the operator does not meet this standard, timely compliance should result in no points either way.

In order to penalize the violator an additional ten points, there must be a finding both that he failed to abate in a timely fashion and that his failure was due to lack of diligence. To prove lack of diligence, the citizen should determine (a) what efforts the operator made to comply, (b) how many men, hours, percent of equipment and dollars he allocated to abatement efforts, (c) what his coal production was during the abatement period, compared to normal, and so forth. The operator should not be allowed to argue that his failure to abate was in good faith because he was seeking review of

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82. 42 Fed. Reg. 62,703 (1977) (to be codified in 30 C.F.R. § 723.12(d)).
83. 42 Fed. Reg. 62,703 (1977) (to be codified in 30 C.F.R. § 723.12(e)).
the notice of order. Unless the permittee has secured temporary relief under section 525, he must abate the violation. Once a point total has been calculated, the fine is set according to a point table. 84

3. **Number of Days**

A key issue in the civil penalty assessment process is whether OSM will assess a penalty as a continuing violation, *i.e.*, a fine for more than one day. OSM *must* assess fines for each day a violation remains unabated after an abatement period set by notice of violation has expired, and must separately assess at least two days where a continuing violation is assigned more than seventy points. In other cases, the decision is discretionary; the Office will consider the four factors mentioned earlier plus "any economic benefit to the permittee which resulted from a failure to comply." 85

4. **Waiver of Penalty Formula**

OSM can waive the use of the penalty point system under 30

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84. The penalty assessed is computed at the rate of $20.00 per point for the first 25 points, $100.00 per point for 26-29 points, and is $5,000.00 for 70 points and above. 42 Fed. Reg. 62,703 (1977) (to be codified in 30 C.F.R. § 723.13).


In situations in which the daily fine is discretionary, a person seeking to have a penalty assessed for separate days should make an argument showing that the permittee benefited or is benefiting from his failure to comply.

Will the cost of the civil penalty plus abatement measures outweigh the economic gain attributable to the violation? To determine costs, the citizen should combine the proposed penalty and direct cost of abatement (any extra costs not normally incurred in daily operations, and either the value of lost production or the expense of men and machines diverted from coal production during abatement efforts). Benefits should be calculated by looking at two discrete time periods. First, what would have been the direct cost of abatement (calculated above) during the period where the operator would have had to take specific abatement measures? This period could be short, if some specific act was required, or could last till the present if the operator would have been required to permanently allocate men and machines to non-productive activities. Secondly, in the interim between the first period where direct costs were incurred and the present, was coal produced which would not have been if the necessary abatement measures had been taken? This double calculation is necessary because the direct savings of not taking corrective action will not always reflect true benefits; for instance, if an operator should have constructed a new and longer haul road six months ago, his saving from not doing so should include both the cost of building the road (which might have taken one month) and the cost of the longer hauling time for the five months.

It must be recognized that it will be difficult if not impossible to compile accurate cost/benefit figures at an informal conference, though it may be possible at a later hearing with discovery. The citizen should attempt to sketch out the comparison as best he can through questions to the operator; even where actual cost figures are unobtainable, a picture can be drawn by making comparisons of before-and-after cycle time, necessary steps in the mining operation, and so forth.
C.F.R. Section 723.14, upon a written determination\textsuperscript{88} by the Director of OSM that "a waiver will further abatement of violations of the Act." A citizen should consider requesting a waiver when he feels that the gravity of the violation is greater than reflected by the point system.\textsuperscript{87} It is likely, however, that operators will request waivers more often, on the grounds that the point system results in exorbitant fines.\textsuperscript{88}

The citizen should be aware that neither the Assessment Office nor the Conference Officers may waive the penalty system; waiver can only be done by written determination of the Director of OSM. Although the citizen has no standing under 43 C.F.R. section 4.1150 to challenge the determination regarding a waiver, as does the operator, he may be able to bring a citizen's suit under section 520 of the Act.

5. Penalty Reduction at Conference

Conference officers may reduce the penalty at their own discretion; however, for any proposed reduction of more than 25 percent and $500, the decision must be approved by the Director or his designee before it becomes binding on the Secretary.\textsuperscript{89} During a conference the citizen should request that the reviewing officer be identified and request an opportunity to show him that the penalty should not be reduced.

6. Penalty Assessment Review\textsuperscript{90}

Under section 518 the citizen may not initiate formal administrative review of a penalty assessment; only the person penalized has standing under 43 C.F.R. section 4.1150 and section 518 of the Act. Should the operator seek review by OHA, however, the citizen may move to intervene.\textsuperscript{91} The citizen can learn of a request for review by contacting either the local office of OHA or the OHA office in Arlington, Virginia.

\textsuperscript{86} Section 4.1154(c) makes clear that the waiver must be written. 43 Fed. Reg. 34,393 (1978) (to be codified in 43 C.F.R. § 4.1154(c)).

\textsuperscript{87} Even though the citizen has no standing in this action, he may submit a request since the Director may, if he wishes, grant a waiver on his own initiative. 42 Fed. Reg. 62,703 (1977) (to be codified as 30 C.F.R. § 723.14)).

\textsuperscript{88} The operator might argue that the point system should be waived because he needs the money for abatement. This contention is foreclosed by the regulation itself. 42 Fed. Reg. 62,703 (1977) (to be codified in 30 C.F.R. § 723.14).

\textsuperscript{89} 42 Fed. Reg. 62,704 (1977) (to be codified in 30 C.F.R. § 723.17(e)).


At the hearing, the citizen-intervenor should be prepared to present evidence as to both the fact of a violation and the level of penalty.\textsuperscript{92} Substantive issues on review will be similar to those at the conference; however, the citizen may prepare more thoroughly by using discovery in the factual areas covered. Like the conference officer, the ALJ may raise or lower the penalty by recalculating points. The ALJ may waive the use of the point system.\textsuperscript{93}

The citizen will strengthen his case if he submits a written calculation of the penalty he believes appropriate, with annotations justifying every increase he suggests or reduction he opposes.

In preparing his case as intervenor, the citizen should invoke his right under section 723.19 to inspect all materials used in calculating the assessment, including submissions by the operator.

7. \textit{Burden of Proof}

In civil penalty proceedings, the burden lies on OSM not only to make a prima facie case for the fact of violation and the amount of penalty, but also to carry the ultimate burden of persuasion. This differs from direct review of notices and orders under section 525, where the initiator of the proceeding has the ultimate burden.

C. \textit{Appeal of Civil Penalties to Board of Surface Mining}\textsuperscript{94}

There is no administrative appeal as a matter of right for any party from a civil penalty imposed by an Administrative Law Judge. However, anyone who was a party to the earlier proceeding (including a citizen-intervenor) may petition the Board for discretionary review.\textsuperscript{95} If the petition is granted, a citizen not involved in the earlier proceeding can move to intervene.

The party wishing to appeal must file a petition with the Board within thirty days of receiving the decision on review. Service should consist of the original plus one copy to be filed with the Board and a copy served on every party to the review proceeding. While section 4.1270 gives little guidance as to what the petition should contain, it is suggested that the following points be included:

\textit{Heading—Petition for Discretionary Review of Proposed Civil Penalty.}

\textsuperscript{92} 43 Fed. Reg. 62,704 (1977) (to be codified in 30 C.F.R. § 723.18(c)).
\textsuperscript{93} Under the regulation, however, the ALJ cannot waive the point system because a reduction in the proposed assessment could be used to abate the violation. 43 Fed. Reg. 34,393 (1978) (to be codified in 43 C.F.R. § 4.1157(b)(1)).
\textsuperscript{95} \textit{Id.}
**Introductory Statement**—Indicate that you are petitioning for discretionary review under section 4.1270 and summarize your claim and desired relief.

**Statement of Standing and Interest**—Because review is discretionary, the citizen must satisfy the Board not only that he is right but that it makes a difference. The citizen should state that he was a party to the earlier proceeding, describe his involvement in the action, and indicate why he remains aggrieved by the penalty. He should try to show that the penalty is too low to serve the purposes of the Act and discourage violations (using, if possible, evidence similar to that used for seeking multiple-day penalties). It may be possible to show a pattern and practice of inadequate penalties in the area, or of widespread violations by this operator despite enforcement efforts.

**Statement of Alleged Errors**—The citizen should enumerate the point assignments which he believes correct and/or why he believes the penalty should have been separately assessed for multiple days. Where possible, each allegation should be referenced to supporting documentary or testimonial evidence, e.g., where insufficient points were assessed for seriousness, proof should be offered in the form of water tests, affidavits of damage, etc. A copy of the decision should be included with the petition. Any other party may file a response to the petition within ten days, and the Board will grant or deny the request within thirty days. Thereafter, the usual procedure for appeals apply.

VI. **Suspension and Revocation of Permits Under Section 521(a)(4)**

Under section 521(a)(4) whenever the Secretary or his authorized representative determines that a pattern of violation of any requirements of the Act or the permit exists or has existed, and concludes that these violations were willfully caused or were the result of unwarranted failure of the permittee to comply, the Secretary must issue a show cause order to the permittee requiring him to show why his permit should not be suspended or revoked. If the permittee requests a public hearing on the issue, he is entitled to an Administrative Procedure Act (APA) type hearing before an ALJ of the Office of Hearings and Appeals.

Both the substantive regulations, and the procedural regulations, contain provisions which expand upon the procedures for
determining whether a pattern exists, as well as the nature of the show cause hearing before the ALJ.

The Director of OSM has two methods of determining when a pattern exists which requires the issuance of a show cause order. One method is mandatory and the other is discretionary.

A. Mandatory

Under section 722.16(c)(3), if the permittee violates the same or related requirements of the Act, regulations, or permit during three or more federal inspections within any twelve month period, and these violations were caused either willfully or by unwarranted failure to comply (simple negligence) a pattern exists and a show cause order must be issued, unless the Director finds that it would not further enforce the performance standards of the Act.

If the Director of OSM issues the show cause order under the mandatory provision of 30 C.F.R. section 722.16(c)(3), the operator may contest whether the violations existed and whether they were willfully caused or a result of unwarranted failure.

If OSM utilizes the mandatory provisions, and offers to prove more than the minimum number of violations, it will be difficult for the permittee to thwart the finding of a pattern. Once a pattern is found to exist, the only issues are:

(1) Whether the permit should be revoked;
(2) If not, how long should it be suspended for; and
(3) What conditions should be attached to the suspension or revocation.

99. 42 Fed. Reg. 62,702 (1977) (to be codified in 30 C.F.R. § 722.16(c)).
100. The permittee may not be able to contest the fact of violations or negligence if this has already been adjudicated in a § 525 or § 518 proceeding.
101. The citizen should give careful consideration to the conditions attached the suspension or revocation. See 43 Fed. Reg. 34,396 (1978) (to be codified in 43 C.F.R. § 4.1194(c)). Where a permit has been suspended, for example, the citizen should insure that adequate conditions are imposed to prevent any environmental harm from occurring during the suspension. This might include monitoring the mine site, periodic testing of effluent discharges, maintenance of sedimentation control devices, continuation of reclamation operations, etc. Also, the operator should be required to compensate the miners (up to a reasonable period) while the permit is suspended. These powers are implicit in the power to suspend or to revoke. If the operator does not accept and comply with such preconditions, then the Secretary should extend the suspension period or revoke the permit outright. One precondition to resumption of mining activities, which should be imposed in all instances of permit suspension, is a prohibition against a change in normal activities or operations prior to the suspension period (such as advancing the production schedule) which would allow the operator to avoid the impact of the permit suspension.
B. Discretionary

At his discretion, the Director may also determine that a pattern exists or has existed, after considering several factors, including:

(1) The number of willful violations or number of violations of the same or related requirements of the Act, regulations or permit caused by unwarranted failure during two or more federal inspections;
(2) The number of willful violations or violations of different requirements of the Act, regulations or permit caused by unwarranted failure; and
(3) The extent to which the violations were isolated departures from lawful conduct. 102

Once the show cause order is issued, a hearing is held (if the permittee requests one). 103 If the ALJ finds that a pattern of violations exist or has existed, he must order that the permit be either suspended or revoked and the permittee directed to complete necessary corrective measures and reclamation operations. Where the permit is suspended, there is a minimum mandatory suspension period of three days, unless the ALJ finds that the imposition of such period "would result in manifest injustice and would not further the purposes of the Act." 104 The decision of the ALJ must be issued within twenty days following the date the hearing record is closed. 105 In such hearings, OSM has the burden of going forward with a prima facie case for suspension or revocation. The ultimate burden of persuasion is on the permittee.

VII. Review of Discriminatory Acts Against Employees—Section 703

Section 703 of the Act prohibits discrimination against employees or representatives of employees who have filed, instituted or caused to be filed, instituted any proceeding under this Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the Act. If an employee is discriminated against because of any of the above activities, he may file a complaint with the Director of OSM within thirty days of the alleged discrimination. The regulations set out rules for conduct of an investigation into the complaint, including the requirement of the hold-

102. 42 Fed. Reg. 62,702 (1977) (to be codified in 30 C.F.R. § 722.16(c)(2)).
103. A citizen may intervene in this proceeding pursuant to the standards set out in 43 C.F.R. § 4.1110. See text accompanying notes 125-28, infra for discussion.
104. 43 Fed. Reg. 34,396 (1978) (to be codified in 43 C.F.R. § 1194(b)).
105. Any party (including a citizen) may appeal within five days from the ALJ's decision to the Board. The Board must render its decision within 60 days of the date the hearing record is closed by the ALJ. 43 Fed. Reg. 34,396 (1978) (to be codified in 43 C.F.R. § 4.1196).
ing of an informal conference to discuss the preliminary findings of OSM as a result of its investigation.\textsuperscript{108}

If OSM determines that a violation occurred, and the permittee refuses to settle the matter, OSM will file a formal complaint with OHA and represent the employee at the formal hearing if the employee desires. If OSM prosecutes the case, the employee may still be represented by his own private attorney. Should OSM determine that no violation occurred, the employee nonetheless may proceed by filing his own formal complaint with OHA where he is entitled to a full hearing.

VIII. PROCEDURAL MOTIONS

A. Procedure for Expedited Review of Cessation Orders

A person seeking administrative review of an unabated cessation order has a statutory right to formal review and a decision within thirty days of the application for review.\textsuperscript{107} Governed by 30 C.F.R. section 4.1180 \textit{et seq.}, the expedited procedure is in lieu of the regular review procedures to be codified at 43 C.F.R. section 4.1160.\textsuperscript{108} Only a permittee who has been issued a cessation order under section 521(a)(2) or (3), or a citizen with standing to challenge such an order, may invoke expedited review, and the right is waived if temporary relief from the order is obtained.\textsuperscript{109}

Normally, a citizen will not initiate expedited review proceedings. More often, he will be a party to a permittee-initiated proceeding challenging the validity of an order. Knowledge of the expedited application process is important, however, both for those limited instances where the citizen does seek expedited review and in the more frequent instances where the operator seeks expedited review. Because of the need to compress formal hearing procedures\textsuperscript{110} into thirty days, the regulations establish intricate and demanding procedures which must be followed. If these proceedings are not followed, significant rights may be forfeited.\textsuperscript{111}

A person intending to file an application for expedited review must notify the regional Field Solicitor within fifteen days of receipt of the order (or twenty days from issuance, if the person was not a

\begin{itemize}
  \item 107. 30 U.S.C.A. § 1275(b) (Supp. 1978).
  \item 108. Where a person is entitled to expedited review and waives his right he is entitled to a decision within 120 days. 43 Fed. Reg. 34,394 (1978) (to be codified in 43 C.F.R. § 4.1180).
  \item 109. 43 Fed. Reg. 34,394 (1978) (to be codified in 43 C.F.R. § 4.1181(b)).
  \item 111. 43 Fed. Reg. 34,395 (1978) (to be codified in 43 C.F.R. § 4.1187(b)).
\end{itemize}
recipient\textsuperscript{112}. The applicant has thirty days from receipt of the order (forty days from issuance, for non-recipients) to file the application itself. These dates are not stayed by an application for informal review before OSM, so the applicant must file for review before the time for filing expires.

Contents of Application\textsuperscript{113}

Whether or not the applicant plans to seek an evidentiary hearing, he is required to make his case in the initial application and should expect that the persuasiveness of the application will play a significant, if not determinative, role in the outcome. The application must include the following:

\textit{Introductory Statement}-This should summarize the request for review, specifying the order to be reviewed and the relief sought. It should \textit{state specifically} a request for decision within thirty days pursuant to section 525(b) of the Act, and should state whether the applicant requests or waives an evidentiary hearing.

\textit{Statement of Facts}-Describe the events leading up to the order, beginning with the citizen complaint. Identify by number or date all complaints, responses, etc. State adequately the grounds on which standing is claimed, \textit{i.e.}, how the applicant is or may be adversely affected by the inadequacies of the cessation order. Finally, describe what the order requires and the facts on which the citizen bases his claim that the order does not require abatement "in the most expeditious manner physically possible." \textit{All evidence} on which the applicant relies should be set forth here. The statement will be more persuasive and more easily read if, where possible, for each fact or assertion is referenced by footnotes to its source—an OSM finding, a test result, a witness' affidavit, etc. Unsupported statements, where necessary, should be made on information and belief. The citizen must verify by affidavit the statement of facts.

\textit{Request for Relief}-The request should set out the specific relief sought, \textit{i.e.}, the affirmative obligation to be imposed on the operator.

\textit{Witnesses}-A list of witnesses by name, address, and place of employment, must be provided, together with detailed summary of each witness' testimony.

\textit{A Copy of the Challenged Order}


The regulations do not specify how notice must be given. Where there is insufficient time to send written notice, the citizen should telephone and inform the Field Solicitor that the call constitutes formal notice and that he is sending a written notice for the record.

\textsuperscript{113} Contents are required by 43 Fed. Reg. 34,394 (1978) (to be codified in 43 C.F.R. § 4.1184).
Copies of all Exhibits and Documentary Evidence
Any other Relevant Information

The application must be filed with the OHA in Arlington, Virginia. Additionally, it must simultaneously be served on all known parties. If service is done by mail, the applicant should inform all parties by telephone at the time of mailing and should inform the ALJ by telephone that such notice has been given. 4

Any party may respond to a petition for review by filing and serving a written response within five working days of service of the application. A citizen who learns of the application and wishes to respond, but is not yet a party should file a response and a simultaneous petition to intervene. 5 The response should observe the same forms and cover the same matters as the application, but need not reproduce exhibits already filed. Respondent may request a hearing even if the applicant has waived it. 6

Under expedited procedures, the ALJ must issue a written or oral decision within fifteen days of the application for review.

B. Procedures for Temporary Relief 7

Even the prompt review procedures provided in the Surface Mining Act and its implementing regulations cannot always resolve controversy as rapidly as the situation necessitates. As a result, section 525 allows the ALJ to grant temporary relief in certain limited situations. Citizens should anticipate that it will be used primarily to stay enforcement of cessation orders; however, citizens should also be alert to the possibility of achieving stricter and more immediate enforcement through temporary relief orders. Two situations that might arise include: (1) where a notice of violation rather than a cessation order has been issued, even though an imminent danger or significant imminent environmental danger exists; (2) or where inadequate affirmative obligations have been included in a cessation order.

Temporary relief will generally be granted only in compelling circumstances.

114. The applicants should not, however, discuss the merits on the case with ALJ.
115. See discussion in text accompanying notes 124-25, infra.
116. While not explicit, 43 C.F.R. § 4.1187(c) suggests clearly that any party may request a hearing, or the ALJ may on his own motion require a hearing. 43 Fed. Reg. 34,395 (1978) (to be codified in 43 C.F.R. § 4.1187(c)).
Contents of Application

An application for temporary relief should include:

Introduction and Request for Relief: This should state that the applicant is requesting temporary relief from a notice or order and should summarize generally the reasons for the request. If the applicant seeks relief from a cessation order, he should state clearly whether or not he waives his right under section 525(c) of the Act to a decision within five days. Finally, the application should state specifically the relief which he is requesting. In the normal citizen-initiated case, this would probably entail describing the cessation order. The citizen might wish to consider, however, requesting a limited form of temporary relief while the full merits of the controversy are resolved.

Statement of Reasons: The regulations call for a statement “setting forth the reasons why relief should be granted.” The applicant should state the facts of the case and the harm which he will suffer if relief is not granted, making clear what other actions he is taking and how long the temporary relief must last.

Showing of Likelihood of Success: In order to be granted temporary relief, the applicant must demonstrate a substantial likelihood that “the findings and decision of the Administrative Law Judge in the matters to which the application relates will be favorable to the application.” This section should contain the applicant’s legal argument and describe in detail the witnesses and evidence which will be used and the legal principles and case support which compel judgment in the applicant’s favor.

Statement of No Adverse Effect: The applicant must state that the relief he seeks “will not adversely affect the health or safety of the public or cause significant, imminent environment harm to land, air, or water resources.”

Supporting Materials: The applicant may strengthen his case by including any supporting documentation—photographs, test results, memoranda, affidavits—which tend to support either his equitable or legal arguments.

C. Motion for Intervention

Intervention is the procedure whereby a citizen may join an administrative proceeding which he did not initiate or to which he is

119. 43 Fed. Reg. 34,397 (1978) (to be codified in 43 C.F.R. § 4.1263(d)).
120. 43 Fed. Reg. 34,397 (1978) (to be codified in 43 C.F.R. § 4.1263(e)).
121. 43 Fed. Reg. 34,397 (1978) (to be codified in 43 C.F.R. § 4.1263(a)).
122. 43 Fed. Reg. 34,397 (1978) (to be codified in 43 C.F.R. § 4.1263(b)).
123. 43 Fed. Reg. 34,397 (1978) (to be codified in 43 C.F.R. § 4.1263(c)).
not a party by statute. The most common occasions for a citizen to seek intervention will be on review of a proposed civil penalty, in a “show cause” hearing over permit suspension or revocation, and in section 525 review of notices or cessation orders by permittees.¹²⁴

43 C.F.R. section 4.1110 establishes the criteria for intervention in administrative proceedings.

(c) The Administrative Law Judge or the Board shall grant intervention where the petitioner-

(1) Had a statutory right to initiate the proceeding in which he wishes to intervene; or

(2) Has an interest which is or may be adversely affected by the outcome of the proceeding.

(d) If neither (c) (1) nor (c) (2) apply, the Administrative Law Judge or the Board shall consider the following in determining whether intervention is appropriate-

(1) The nature of the issues;

(2) The adequacy of representation of petitioner’s interest which is provided by the existing parties to the proceeding;

(3) The ability of the petitioner to present relevant evidence and argument; and

(4) The effect of intervention on the agency’s implementation of its statutory mandate.

The petitioner should show how he personally will be affected by the outcome of the proceeding and note that this will give his participation a focus not available to one wishing merely to assert the public interest. The petitioner should rely on the Preamble to the Interim Regulations, that states “the Office contemplates that intervention will be liberally granted.”¹²⁵ The citizen who cannot, or fears he may not qualify under the above standard should plead in the alternative for discretionary intervention.

Under section 4.1110(d), if a petitioner does not qualify for intervention as of right, intervention may be granted upon a consideration of the above listed four factors. Three of the four factors are self-explanatory. The fourth effect on implementation of the agency’s

¹²⁴. The petition should be filed with the Board or the ALJ handling the action and must also be served on all parties to the action. 43 Fed. Reg. 34,388 (1978) (to be codified in 43 C.F.R. § 4.1109(a)). Like a pleading, it should be captioned with the name of the parties and the mine to which the action relates, as well as the docket number.

¹²⁵. The Preamble to the Final Regulations states that subsection (c)(2) regarding intervention as a right is broad enough to encompass “persons or groups in cases where significant legal determinations may be reached which might affect the ability of such persons or groups to protect their interests in subsequent proceedings.” 43 Fed. Reg. 34378 (1978).
mandate is intended to underscore the Congressional purpose of broad public participation in all proceedings under the Act.

D. **Advancement of Proceedings**

Instead of seeking expedited review and temporary relief proceedings, a party seeking faster than normal relief may move to *Advance The Scheduling Of A Proceeding.* This should prove to be a particularly useful tool to citizens seeking review. Often it will be fruitful to file this motion in the alternative with a motion for temporary relief. The motion must be in writing, and should include two factors:

1. **The need for prompt action.** The citizen should spell out the adverse environmental or safety effects and risks which will be prolonged if the notice is not strengthened or replaced by an order, and should stress that the harm will be irreparable. Thus, it should be noted both that the court cannot undo damage done, and that a private damage action, while technically available, is either not feasible or would not recompense adequately for the harm.
2. **The advancement provides no inconvenience to the court or injustice to the parties.** The time schedule proposed should allow adequate time for a full and fair hearing. Chances of success on the merits is not an issue here.

Any facts alleged in the motion must be supported by affidavit. It is anticipated that only allegations of harm will need to be supported by affidavits. Service must be accomplished by personal delivery, telephone, or telegraph, followed by a mailing.

A proposed order should be included with the motion, or in the terms of the motion, setting forth a proposed schedule for the proceeding. The appellee will be given ten days to respond to the motion, after which the ALJ may set a hearing on it if he desires and thereafter establish such schedule as he sees fit.

E. **Consolidation of Proceedings**

As might be expected, the diversity of potential actions in the Act’s enforcement scheme creates a possibility that different parties will commence various proceedings involving similar questions of law or fact. In such situations, the cases may be consolidated under, either on the motion of a party or at the initiative of the Board or an ALJ.

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127. *Id.*
128. 43 Fed. Reg. 34,389 (1978) (to be codified in 43 C.F.R. § 4.1114(b)(2) and 4.1114 (b)(3)).
Consolidation is likely to be routine in several situations, such as where review of both a notice or order and a civil penalty assessment has been requested, or where both a notice and subsequent modification are being challenged. It may be expected that citizens, with scarce resources, generally will welcome consolidation. Consolidation, however, should be considered very carefully before seeking, or acceding to, consolidation; in particular one should be careful that consolidation does not frustrate speedy relief or result in a confused and burdensome hearing.

To request consolidation, one must be party to one of the proceedings. A written motion should be filed with the Board or ALJ detailing the request and briefly describing the common question of law or fact and where necessary or helpful accompanied by a memorandum. Opposing parties may file statements in response anytime in the next fifteen days, but the ALJ or Board need not await a response before deciding. Consolidation of proceedings before OHA is a matter of discretion for the ALJ's and the Board.

IX. ATTORNEYS FEES AND COSTS

Section 525(e) provides for the award of attorneys fees in all administrative proceedings under the Act. 43 C.F.R. section 4.1290 et seq. establishes the criteria for the award of fees, who may receive them, and the procedures for filing. Any person may file a petition for award of costs and expenses (including attorneys' fees) reasonably incurred as a result of initiation and/or participation in a proceeding under the Act, where the proceeding results in the issuance of a final order by an ALJ or the Board. The award also may include all costs and expenses (including attorneys' fees) incurred in seeking the award.

The petition must be filed with the ALJ or the Board, whoever

131. Temporary relief might be sought where the citizen felt the time period was too long, but it is unlikely relief would be granted both because of the unlikelihood of success and the fact that the relief sought would be unnecessary if the citizen did not propose a compliance period shorter than a hearing would consume and might be seen as permanent rather than temporary if it proposed a shorter time. A possible solution would be to seek an order specifying a date by which the ALJ would rule on the appeal and stating that the violation had to be abated by that date unless the ALJ found, after reviewing the original notice and not contemporaneous occurrence, that the original time was appropriate. The operator could then make his best efforts to comply by the earlier date, but would not suffer prejudice if he failed.
132. These regulations do not cover awards for public participation in rulemaking procedures, although awards in such circumstances are under active consideration by the Department.
issued the final order, within forty-five days of its receipt; otherwise, a person may be deemed to have waived his right to an award.\textsuperscript{134} The petition must include:

(a) the name of the person from whom costs and expenses are sought;
(b) an affidavit setting forth in detail all costs and expenses including attorneys’ fees reasonably incurred for, or in connection with, the person’s participation in the proceeding;
(c) receipts of other evidence of such costs and expenses; and
(d) where attorneys’ fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, and the experience, reputation and ability of the individual or individuals performing the services.\textsuperscript{135}

Persons served with a copy of the petition may respond within thirty days from the date of service.\textsuperscript{136}

Under 43 C.F.R. section 4.1294, awards may be assessed in the following circumstances:

(a) To any person from the permittee, if-
(1) The person initiates any administrative proceedings reviewing enforcement actions, upon a finding that a violation of the Act, regulations or permit has occurred, or that an imminent hazard existed, or to any person who participates in an enforcement proceeding where such a finding is made if the administrative law judge or Board determines that the person made a substantial contribution to the full and fair determination of the issues; or
(2) The person initiates an application for review of alleged discriminatory acts, pursuant to 30 C.F.R. Part 830, upon a finding of discriminatory discharge or other acts of discrimination.

(b) To any person other than a permittee or his representative from OSM, if the person initiates or participates in any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues.

(c) To a permittee from OSM when the permittee demonstrates that OSM issued an order of cessation, a notice of violation or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee; or

(d) To a permittee from any person where the permittee demon-

\textsuperscript{134. 43 Fed. Reg. 34,399 (1978) (to be codified in 43 C.F.R. § 4.1291).}
\textsuperscript{135. 43 Fed. Reg. 34,399 (1978) (to be codified in 43 C.F.R. § 4.1292).}
\textsuperscript{136. 43 Fed. Reg. 34,399 (1978) (to be codified in 43 C.F.R. § 4.1293).}
strates that the person initiated a proceeding under Section 525 of the Act or participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee.

(e) To OSM where it demonstrates that any person applied for review pursuant to Section 525 of the Act or that any party participated in such a proceeding in bad faith and for the purpose of harassing or embarrassing the Government.

The citizen, therefore, has two bites at the apple in many proceedings: if there is finding of violation or imminent hazard, then the citizen initiator may receive an award from the permittee. The citizen participant also may receive an award from the permittee if he made a substantial contribution to a full and fair determination of the issues. If there is no finding of violation or imminent hazard, the citizen initiator and participator still may seek an award from OSM if they made a substantial contribution to a determination of the issues. In any proceedings not reviewing enforcement actions, citizens may seek an award from OSM, again on the grounds of having made a substantial contribution.

The permittee, on the other hand, may seek awards of costs and expenses against the citizen only where it is shown that the citizen's initiation and/or participation was in bad faith, that is, solely to harass or to embarrass the permittee. Decisions on the award of costs and expenses are appealable from the ALJ to the Board and from the Board to the United States District Court in the area where the mine is located.137

APPENDIX ONE

STRIP MINING LEGISLATIVE HISTORY LISTING

Below is a listing of the major documents comprising the legislative history of the Strip Mining Act. It is our understanding that the Office of Surface Mining has developed an index to the Legislative History and has computerized the Legislative History as well as the index. This may be useful to attorneys who are participating in major litigation.

Public Law 95-87 — August 3, 1977
House Committee Report No. 95-128 — April 22, 1977
Senate Committee Report No. 95-128 — May 10, 1977
House Conference Report No. 95-493 — July 12, 1977
House Committee Report No. 94-1445 — August 31, 1976
House Committee Report No. 94-896 — March 12, 1976
Senate Conference Report No. 94-101 — May 2, 1975
House Committee Report No. 94-45 — March 6, 1975
Senate Committee Report No. 28 — March 5, 1975
House Committee Report No. 93-102 — May 30, 1974
House Conference Report No. 93-1522 — December 5, 1974
Senate Conference Report No. 93-402 — September 23, 1973

Congressional Records (H.R.2)

House — April 29, 1977 — p. H 2736
Senate — May 19, 1977 — p. S 7996
Senate — May 20, 1977 — p. S 8083
Senate — July 18, 1977 — p. S 12201
Senate — July 20, 1977 — p. S 12423

Senate Congressional Record — p. 5652
March 5, 1975 (S.7)

House Congressional Record — p. 23393
July 16, 1974 (Amendment to H.R. 11500)

Senate Congressional Record — p. 33145
October 8, 1973 (Amendment to S. 425)
APPENDIX TWO

DIRECTORY

1. OFFICE OF HEARINGS AND APPEALS
   4015 Wilson Boulevard
   Room 1226
   Arlington, VA 22203

2. BOARD OF SURFACE MINING AND RECLAMATION
   APPEALS
   4015 Wilson Boulevard
   11th Floor
   Arlington, VA 22203

3. OSM REGIONAL OFFICES
   OSM HEADQUARTERS:
   U. S. Department of the Interior
   18th & C Streets, N.W.
   Room 6229
   Washington, DC 20240
   (202) 343-4719

   REGIONAL DIRECTOR'S ADDRESS

   REGION I:
   Thomas Hill Building
   951 Kanawha Boulevard, East
   1st Floor
   Charleston, WV 25301
   (304) 924-1208

   REGION II:
   1111 Northshore Drive
   Northshore Building 2
   Sixth Floor
   Knoxville, TN 37919
   (615) 588-5396

   REGION III:
   Federal Building and Courthouse
   Ohio and Pennsylvania Street
   Indianapolis, IN 46204
   (317) 269-6433
REGION IV:
601 East 12th Street
17th Floor
Room 1768
Kansas City, MO 64116
(816) 758-5162

REGION V:
Old Post Office Downtown
1823 Stout Street
Denver, CO 80215
(303) 837-5511

REGIONAL SOLICITOR'S ADDRESS

REGION I:
Field Solicitor's Office
950 Kanawha Boulevard East
Charleston, WV 25301

REGION II:
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P.O. Box 15006
Knoxville, TN 37901

REGION III:
Field Solicitor's Office
Federal Court Building
Room 521
Indianapolis, IN 46204

REGION IV:
Field Solicitor's Office
U.S. Courthouse
811 Grand Avenue
Suite 941
Kansas City, MO 64106

REGION V:
Field Solicitor's Office
Federal Center
P.O. Box 25007
Denver, CO 80225
A COMpendium of CASES ON FUTURE INTERESTS IN KENTucky*

Eugene W. Youngs**

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Proem: Herewith follows a summary of the leading cases in the various areas dealing with aspects of future interests as decided by the former Court of Appeals, now the Supreme Court, of Kentucky. Special attention has been given to those areas wherein the Kentucky law differs from the majority view, and where the result has been dictated or influenced by the application of a relevant Kentucky statute particularly in the solving of problems of construction.

In the main, a study of the Kentucky cases shows no radical departures from accepted common law precedents in the law of future interests in property, but in certain areas, the Kentucky courts do follow a minority view. This is true, for example, with the view taken by the Kentucky courts in permitting suspension of the power of alienation on a fee simple estate:

Example: Gift of the fee to daughter A with provision the land is not to be sold by A until she attains the age of 35.

At common law, the provision against alienation, being repugnant to a fee simple estate, is void as against public policy. But by the Kentucky precedents, such a restriction is deemed "reasonable and not inconsistent with a devise of a fee simple estate."

By the majority view, it is not possible to grant or devise a fee simple estate with a power to consume or convey and provide a gift-over if unconsumed or unconveyed, as such attempted executory

* Editor's Note: Due to the length of this work, this article is being published in two parts, the concluding portion of which to be published in the Volume six, Number two issue. For the convenience of the reader, a table of contents for the entire article is included at the end of part one.

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interest is repugnant to a fee simple estate. In Kentucky, this is permitted. In the case of Slowey v. Jenkins, the testatrix' will devised the residue of her estate to her husband "without any limitation, restriction or encumbrance as to the title of my husband." Testatrix' will contained the further provision: "In the event my husband predeceases my daughter, Frances, then I devise all of my residue to Frances." The lower court held that the husband took an absolute fee simple estate, which, upon his death prior to testatrix' daughter, Frances, passed to the husband's heir, Jenkins. This was reversed by the court of appeals, the court holding that the husband took a defeasible fee which, upon his death without exercising his power of disposal, passed to Frances as an executory devise.

One interesting application of a rule of construction to reach the intent of the testator has frequently arisen in the following situation: Testator devises land to devisee in fee, and then makes a provision for a further devise of the same land on the original devisee's death to the latter's children. At common law, the attempted gift-over would fail as being repugnant to the absolute gift of a fee simple estate. However, the Kentucky courts uniformly will construe the first gift not as creating a fee simple estate, but only a life estate despite the language of the devise. This construction certainly carries out the intention of the testator.

One of the most startling departures from the common law in Kentucky is the consistent holding by the courts denying the operation of the doctrine of estoppel by deed, or the doctrine of "after-acquired title." The courts take the view that an attempted alienation of a mere "expectancy" is a nullity, and the deed void including any warranty therein. This is strange doctrine indeed, and is distinctly a minority view all starting from a judicial construction of an early Kentucky statute which provided that an attempted conveyance of land in the adverse possession of another shall be null and void.

Kentuckians are a litigious people, ever ready and willing to determine their legal rights in a court of law. The process of sorting out and clearing up the cases on future interests in Kentucky reflects that the Kentucky courts go far to reach the result intended

2. 408 S.W.2d 452 (Ky. 1966).
3. There are other differences in the Kentucky law of future interests in departing from the common law majority precedents, particularly in the areas of adoption and construction. See text accompanying notes 59 et seq. infra.
by the alienor from the four corners of his instrument, fully realizing that technical words used by a testator do not always have the precious nicety of meaning that such words or phrases may have to an estate planner in Massachusetts. Thus, we are not too surprised when the court of appeals may construe the word "children" as heirs when an understanding of the entire instrument compels such a construction.5

I. REMAINDERS

The Kentucky cases show an acceptance of the common law definition of a "remainder" as a future interest created simultaneously and by the same instrument of transfer with a prior possessory estate and created in some person other than the transferor. These are estates in property, which, although presently "owned," will not come into possession or enjoyment until sometime subsequent to their creation. Of course, whenever an alienor, by his instrument, creates a life estate, he is always creating a future interest of some type. If to a successive beneficiary other than the transferor or his heirs, then a remainder is created if the first estate created in possession is less than a fee simple estate. If the transfer stops with the mere creation of a life estate in the transferee, then the future interest created is a reversion in the grantor and his heirs.

If a future interest is created after a transfer of a fee simple determinable estate, such future interest is not a remainder, but an executory interest. Since an executory interest, unlike a remainder, cannot vest in interest before it vests in possession, strict compliance with the Rule Against Perpetuities is required:

Example: O to A and his heirs, Blackacre, but if liquor is ever sold on the premises, then to B and his heirs.

B's executory interest here is void as it could vest beyond the permissible period of the Rule Against Perpetuities: Life or lives in being at the creation of the interests plus twenty-one years. So to make the above executory limitation good, it is necessary that the instrument limit the time so that the condition fulfilling the event which triggers the gift-over does not occur without the permissible period:

Example: O to A and his heirs, but if A ever sells liquor on the premises, then to B and his heirs.

In this example, the gift-over by way of executory limitation is good under the Rule Against Perpetuities.

Kentucky accepts the standard common law rules to determine whether a remainder is vested or contingent, including the well-established rule that no living person can have an heir. Thus, Kentucky rejects the so-called New York view, a heresy embodied in the infamous case of Moore v. Littel. In Williamson v. Williamson, the testator had devised land to several of his daughters including one, daughter A for life and then to her heirs. A married H and had two children by this union. The children predeceased A, and when A died, H claimed the fee by inheritance from his children as heirs of their mother A, and sought a partition. The court rejected his claim and held that H took nothing. Since A was a living person, she could have no heirs until she died. Thus, the remainder in her children as potential "heirs" was contingent and not vested and nothing passed to H, father of the two children who predeceased their mother in death.

The precedents in Kentucky also follow the general rule that in a gift by remainder to a class not yet formed, the remainder is contingent. But as soon as class members are born, the remainder becomes vested subject to being divested in part as later class members are born and join the class. Thus, where testator's will devises to life tenant for life with a gift over to the devisee's children at his death, so long as the devisee is childless, the remainder is contingent. But as soon as a child is born, the remainder vests and the remainder is not divested by that child's death during the life of the devisee but his share in the remainder will pass by his will or by intestacy. Since there is no condition precedent to be fulfilled, the remainder vests at the moment of birth in a class member subject to being opened as a class to later born children.

And Kentucky recognizes the generally accepted common law view that a remainder may still be vested even though there is a

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7. 41 N.Y. 66 (1869).
8. 57 Ky. (18 B. Mon.) 329 (1857).
9. See also Johnson v. Jacob, 74 Ky. (11 Bush) 646 (1876), where the remainder was to descendants, as if the life tenant had died intestate. The court held that the remainder to the life tenant's "descendants" was contingent, "and must wait until the death of the life tenant in order to determine what persons could qualify as descendants." Id. at 659.
11. Id.
provision for its being divested upon the happening of a condition subsequent.\textsuperscript{13}

Example: To A for life, remainder in fee to B, but if B fails to survive A, then to C. B's remainder is vested all during his life, but he must survive A to avoid a divestment. C's remainder is contingent because the same condition which was subsequent with respect to B is precedent with respect to C.

Again, in the case of \textit{Johnson v. Whitcomb},\textsuperscript{14} the court was called upon to determine whether a particular remainder was vested or contingent. The sister of the testator was given an estate for life, with a further provision that at her death the property was to be equally divided between the brother and sisters of the testator or such of them as may be living. The court ruled that the remainder in the brother and sisters was vested, subject, however, to being divested if any die before the life tenant. The gift is read as if it were, "remainder to my brother and sisters but as to any who may predecease the life tenant, his or her share will be divided among my other brother and sisters at the death of the life tenant." It is axiomatic that if the language, as such, can only be construed as requiring survivorship, then the remainder would remain contingent until the death of the life tenant. Thus, if the language were "to A for life, remainder to such of my brother and sisters who survive the life tenant, A," the remainder is contingent because we have to wait until the death of A to determine which of the brother and sisters of the testator survive A. This distinction again shows the importance of selecting the exact language that will bring about the precise result which the testator wants.

The importance of resolving the issue of whether a remainder is vested or contingent was brought out in an interesting case settled by the Kentucky Court of Appeals in 1942.\textsuperscript{15} The testator died in 1897, leaving as property outright to the four sons, each getting a

\textsuperscript{13} Mercantile Bank v. Ballard's Assignee, 83 Ky. 481 (1885). Note carefully the distinction in the Mercantile Bank case where the remainderman takes a fee and the requirement of outliving the life tenant is vital and significant, and the case where it is not, as in O to A for life, and then IF B Survive A, then to B for life. Although in form at first blush this would appear to be a qualifying condition precedent to B's enjoyment, hence B's remainder in form should be contingent, it is actually vested at common law; since B is given a life estate only (not a fee) he must perforce outlive A to take the estate. Hence, at common law, the condition IF B Survive A would be stricken as surplusage, and B's remainder for life be declared vested at the time of creation.

\textsuperscript{14} 166 Ky. 673, 179 S.W. 821 (1915).

\textsuperscript{15} Montgomery's Ex'r v. Northcutt, 292 Ky. 622, 167 S.W.2d 317 (1942).
one-fifth share, but Mary was given only a life estate as to her one-fifth portion, with a remainder to testator’s heirs and children unless Mary should leave surviving her, heirs of the body, in which case her share (one-fifth) would go to her surviving children. The life tenant died childless forty years following the death of her father, the testator. As is usually the case when the life tenant lives an inordinately long time, the remaindermen die off, raising serious problems of construction for the courts. Two of testator’s sons predeceased Mary, one leaving a widow and no children, the other leaving only children. The court held that the remainder created in the testator’s children, the brothers of Mary, was vested, and, hence, the widow of the one deceased brother and the children of the other deceased brother of Mary were entitled to a distributive share in the one-fifth of the estate enjoyed for life by Mary. Had the court ruled the remainder to be contingent, of course, only the brothers who survived Mary would have been entitled to share in Mary’s one-fifth of the estate.

The Kentucky Court of Appeals made a similar ruling in the case of *Fugazzi v. Fugazzi’s Committee.* In *Fugazzi,* the testator died in 1924, devising certain real estate to his widow for life with a provision that upon his widow’s death, the property be divided among the testator’s children. He also devised a house and lot to his daughter Ruby for life, and upon her death, the residence was to go to the widow for life, with remainder to all of testator’s children equally. Ruby, the daughter, died married and intestate in 1926, leaving a husband and a son who died shortly after his mother. After the death of Ruby, her husband transferred the residence by quit-claim deed conveying any interest in the testator’s estate to the six surviving children of the testator named as devisees in the will. Ruby’s son devised his property to his wife, Marie, who, at the time of the litigation, had been declared non compos mentis. A committee was appointed to protect her interest. When Frances, the widow of the testator, died in 1938, five surviving sons claimed all of the property as sole owners. The Committee objected claiming that the remainder in the children was vested, and the one-seventh interest of Ruby passed by descent to the son upon whose death his wife, as devisee, became entitled. The court sustained this view and held that Marie, the incompetent, was entitled to a one-seventh undivided interest which had passed by intestacy of Ruby to her husband and which she got by his will.

16. 275 Ky. 62, 120 S.W.2d 779 (1938).
In Mansur v. Security Trust Company, another interesting case, the court ruled that remainder to the issue of the life tenant was contingent until a child was born. There the testatrix devised to her sole surviving daughter a beneficial interest in a trust for her life, the testamentary trust provision also providing that upon the daughter's death, if any issue of the daughter was left surviving then the whole of the trust estate to such issue in such proportion as said issue would respectively take under the then existing Kentucky statutes of descent and distribution. Thirty-three years later, the daughter died testate and without issue, devising all of her property, including any interest in her mother's trust estate, to Christ Church Cathedral of Lexington, Kentucky. Other heirs-at-law of the mother brought suit against the trustee, claiming an interest in the trust corpus contending that the daughter took only a life estate, and that the attempted bequest and devise of the mother's trust estate was nugatory. The court of appeals held that until issue was born to the daughter, the remainder in the trust corpus in such issue was contingent. Until such remainder vested, the corpus of the trust was a reversionary interest in the settlor testatrix, which, because the daughter was the sole heir, passed to the daughter and became subject to disposition by her will. Accordingly, the trust property did not vest in the trustee.

A similar result was reached in Mountjoy v. Kasselman. The testator left as his sole heir and distributee at law, his daughter, Louise. By his will, the father left his realty to his daughter, Louise, for life, adding a general testamentary power of appointment to her gift. The will contained no residuary clause nor any provision for the disposition of the property after the death of Louise. The court held that Louise could, in her lifetime, convey a fee simple to the land, reasoning that on the death of her father, Louise acquired a fee simple absolute through a merger of her devised life estate and the reversion which descended to her as sole heir of her father by intestacy. In effect, Mountjoy stands for the rule that an estate in fee and a power appendant may subsist in the same person, but the power is extinguished upon a conveyance of the fee.

In Kentucky whether a fee simple absolute is conveyed or devised depends upon the language used and the intent expressed in the four corners of the instrument. In solving this construction problem, there is no presumption that a fee is intended. So in Bourbon Agri-
In this case, the testator’s will created a trust of devised property to the trustee for testator’s only child, a son, for life, with remainder to the son’s children. The court held that the trustee took only an estate commensurate with that of the son’s life estate with a reversion arising in the testator of the legal title which settlor thought he had created in equity by the trust. Hence, the son, being the only heir, succeeded to the reversionary interest through intestacy, and the son took a fee simple estate subject only to be divested upon his having children. The son, in fact, did die childless, and the court held that the estate descended to his heirs, one-half on father’s side and one-half to his mother’s side. The heirs of the father claimed the absolute estate as heirs of the testator. It would appear that the court of appeals took too narrow a view as to the title the testator thought he was devising to the trustee as it would seem to have been the intention of the settlor that the remainder in the children of the son would be in equity. Had the view of the testator’s heirs prevailed, the trustee would have held the property by way of a resulting trust for the estate of the settlor upon the death of the life tenant son without children. It may be that this result was dictated by a feeling that the direct heirs of the son should be favored rather than more remote lineal heirs of his father. The lesson is plain here: in creating a Kentucky trust, the instrument should clearly and expressly devise or convey a fee simple estate to the trustee, because as Bourbon Bank demonstrates a fee devised to the trustee will not be presumed. It is worthy of comment that the court of appeals in Bourbon Bank paid scant attention to the Kentucky statute which reads: Unless a different purpose appears by express words or necessary inference, every estate in land created by deed or will, without words of inheritance shall be deemed a fee simple. . . .

Another instance in which the court determined a remainder to be vested is the case of Clay v. Security Trust Company, wherein the testator, who died in 1932, created a testamentary trust for his sister, Laura, for life. The will provided that after the death of Laura, the trustee was to hold the trust corpus for Laura's son John paying the income therefrom when the nephew John became 35, and to pay the principal to John at age 45. John survived the testator,
but died in 1944 before attaining the age of 35. His mother, the life beneficiary, died in 1951. The court held that John had a vested interest in the trust property by way of remainder with merely the enjoyment postponed. On John’s death, the trust property went to John’s devisee under his will. This is another example of a long-living life tenant outliving the remainderman.

A similar result was reached in the case of Fitschen v. United States Trust Company. In this case the father-testator died in 1918 and, by will and codicil, bequeathed his personal property to his wife, Nannie, and created a testamentary trust of his realty to be held for the benefit of Nannie for life or until her remarriage, and then the trust property was to go to testator’s two named sons, Theodore and Fred. The testator further provided that if the sons were not living, then to their heirs under the statutes of descent and distribution. Theodore, one of the sons, survived his father, but died during the life of Nannie, intestate and childless in 1931. The other son, Fred, died in 1945 survived by his widow to whom Fred devised all of his property. The court held that the equitable remainders in the sons were vested and passed to their heirs and devisees. It is noteworthy here that the life beneficiary survived the testator by twenty-nine years, another instance wherein the life beneficiary outlived the two remaindermen.

In McKnight v. Fleming, a testatrix devised land to her husband, H, for life, with a power of sale, and then to testatrix’ granddaughter, Annie absolutely. H remarried, and on his death, he devised the same land to his second wife, W, for life, remainder to Annie in fee. The court held that the power of sale added nothing to the life estate of H, and that Annie, the granddaughter, took the land as remainder person under the original will of the testatrix as H had only a life estate in the land.

A similar result was reached by the court of appeals in the case of Cornelison v. Yelton. In this case, H, the owner of land conveyed it to his wife, W, for life with a power of sale, and if the land was not sold, then to H, the owner, if he were still living, “and his children,” and if H was not living, then to his children. At the time of the conveyance, H and W had a child, Willie, age sixteen in 1905 who died two years later without issue. In 1938 H, the original grantor died, survived by W who, during her lifetime, did not exercise

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22. 313 Ky. 700, 233 S.W.2d 405 (1950).
23. 309 Ky. 486, 218 S.W.2d 44 (1949).
24. 296 Ky. 501, 177 S.W.2d 879 (1944).
the power of sale. She died in 1941 devising all of her property to her nephew, Cornelison. The heirs at law of the grantor brought suit to establish title as against the claim of Cornelison. The court upheld the claim of the heirs on the ground that the reversion passed to them on the death of the life tenant, who never exercised the power of sale and hence the condition of defeasance was never fulfilled. All W took was a life estate.

We have seen that Kentucky courts have followed the common law rule that a vested remainder is no less vested because a class may open to admit new class members. However, when the class can no longer be enlarged and the remainder vests in possession, of course, the children can convey a good title when the children form the only possible class members. Thus, in *Sermersheim v. Ackerman*, where the husband (H) conveyed land to his wife (W) for life, with remainder to their children in fee, and then H and W divorced, and W died, it was held that the children of H and W could convey good title free of any claim of afterborn children of H who may marry again.

At common law, contingent remainders were destructible; but that is no longer the law in Kentucky as well as all but a handful of states. A contingent remainder under the old precedents required a supporting freehold estate, and if the prior freehold estate fell either by a tortious feoffment, or by merger with the reversion, the remainder was destroyed. Despite the abrogation of the doctrine of contingent remainders in Kentucky, the court of appeals in 1940 ruled in effect that a contingent remainder could be destroyed. In the case of *Lawson v. Asberry*, a grantor in 1908 conveyed land to his niece, for life, with a remainder in fee to her bodily heirs. The deed contained a reserving clause that the conveyance was made in consideration of the niece supporting the grantor during his lifetime. The original deed consisted of 111 acres of land. Later, the niece reconveyed back to her uncle, the grantor, fifty-three acres of the originally conveyed land in consideration of the uncle’s release of her agreement to support him. The original grantor, then recon-

25. 284 Ky. 357, 144 S.W.2d 804 (1940).
26. Ky. Rev. Stat. § 381.100 (1972) which reads as follows: “A contingent remainder shall, in no case, fail for want of a particular estate to support it.”
   KY. REV. Stat. § 381.110 (1972) which reads as follows: “The alienation of a particular estate on which a remainder depends, or the union of such estate with the inheritance by purchase or descent shall not operate by merger or otherwise to defeat, impair or affect such remainder.”
27. 283 Ky. 390, 141 S.W.2d 564 (1940).
veyed the fifty-three acres to Asberry. Grantor then died in 1931 and the title to the fifty-three acre tract was challenged by the children of the niece. The court held that indefeasible title was in Asberry, the opinion pointing out that the title of the children (of the grantor’s niece) was dependent upon the fulfillment of the condition by the life tenant, their mother, and the new agreement between the parties (grantor and his niece) that the contract of support shall not be fulfilled deprives not only the life tenant but the remainder persons of any right or title to the land. In holding that the release could be asserted against the contingent remaindermen, the court holds that, in effect, the contingent remainder is destroyed. At common law, the same result would have been reached by a merger of the life estate conveyed by the niece back to the grantor and his reversion, thus destroying the contingent remainder.29

As previously stated, survivorship in Kentucky, as at common law, involves a contingency, as it is necessary to wait until the termination of the preceding estate to determine who “survives.”29 In the case of Ford v. Jones,30 the testatrix devised the residue of her real estate to her sons for life, and then to the survivor for life, then to all her surviving children and their heirs. The court held that the sons and all of the other children of the testatrix could not convey a fee simple estate. In Kentucky, by statute, a contingent remainder is indestructible.31 At common law, the sons and the other children of the testatrix could have conveyed away a fee simple estate since all of the children would have inherited the reversion from the testatrix, and a conveyance by the life tenants and all of the children would have also conveyed the reversion, thus uniting all of the estates in a fee simple status in the transferee.32

Kentucky follows the common law doctrine of worthier title, or the rule that forbids the creation of a remainder in the grantor’s rightful heirs.33 At common law, this was a rule of property, and despite the efforts of a grantor to create a remainder in his own heirs, the grantor still would have a reversion, and his heirs would take a more worthy title by descent than as “purchasers” under the deed. The rule persists in Kentucky and in about three-quarters of

30. 223 Ky. 327, 3 S.W.2d 781 (1927).
American jurisdictions as a rule of construction. This means that the language of the instrument is clear enough. As was stated by Justice Cardozo speaking for the New York Court of Appeals in *Doctor v. Hughes,* to overcome the presumption that a reversion rather than a remainder was intended, "the intention to work the transformation must be clearly expressed." The doctrine of worthier title was later abridged by statute in New York.

The Kentucky court strictly applied the doctrine of worthier title in the case of *Pewitt v. Workman.* In *Pewitt,* the owner of land conveyed it by deed to his wife for life, "and then to the heirs of my body." O then devised the same land by his will to W and her heirs. It appeared that W had children by her first marriage, but none by O. O had previously married and had children born of that union who claimed the land by way of the original remainder in the deed to W. The court held that when W died intestate, her heirs were entitled, and O's children of his first marriage took nothing. Applying the doctrine of worthier title, the court held that after the first conveyance, O had retained a reversion which passed to W by O's will. A merger of the life estate and the reversion in fee put absolute title in W which passed by intestacy to her heirs. An earlier Kentucky case is in accord. In *Alexander v. DeKermel* O, the owner of land conveyed it to A for life, and then to the grantor's heirs. O later died testate devising the same land to DeKermel. The court held that DeKermel, the devisee, was entitled and that no remainder in O's heirs was created by the deed of conveyance. O retained a reversion which passed to his devisee upon the death of A.

But in a recent case in 1965, the court did enforce a remainder to the heirs when the intent to create a remainder was to be found from the "four corners of the instrument." The testator left a will devising land to his wife for life, with a remainder to "my nearest blood relatives under the laws of the State of Kentucky." The court held that all of the heirs at law of the testator who survived him took a vested remainder in the land on a per stirpes basis and that such interests vested at the date of the testator's death. This case appears to be authority that where the intention of the testator is clearly expressed that a remainder is intended, the court will so enforce as

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35. 225 N.Y. 305, 122 N.E. 221 (1919).
36. N.Y. Est., Powers & Trusts Law §§ 6-4.3 & 6-5.9 (McKinney 1967).
37. 289 Ky. 459, 159 S.W.2d 21 (1942).
38. 81 Ky. 345 (1883).
a remainder, and the doctrine of worthier title will not apply.

Under modern law in most states, certain contingent remainders are assignable. In the earlier common law, a contingent remainder was not transferable, such a transaction smacking of champerty. Of course, the assignee of the contingent remainderman gets only that right which the transferor had, and, if the contingency rendering the remainder contingent is not met, the transferee would take nothing. In *Lindenberger v. Cornell*, the testator created a life estate in his widow, with a remainder to the testator's mother with a provision that if the mother predeceased testator's widow, then the property was to go to the testator's brothers and sisters surviving the life tenant. A conveyance of interests was made by the mother, the brothers, and sisters to the widow. The court held that this was not sufficient to give the widow a fee simple estate, since if the mother, brothers and sisters of the testator were all to die during the tenancy of the life estate holder, the property would go as undisposed property to the testator's heirs.

In the strange case of *Barnes v. Johns*, the testator devised land interests to his five children, each to receive a one-fifth interest, one-half of which was a gift outright in fee, and the other one-half given to each child for life, with a remainder in fee to their respective children. One of the testator's daughters died childless, testate, devising her property to her husband. The court held that as to the one-half interest in which Mary had only a life estate, at her death this portion went to the testator's heirs as intestate property under the Kentucky statute of descent and distribution, rejecting the contention that Mary was intended to take the whole which was to be divested only if she died leaving children. At common law, the remainder interest in children yet unborn would be contingent until the birth of a child when the remainder would vest subject to partial divestment upon the birth of later children who would share in the vested remainder.

In several cases, the Kentucky Court of Appeals dealt with the type of relationship that exists between a life tenant and a remainderman. Is this a relationship that is "amicable" or adverse? In *Superior Oil Corporation v. Alcorn*, the court suggests that the relation between the life tenant and the remainderman is not per

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41. 190 Ky. 844, 229 S.W. 54 (1921).
42. 261 Ky. 181, 87 S.W.2d 387 (1935).
44. 242 Ky. 814, 47 S.W.2d 973 (1930).
se adverse, but "amicable" and the general rule is that a remainder person does not have to take any steps to protect his title and interest until the life estate terminates. In this case a husband, upon the death of his wife took and held land as tenant by the curtesy under an old Kentucky statute, and he immediately conveyed away the land, dying in 1919. The court held that the remainder people could assert their good title against the transferee of the husband, who, by the transfer, received only a life estate pur autre vie. Thus, in 1919, for the first time a cause of action that could be assertable arose in the remainderman, since that is the first year they became entitled to possession and enjoyment. In its opinion the court said that while it is true that Kentucky law gives a right to the holder of a future interest to sue in declaration of right, the law does not require the future interest holder to sue. The court stated that there is a difference between saying that a remainderman may sue and saying he must sue. In this case, the husband had no color of right, and, thus, his purported conveyance of the fee did not cause his life estate to terminate when he conveyed, thus requiring future interests to file at such time. They could wait until the death of the husband, when his life estate terminated. This case follows the rule generally, that ordinarily the right of a remainderman to recover land must await his entitlement to possession upon the death of the life tenant, and accordingly the statute of limitations will not commence to run until then.45

Although the general rule is as stated in the *Superior Oil* case, that a life tenant holds amicably with and not adverse to the remainderman, and hence, no limitation runs against the remainderman until the death of the life tenant, a situation arose in *Hargis v. Fleshner Petroleum Co.*,46 which requires the future interest holder to move immediately to protect his interest. In 1887, the husband, believing that he had been devised a fee in the land from his wife, made a conveyance of the "fee" to a transferee. In fact, the will was void under the then Kentucky law which prohibited a married woman to devise land unless such land had been set apart for her separate use, or in exercise of a power. The remainder people waited until 1912 when the husband died to claim the land as remaindermen. The court held that the future interest holder's claims were barred by the Kentucky statute of limitations. The court reasoned that although the husband's true estate was only a life interest by

46. 231 Ky. 442, 21 S.W.2d 818 (1929).
curtesy, he had been devised the land and hence had “color of title” even though the will did not devise the fee, since the wife legally had no power to do so, and the will was void; nevertheless, it did give color to claim and title of the husband. His act of transfer then was an adverse act denying the validity of the future interest holder. This started the running of the statute of limitations. It was incumbent upon the remaindermen at that time to commence the suit to recover. By waiting until the death of the husband, the court ruled that their claim was barred by the statute.

It should be noted that the result in *Hargis* is consistent with similar holdings in courts in other states to the effect that a void deed while it passes no land interest will give the grantee sufficient color of title to protect his interest and plead the statute of limitations since an immediate cause of action commenced upon the claim of fee simple which is adverse to the purported interest of a remainderman.

Kentucky follows the general rule that until a remainderman is entitled to possession, an action of ejectment will not lie since the life estate is still outstanding.

II. POSSIBILITY OF REVERTER

At common law, in addition to the fee simple absolute estate which was of the highest dignity, it was possible to create a somewhat lesser fee simple estate wherein the grantor and his heirs retained a tie to the land whereby if a certain event were to occur, the land would revert back to the grantor or his heirs, or if a certain event happened, the grantor reserved a right in himself and his heirs to enter and declare the estate of the grantee at an end. The first type of estate gave the grantor a future interest known as a “possibility of reverter” and the second “a right of entry for condition broken.” In the first type, the estate of the grantee of a fee simple determinable ended automatically upon the happening of an event without the grantor or his heirs doing anything. In the second, the happening of an event in effect gave the grantor and his heirs an option as to whether to reenter and reclaim the land according to the express terms of the conveyance, or ignore it and permit the


grantee to continue in possession undisturbed. The second type is referred to as a power of termination in the grantor and his heirs which is a right of entry for condition broken.

An example of a fee simple determinable is in the situation:

O to A and his heirs so long as St. Paul’s stands.

Because the estate in the granted premises could last forever, it is a fee simple; but because it could end upon the collapse of St. Paul’s it is determinable. If and when St. Paul’s Cathedral, London comes tumbling down, the estate of A automatically ends without any action required by O or his heirs.

An example of a fee simple subject to a right of entry for condition broken is as follows:

O to A and his heirs, but if liquor is ever sold on the premises then O reserves the right on behalf of himself and heirs, etc. to enter the land and declare the title in the grantee and his heirs at an end.

It is to be noted that at common law, if and when liquor is sold on the premises, the estate of A does not automatically terminate. This requires an exercise by O of his power to terminate.

These peculiar estates are no longer so important in the modern law but occasionally today, practicing lawyers find a use for them. In the early days of America, land would be conveyed by a generous grantor for school or church purposes, and usually not in the form of a fee simple absolute, but in the form of a fee simple determinable, the deed providing that if the land ever ceases to be used for school or church purposes, it would revert back to the grantor and his heirs. Their continued existence does clog titles and interferes with the free alienation of land because of the limited land use by the terms of the deed. And this, coupled with the fact that at common law, the future interest held by the grantor and his heirs, viz., possibility of reverter and right of entry for condition broken were not within the application of the Rule Against Perpetuities, both of these estates have fallen into disfavor today. The state legislatures in many states including Kentucky have sharply reduced the rights of the grantors of these estates.50 Such reform statutes usually take the form of limiting the period of time in which the grantor may

50. Ky. Rev. Stat. §§ 381.218-.219 (1972). As will be seen in the statutes section of this presentation, infra, the Kentucky legislature has severely limited the right of the future interest holder of these common law estates by converting all possibilities of reverters to rights of entry for condition broken and limited the period of time in which such rights may be successfully asserted.
reclaim the land, e.g., forty years in Illinois, thirty years in Massachusetts.52

Another form in which disfavor is shown against these estates is by the judiciary requiring substantial compliance with the exact terms of the condition; hence, a mere temporary or insubstantial breach of a condition will not give the grantor an assertable right to declare the grantee’s estate at an end. Thus, in *Sargent v. Trustees of Christian Church of Little Cypress*,53 the Kentucky Court of Appeals ruled that mere temporary and explainable non-compliance with the purpose of the conveyance will not justify a reentry by the grantor. In this case, owner of land, conveyed it and a building to a church and Masonic Lodge “so long as the premises were to continue as a church and order.” During the economic depression of 1929-1933, services in the church portion were discontinued temporarily due to financial difficulties including the difficulty in replacing a clergyman and in finding a new church affiliation. The court, in denying the right of O to reclaim the land, states that as a matter of construction, the deed is to be construed most strongly against the grantor and most favorably toward the grantee, and that a mere temporary and explainable discontinuance of church services will not at law constitute an abandonment of purpose. There was proof of extensive illness among the congregation as well as financial problems.

Following common law precedents, the Kentucky court in *Bowling v. Grace*54 upheld the validity of a fee simple determinable against the contention that it suspended the absolute power of alienation under an old Kentucky statute.55 In this case, the grantor’s deed provided that if the land conveyed was not used for school purposes, the land would revert to the grantor, etc. The court noted that a possibility of reverter may be released at any time to the holder of the fee simple determinable after which the grantee would hold a fee simple absolute.

In *Commonwealth v. Pollitt*56 the court upheld an unusual conveyance of a fee simple determinable. By will the owner of land devised by gift to a school district land on condition that if his son, named, who had disappeared shall return and identify himself, the

51. ILL. REV. STAT. ch. 30 § 37e (1975).
52. MASS. GEN. LAWS ANN. ch. 184A, § 3 (West 1955).
53. 252 Ky. 57, 66 S.W.2d 5 (1933).
54. 219 Ky. 496, 293 S.W. 964 (1927).
55. KY. STAT. § 2360 (1922).
56. 25 KY. L. REP. 790, 76 S.W. 412 (1903).
property could be reclaimed by the son. It appeared that the son had mysteriously disappeared before the testator made his will and had not been heard from since the testator’s death. The court held that the school district held a determinable fee subject to be divested upon the return of the testator’s son. 57

By a 1960 act, the Kentucky legislature brought the fee simple determinable to a merciful end by converting all subsequently created fee simple determinables to fee simples subject to entry for condition broken, and limiting enforcement to thirty years from creation. 58

III. CONSTRUCTION OF LIMITATIONS

A review of the Kentucky cases in the appellate court reflects, as could be expected, that problems of construction of instruments form the bulk of the work of the court in property future interest cases. Often the opinions express the idea that the intention of the grantor or testator is the polar star of construction. 59 What did he want? What did he mean to do? Many flawed, ambiguous, and inconsistent instruments come before the court’s scrutiny, and the construction problem is often aggravated by the unfortunate choice of language which, over the centuries of court precedents, has come to take on technical meanings which the testator may or may not have intended. Often the courts will say that the intention of the transferor must be garnered from the four corners of his instrument. 60 By this is meant, it is supposed, that the court should not select one particular expression of language, one particular paragraph or item in the dispositive instrument, and conclude the intention of the transfer from that. Rather, the instrument should be read as a whole. Where it has been shown that the testator meant “children,” but used the term “heirs,” the Kentucky precedents have construed the instrument as the testator intended. 61 And so if the testator used the word “children” but really meant “heirs.” In at least one instance, the court of appeals used that old construction gambit of deriving the intent of the testator as meaning one thing, because in another part of the instrument he demonstrated that “he

57. There is no problem in this case with the rule against perpetuities since the time in which the land could be reclaimed would be the son’s life, a life in being at the creation of the interest.
59. See Johnson v. Citizen’s Fidelity Bank & Trust Co. 414 S.W.2d 413 (Ky. 1967).
knew how to create a life estate." Thus, the words "heirs" and "heirs of the body" will not always be given their technical legal meaning where the entire will reflects that the testator only intended the taker to have a life estate.

But absent such evidence, the court will construe the phrase "and bodily heirs" as meaning what it says, the devisee taking a fee under the Kentucky statute converting a common law fee tail estate into a fee simple estate. In the Whittaker case, the testator devised land to his son "and the heirs of his body," the will expressly stating the testator's purpose to be "to secure to each of my children a house free of debt which at their death the land shall pass free and unencumbered to their children." The court held that it was the clear intent of the testator despite the use of language which at common law would have created a fee tail in the son, that the son was to take a life estate only.

An instance wherein the word "heirs" was not given its legal and technical construction is illustrated in the case of Waggener v. Penn. Here, the testator devised a number of lots of land each to his children by identical devises. The devise in litigation was to the testator's daughter Orra, "for her natural life, and at her death to descend immediately to her heirs." A further provision forbade the daughter to sell her interest. It appeared that all of the testator's children died childless, and the testator's "line went out." The daughter, Orra, was the last to die, and before she died, conveyed the land, purporting to transfer a fee simple. The daughter's collateral heirs claimed the land at her death by virtue of the devise by her father. The court held that the heirs were not entitled, but rather the transferee. The court concluded that, while the testator used the term "heirs," he really meant "children," since the will spoke in terms of the land "descending." The court reasoned that the daughter held a life estate and a remainder in the land if she and all of her father's other children died leaving no children, under old Kentucky statutes 1393 and 4843. The daughter took the remainder which was subject to defeasance if she left children when she died. Since the defeating disposition never occurred, i.e., dying leaving children, her conveyance passed a fee. The court relied upon a precedent in earlier litigation of the same will, Hughes v. Clark,

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64. 257 Ky. 124, 77 S.W.2d 427 (1934).
65. 16 Ky. L. Rep. 41, 26 S.W. 187 (1894).
in which case the word "heirs" was construed as "children," and that, upon the death of one of the devisee's children, such interest would vest in fee in the other children. The original portion devised to any child was held subject to be defeated only by such child dying leaving children who would take under the will and divest the parent. So the transferee would take the fee by the conveyance from Orra subject only to divestment in the event Orra died leaving children. The court concluded its opinion by stating that Orra's deed conveyed her life estate "and her remainder." Undoubtedly, substantial justice was attained in the Waggener case. The blood relation of the testator, the daughter, and her transferee, should prevail over remote collateral relatives, but the manner in which the court reached the result is via a mysterious route. The court said that the daughter had a remainder, but this was pulled out of thin air. By the court's own construction of heirs as children, Orra's children, not Orra, had the remainder. It would have been better reasoning for the court to reach this result by an analysis that the reversion passed to Orra as the sole surviving heir of the testator, which enabled her to convey, along with her life estate, a fee by deed to her grantee.

Legislatures were too quick to abrogate the Rule in Shelley's Case. How simple the solution of Waggener would have been then. By the devise to Orra and her heirs, she would have taken the fee simple by devise which her deed would have passed to her grantee. It should be noted in passing, that the court slips over the limitation on Orra's right to convey her interest during her lifetime simply by stating her "remainder" was subject to no such limitation. Later in this presentation, we shall see how the Kentucky courts permit restraints on alienation to a degree not countenanced by most courts in other jurisdictions.

In another construction problem presented to the Kentucky courts, the testatrix devised realty to her sister for life, and then provided the land to be distributed between "my grandnephews and nieces then living." The court ruled that grandnieces as well as grandnephews were entitled to share in the property upon the death of the life tenant, ruling as a matter of construction the word "grand" appearing before nephews also modified nieces.66

Built-in ambiguities are the banes of courts when a will is presented for construction, usually because the executor of the will omits an important instruction which the court may have to fill in.

66. Shedd's Adm'r v. Gayle, 288 Ky. 466, 156 S.W.2d 490 (1941).
In *Howard v. Howard's Trustee*, the testatrix, grandmother of the plaintiff beneficiary, created a trust with gifts to the plaintiff payable upon her attaining the age of twenty-one. Then, ambiguously, the testatrix added a provision that should the granddaughter (plaintiff) die without children, then a gift-over to the testatrix' daughter. The important element omitted causing the ambiguity was when the gift-over was to take effect. Did the testatrix intend only that the gift-over would take effect if the plaintiff were to die childless before age twenty-one or at any age? The plaintiff married and became the mother of children. Attaining the age of twenty-one, she demanded payment of the trust gift from the trustee who declined to pay on the ground that the plaintiff could still die without children, and then the gift-over would take effect. The court resolved the ambiguity by holding that the plaintiff beneficiary had only to survive until the point of distribution, the age of twenty-one. Thereafter, the testatrix did not intend that the gift would be divested. The plaintiff was immediately entitled upon becoming twenty-one, and her gift indefeasibly vested whether or not she is later to die without children. The lower court held that the trustee was correct. Reversed.

Another ambiguity that had to be resolved by the court of appeals was whether the term "children" in the testator's will included those adopted or was limited only to natural children born to the parents. In *Sanders v. Adams* a testator devised land to his widow for life and, upon the death of his wife, the testator's two daughters, Maggie and Lizzie, were each to receive a one-half interest in the land for life, and on death each daughter's interest was to go to the children of each daughter respectively. In the same will the testator devised other farm property known as the Collier farm to a third daughter, Martha Mattie, for life, and, if Martha Mattie should die without children, then the Collier farm was to be equally divided among the other two daughters, Maggie and Lizzie. Martha Mattie married thereafter and adopted two children, Dora and James. By will, Martha Mattie, now a widow, devised her property to her adopted children. Upon the death of Martha Mattie without natural born children, a suit was filed by Maggie and Lizzie to recover the Collier farm claimed by Dora and James, the adopted children of Martha Mattie. The lower court ruled in favor of the sisters, Maggie and Lizzie. The court of appeals affirmed, holding that while Dora

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67. 212 Ky. 847, 280 S.W. 156 (1926).
68. 278 Ky. 24, 128 S.W.2d 223 (1939).
and James could, as adopted children, inherit from the adopting parent, they did not qualify as "children" since an adoption creates an "artificial relation." This decision is disappointing and backward-looking. The testator did not qualify the word "children" as limited only to those naturally born to his daughter, although he could have. The trend in the modern cases in other jurisdictions is to the contrary for the reason that an adopted child is a lawful child. The testator's will should have defined the terms used in the will so that the word "children" would include or exclude adopted children. This would have avoided a suit for construction and clarification.

In another case involving property rights arising out of an adoption, the court of appeals in *Bedinger v. Graybill's Executor* solemnly held that a husband could legally adopt his adult wife to qualify her as a beneficiary of a trust created by his mother as the son's "heir-at-law." In the *Bedinger* case, the testatrix's will established a trust for the son, Robert, for life, and on his death the trust corpus was to be distributed among the son's heirs-at-law in accordance with the statutes of descent and distribution then in force in the Commonwealth of Kentucky. In 1922, the year his mother died, the son married. In 1941 when the son, Robert, was fifty-eight years of age, and his wife, Louise, was forty-five, Robert formally "adopted" his wife "as his legal heir at law." Robert died childless. In a suit brought by the trustee to determine if the wife, Louise, was entitled or only the natural heirs of the son, his cousins, the court held for Louise. The court of appeals divided sharply on this result four to three.

In *Minary v. Citizens Fidelity Bank and Trust Company* the court of appeals narrowly distinguished *Bedinger v. Graybill's Executor*. In *Minary*, the testatrix created a testamentary trust which provided that the income would be paid to her husband and to her three named sons. The trust was to terminate upon the death of the last surviving beneficiary with the corpus to be distributed "to my then surviving heirs according to the laws of descent and distribution then in force in Kentucky." The last survivor, a son, adopted his wife "as his child." In an action to construe the will, the court of appeals held that the adopted "child" of the surviving son was not entitled to take under the will of the testatrix, as she

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70. 419 S.W.2d 340 (Ky. 1967).
71. 302 S.W.2d 594 (Ky. 1957).
was not considered an heir at law of the testatrix although she was an heir-at-law of the son. The court distinguished the Bedinger case on the ground that, in Bedinger, the bequest was to “heirs-at-law of the son,” whereas in the principal case, the gift-over was to heirs-at-law of the testatrix.

In Harper v. Martin, a newly constituted court of appeals (not the Kentucky Supreme Court) ruled that the subterfuge doctrine, i.e., the practice of adopting an adult solely for the purpose of making such adoptee an heir under terms of a testamentary disposition, has no application to an intestate distribution since there is no plan for distribution that would be thwarted by permitting an adopted person to inherit. By this decision, the doctrine of Minary is limited to testamentary dispositions.

A. Life Estate or Fee Simple?

One of the most intriguing ambiguities the Kentucky courts have been called upon to resolve is the construction problem presented when the testator seemingly devises a fee simple absolute in the first paragraph of his will, and, in a second paragraph, qualifies the first by making a provision for a gift-over on the death of the devisee. Thus, the testator gives with his right hand and then takes something back with his left hand. The ambiguity arises because the testator cannot have it both ways. He cannot give absolutely a fee simple and then provide that at the death of the devisee, the land interest shall go to someone else. It is impossible to comply with these directions of the testator because one contradicts the other. Either the devisee has a fee and the gift over is void, or the devisee takes something less than a fee and the gift-over takes effect. It seems that at common law a devise of land to A and his heirs, and on the death of A to B and his heirs, A would take a fee simple absolute and B take nothing since the gift-over is repugnant to the fee simple. In general the Kentucky cases do follow this common law rule if the expressed intent is clear enough that the devisee has the power to consume or convey the land interest.

Sometimes the ambiguity arises in a conveyance where the granting clause of the deed conveys a fee simple but the habendum clause expressly states that the grantee shall have and hold for his lifetime. These inconsistent clauses were considered by the court of appeals

72. 552 S.W.2d 690 (Ky. Ct. App. 1977).
74. Sumner v. Borders, 266 Ky. 401, 98 S.W.2d 918 (1936).
in *Woods v. Cook*, with the court construing the habendum clause as the clause that expressed the true nature of the estate the grantee was intended to take. This construction was aided by the grant of a remainder to others following the death of the grantee. Thus, the grantee took only a life estate and the remainders' rights were not affected by the granting clause purporting to convey a fee to the grantee. This case probably shows the folly of copying the words out of an old deed or form book. It is to be noted that where the deed does not purport to create remainders, any conflict between the granting clause and the habendum clause is, by the majority, traditional view, resolved in favor of the granting clause, for these are the words of conveyance. Thus, the rule followed in the majority of American jurisdictions: "The granting clause creating a fee simple estate will prevail over the subsequent habendum clause granting a less estate." But there is much law contrary when the deed expressions clearly show that the lesser estate was truly intended.

But where the testator's will devised to his widow "all my estate to do with as she sees fit" with a separate clause in the will providing a limitation over to the testator's brothers and sisters at the death of his widow "if she has any of my real or personal property at that time," the court held that the widow took a fee simple absolute estate and the attempted gift-over was void as repugnant to the fee. The court said in this case that the testator gave his wife all of the accoutrements of absolute ownership in fee "to do with as she sees fit." The wife did so do as she saw fit. She died intestate and the property devised to her by her husband went to her heirs, and not to the testator's brothers and sisters.

The Kentucky Court of Appeals was assuredly correct in the decision of *Sumner v. Borders* wherein the husband gave his wife a fee simple absolute with words indicating it was hers to do with as she saw fit, i.e. to sell, to devise, or to permit it to descend by way of intestacy as she chose. What the testator did not know was that by once absolutely devising his property it no longer remained his property, and his will could have no more effect on the disposition of that property than on the wife's own property which indeed it became by the terms of the husband's will.

75. 248 Ky. 216, 58 S.W.2d 404 (1933).
77. See Grayson v. Holloway, 203 Tenn. 464, 313 S.W.2d 555 (1958).
79. 266 Ky. 401, 98 S.W.2d 918 (1936).
In *Campbell v. Prestonburg Coal Company* the court construed conflicting language in a grantor's deed. The owner of land conveyed it to the grantee and his heirs and, in a later paragraph, provided for him "to have and to hold forever" and that the "intention of this deed is to convey the said land to the grantee and his children as heirs of his body." Surely a more butchered legal document could not be imagined. The court construed the phrase "and the heirs of his body" as words of limitation and not as words of purchase; hence, the grantee took a fee simple estate since the fee tail had been abolished by statute. The court applied here a rule of construction suggested by another Kentucky statute "a fee intended rather than a lesser estate." In yet another gem of ambiguity presented to the Kentucky courts, the testator's will ambiguously bequeathed the residue of his estate to his wife "to be hers absolutely until her death," with the remainder to his named daughters, Pauline and Lillian, the step-children of his wife. The court held that despite the language of "absolute," the wife took only a life estate in the property with remainders in the two stepdaughters. The court acknowledged that such cases present difficult construction problems since if truly the wife was intended a fee, the gift-over could not be given effect. But here, the language of the testator was clear enough despite his bequest to his wife "to be hers absolutely" because he stated expressly it was to be hers absolutely until her death. This is the language that creates a life estate, not a fee simple.

But where the testator's will bequeathed the residue to his wife, absolutely without restriction, "that she might dispose of it as she deems fit and use the proceeds as she wishes," the court held nugatory an attempted gift-over to a niece created by the testator's will as to any part of his estate not disposed of by his wife. The court said that cases seeming to hold to the contrary were all cases in which the devise created a life estate solely, with a power to dispose or a power to appoint. Then, if the power is not exercised at the termination of the life estate, the gift-over can take effect. So the court held the gift-over void as repugnant to the fee bequeathed.

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80. 258 Ky. 77, 79 S.W.2d 373 (1934).
84. Craig v. Radelman, 199 Ky. 501, 251 S.W. 631 (1923). Note that in the Craig situation, it is not possible to treat the gift-over as an executory limitation, the gift-over taking effect
There are a number of cases in which the Kentucky courts have found that only a life estate was intended to be created in a devisee where the language is express that it is the testator's desire that the land should descend and "remain in the family." Such language is inconsistent with a fee since it is a characteristic of a fee that it can be sold by the fee simple owner. Thus, in Robson v. Gray the testatrix devised land to her grandson, G, providing that if G die leaving a wife, his widow was not to get dower in the land, and, further, that G had no power to sell the land to any person, and that it was the testatrix' wish that the land shall descend to G's heirs and remain in the family and never be sold. The court held that considering all of the language of the will, the testatrix intended that G was to take only a life estate, with remainder in G's children in fee. The court further ruled that the attempted restraints on alienation were void and unenforceable.

In Brock v. Brock, the court construed a devise by a mother to her "daughter and her children" with a provision against the land being used to pay her daughter's debts as simply creating a life estate in the daughter with a remainder in fee in the daughter's children en esse and to be born. The court held that in order to protect the land against creditors, there must be a provision for defeasance. There must be a gift-over or the provision against using the property to pay debts would be contrary to public policy. The court said that nothing in the will tended to show that by the word "children" the testatrix meant "heirs."

In Dulaney v. Dulaney, the court declined to permit the testatrix to have her cake and eat it too. Her will devised property to her children absolutely, but the will then provided that if any child should die and leave property belonging to the testatrix, then one-half of such property shall pass by that child's will and one-half upon the happening of an event. Thus at common law after the Statute of Uses (1536) in a limitation, O to A and his heirs, but if no son is born to A, then to B and his heirs, B's interest could take effect as an executory limitation if no son is born to A. The fact that a son is not born to A is an event, but it is submitted that in the Craig situation the failure to dispose is not such an "event" as would trigger the enforcement of an executory limitation. This runs counter to the idea that no testator should bequeath property absolutely with a power to consume and still consider it to be a part of his estate subject to additional disposition as to that property not disposed of by the legatee.

85. 29 Ky. L. Rep. 1296, 97 S.W. 347 (1906). Note that this case was unofficially reported in the Kentucky Law Reporter. Cases so unofficially reported have no force in law and serve as little precedent, much like an opinion of the Attorney General. They may be cited simply for persuasive effect, but do not constitute reported case law in Kentucky.

86. 168 Ky. 847, 183 S.W. 213 (1916).

shall go to the testatrix' living heirs. The court held an absolute gift in fee was devised and the attempted gift-over was void as repugnant to the devise of a fee. Apparently some testators and testatrix cannot rid themselves of the idea that property once devised absolutely is still their property. Their lawyers should be careful to disabuse such testators and testatrix of such ideas. Inherent in the language of the gift-over in the Dulaney case was that there may not be any property left over, i.e. the original devisees have a right to consume and dispose. Again we see the "event" argument. At common law, if a limitation states: to A and his heirs, but if A dies without ever having married, then to B and his heirs, the failure to marry is an event, and any transferee from A would take subject to this limitation and the gift-over by way of an executory limitation is good. But in the Dulaney situation, it is contemplated that the devisees have the full power to use and dispose, sell and transfer, to the detriment of the purported gift-over beneficiaries who would be entitled only to that property not disposed of. The distinction is subtle, but critical.

In the case of Fernandez v. Martin, the court made a distinction between a bequest of personal property and of real property where the will gave personal property and realty to devisee with unlimited power of disposition and whatever was left was then to go to testator's daughter. The court held there could be no future interest in consumable personal property and, hence, as to the personal property the legatee took the personal property absolutely. But as to the land, the court construed the language as intending only a life estate in the devisee with a remainder to testator's daughter. Apparently the will was holographic and contained language devising the land to the testator's wife, the devisee, in fee simple except that she could sell only for reinvestment in other real estate and only so long as she remained the testator's widow, the whole land being then left to the daughter. The intention of the testator was clear here despite the language of "fee simple" which was so watered down by express language it could not have recognized itself in a carnival mirror of distortion. The court properly held that the wife got only a life estate, with a remainder in the daughter.

There are a number of cases holding void an attempted gift-over of a devise of land absolutely with unlimited power of disposition when the testator attempts to create a remainder as to that "remaining undisposed of," at death of the devisee. The devisee

88. 189 Ky. 438, 225 S.W. 27 (1920).
takes a fee, and the gift-over is void as incompatible with the prior devise of the fee. Thus, Kentucky follows the general rule, and the rule well known at common law. 89

Another conflict between the granting clause and the habendum clause of a deed was resolved by giving effect to the habendum clause in Thomas v. Combs. 90 Here the deed conveyed land to the grantee, “his heirs and assigns,” but the habendum read, to have and to hold unto him “during his life and at his death to be equally divided among his heirs.” The court held that such deed conveyed only a life estate to the grantee, with a contingent remainder in grantee’s heirs.

Typical of these cases requiring construction because of the ignorance of testators as to what property their wills dispose of is the case of Becker v. Roth. 91 In this case, the testator left all of his property to his wife absolutely and then provided for a limitation over of such part of the property as shall remain “undisposed of” if his wife died or at the time of her remarriage. The court held that the wife took all absolutely and the attempted gift-over failed as repugnant to the fee simple devised. The court further said that once an absolute fee is given, it cannot be divested by a subsequent provision of the will.

Note that the situation in Becker v. Roth differs from the case wherein the first devisee is given only a life estate and with a power of sale tacked on. In McCullough’s Administrator v. Anderson, 92 the testator devised land to X for life, adding a power to dispose of the property by deed or will. A remainder was also created following X’s life estate. X died without exercising the power by deed or will. The court held that the remainder took effect. This case established a rule followed by a string of precedents in Kentucky so holding. 93 The rule followed is that a power of disposition granted to a life tenant does not expand the life estate into a fee simple. This is also the rule of common law, it being considered that the power to dispose in the

89. Weller v. Dinwiddie, 198 Ky. 360, 248 S.W. 874 (1923); Martin v. Palmer, 193 Ky. 25, 234 S.W. 742 (1921); Linder v. Llewellyn’s Adm’r, 190 Ky. 388, 227 S.W. 463 (1921); Cralle v. Jackson, 26 Ky. L. Rep. 417, 81 S.W. 669 (1904).
90. 259 Ky. 93, 82 S.W.2d 188 (1935).
92. 90 Ky. 126, 13 S.W. 353 (1889).
life tenant will defeat the remainder interest only if it is exercised. And here, adding the gift-over is not repugnant to a life estate. In *Barth v. Barth*, the court ruled that the attempted limitation over after a devise of an absolute fee was mere precatory language having no legal effect, but rather in the nature of a recommendation by the testator if the life tenant takes the hint in disposing of his or her estate.

In the case where the court construed the first devise as creating a life estate rather than an absolute gift in fee, ordinarily there is some language in the will which, in reading the instrument from its four corners, the court concludes that, despite the language of absolute gift, the testator intended that the first devisee was to get a life estate only. Correspondingly, when there are no such words or phrases limiting the duration of the estate devised to the first devisee, the Kentucky courts are likely to rule that the first devisee takes the absolute estate. If so much power over the disposition of the property is given to the first devisee, including the right of disposition by deed or will, and the language is couched in absolute terms, then it is likely that the rule in *McCullough’s Administrator*, may not be followed. As so often stated in the opinions of these construction cases, each case stands on its own pins, and the precise language used and the strength of the language selected in a given will may well be determinative of the construction—life estate or fee. For example, in *Pedigo’s Executor v. Botts*, the testator appeared to give the property in absolute terms but used language thereafter in the will, “to enjoy the same during the remainder of her [first devisee] natural life time.” The court had no difficulty in determining that the first devisee was intended to get a life estate only, even though the first gift was coupled with a power of disposition. This construction was aided by the fact that the remainder persons were the children of the testator and the first devisee, the wife.

An example of strong absolute language being construed as creating a fee simple in the first devisee is the case of *Dills v. Adams* where the testator devised land to his wife and provided expressly in his will that the wife should have full control and charge of the property and a power to sell to whomever she may desire to sell to and to dispose of the proceeds. The court saw this language in absolute terms, and the wife took a fee simple, not a mere life estate.

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94. 18 Ky. L. Rep. 840, 38 S.W. 511 (1897).
95. 28 Ky. L. Rep. 196, 89 S.W. 164 (1905).
coupled with a power of disposition or appointment.

A life estate intention was determined in the case of *Woodward v. Anderson.* In this case the testator died married but childless. The will gave the wife her husband’s property “to be hers absolutely to do with as she pleases during her lifetime.” The will also created a gift-over to the testator’s niece. Before her death, the wife sold the premises devised to her and bought a new house and lot, a dwelling house, with the proceeds. The wife proceeded to lease the newly purchased house to the defendant. The court held that the wife had only a life estate in the originally devised land, and that the niece of the testator was entitled to the leased premises in dispute. The court of appeals said that in wills of this character there are two classes of cases:

1. Where property is devised absolutely, with the power of unlimited disposition, and, by a subsequent part of the will, the testator undertakes to devise over an undisposed-of remainder of the property, the limitation over is void. The gift-over is repugnant to the fee given absolutely and it is immaterial if the power of disposition is exercised or not.

2. Where a life estate only is devised with a power of disposition, then the limitation over of such of the devised property as should remain undisposed of at the death of the life tenant is valid.

This is a good summary of the two rules of law applied. In the first, the devisee is disposing of his or her own property because an absolute gift in fee was given. In the second case, since the devisee has only a life estate in the property, he or she is not disposing of his or her own property, but the property of the testator over which the life tenant has a power of disposition. That property of the testator not disposed of by the devisee-donee of the power is subject to the additional dispositive language of the will and will go to the remainderman.

A will containing an unusual disposition was presented to the court in the case of *Clay v. Chenault.* Here the testator devised land to his son with a power to sell or convey without any requirement of reinvestment of the proceeds. A further provision in the will provided that if the proceeds of such sale at the time of the son’s death be invested in other land and should he die without descendants, then such land was to revert back to the testator’s general estate. The court held that the son took an absolute estate and the

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97. 145 Ky. 134, 140 S.W. 57 (1911).
98. 108 Ky. 77, 55 S.W. 729 (1900).
attempted limitation over void, the court noting that the gift to the son was in absolute form. Here, an absolute power of sale was given to the son without any obligation to account. In effect, the court said that the testator cannot give with his right hand and take it back with his left. The court bolstered its decision by a reference to Kentucky statute:

Unless a different purpose appears by express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple, or such other estate as grantor or testator had power to dispose of.99

Getting back to the “event” concept that a testator may provide to divest a fee simple estate, the Kentucky Court of Appeals recently permitted such a provision of divestment to take effect. In Slowey v. Jenkins100 the testatrix left a will devising the residue of her property to her husband, Allen L. Jenkins, “without any limitation, restriction or encumbrance as to the title of my husband.” Additional provisions on the will provided that the testatrix’ adopted daughter, Frances, reside in the residential home devised to the husband should she so desire, and requested the husband to come to the aid of Frances in the event of any change in her physical or financial condition. The will contained this further provision: “In the event my husband predeceases Frances, then I devise all of my estate to Frances.” The lower court ruled that, upon the death of the husband before Frances, the husband died owning a fee simple absolute, following the cases of Hanks v. McDanell,101 and DeCourley v. Tucker.102 The lower court refused to equate this divesting clause as the usual “happening of an event” case because of the strong language of absolute gift to the husband: “without any limitation, restriction, or encumbrance as to the title of my husband.” But the court of appeals reversed and overruled the two aforementioned cases as precedents. The court held that what the husband took was a defeasible fee which, upon his death without exercising his power of disposal, passed to Frances by way of executory devise on the “event” theory, as against the claim to the property by the husband’s heir. The court of appeals said that the polar star rule of construction is to carry out the intention of the testator

100. 408 S.W.2d 452 (Ky. 1966).
101. 307 Ky. 243, 210 S.W. 2d 784 (1948).
102. 383 S.W.2d 337 (Ky. 1964).
or testatrix: "The intention of the testatrix shall prevail."

And the court seems to equate the gift to the husband as really a consuming life estate or its equivalent.

The Slowey case is patently out of step with the rules the court of appeals itself set down in Woodward v. Anderson. In Slowey there is no language indicating the testatrix intended to create solely a life estate in her husband. On the contrary, she used strong language of fee simple absolute. In truth, no one can say what the testatrix intended by her language. The court had no compunction in knocking out a gift-over in other cases where a fee simple absolute was accompanied by a power to consume or dispose, regardless of the testator's intentions.

In analyzing the precedents on the "event" theory where, upon the happening of an event, a prior estate shall be divested in favor of an executory devisee, let us look at the following:

Suppose at common law, O devised to A and his heirs, but if A predecease B, then to B and his heirs.

This limitation was effective to create a defeasible fee in the first devisee. The state of the title is after the devise: A has a fee simple estate subject to being divested by way of an executory devise in favor of B, upon the happening of an "event," namely, the death of A before B. Now A, during his lifetime, can alienate his fee simple estate, but his transferee would take subject to the divesting clause in the devise.

This differs from the situation in the Slowey case:

O devised to A and his heirs, with a power to convey or dispose of, and upon the death of A before B, then to B and his heirs.

In the Slowey situation, if A conveys away the land, it divests B of the executory devise because the testatrix' power conferred upon A without any limitation, restriction, or encumbrance as to the title of A. The transferee, by virtue of the power of sale conferred upon A, takes free of any claim of B. Thus, the Slowey case differs from the suppositious case immediately above. Despite what the court said in its opinion, A did not take a life estate, or a consuming life estate, or its equivalent.

The majority view followed by most courts in the United States, including Massachusetts, is contrary to the Slowey case. A testator cannot devise an absolute estate to a devisee with a power to consume or convey and still have an effective gift-over by way of an

103. Slowey v. Jenkins, 408 S.W.2d at 454.
104. 145 Ky. 134, 140 S.W. 57 (1911).
uncle. So, prior to the death of his uncle, Grantor conveys Blackacre by warranty deed to X and his heirs. At common law, nothing passed by this deed since the nephew had nothing to pass. However, Grantor is liable on his warranty and can be sued for breach of warranty, successfully. Suppose now that the uncle, O, dies, and the land descends to the nephew. At common law, and by the majority view in the United States, the title lately inherited from O by the nephew automatically by operation of law goes to the grantee without the necessity of a new deed. It is said that the grantor is estopped to deny his own warranty deed, and it is no defense if he were to claim that at the time of the conveyance he did not have title.

But this is not the decisional law in Kentucky, for by a string of precedents in Kentucky, no title ever passes by a warranty deed of conveyance by a grantor who has only an expectancy. The view that an expectancy cannot be conveyed if, in fact, the expectancy comes into actuality, is a minority view. The reason for the Kentucky courts rejecting the majority view in this area was the existence of an old Kentucky statute: “Any sale or conveyance, including those made under execution, of any lands, or the pretended right or title thereto, of which any other person has adverse possession at the time of the sale or conveyance, is void, but this section does not render void any devise of land in adverse possession.”

Applying this statute, the court of appeals in Consolidated Coal Company v. Riddle, held that no rights of any kind passed to the transferee of a mere expectancy even though the transferor later acquired the title and the original conveyance was by a warranty deed. In this case, the owner of land conveyed it to his daughter, Margaret, who had several children including J.I. Riddle and T. M. Riddle, who, prior to the death of their mother, conveyed by warranty deed whatever interest they had in the mother’s property to a third brother, J. F. Riddle, the latter then conveying the property to the Consolidated Coal Company. In order to induce the sale to the coal company, the two Riddle brothers gave additional quit-claim deeds to the conveying Riddle, J. F. Riddle. Upon the death of the mother, J. I. and T. M. Riddle brought suit against the coal company to recover their interest, and seeking a partition. The court of appeals solemnly held that the Riddle brothers were entitled.

This is distinctly a minority view and strange law indeed. Apply-
executory interest. In the hypothetical above, the devisee was given a defeasible fee truly, and any taker by way of transfer from such devisee would take subject to the right of the executory devisee. In the Slowey situation, at common law and by the majority view, the devisee would take an absolute estate, not defeasible.

The result in the Slowey v. Jenkins case is unfortunate and throws the state of Kentucky law in this area of construction into confusion. Out the window with Slowey went all the carefully applied rules which determined a construction of a life estate or a fee as delineated in Woodward v. Anderson.

But the Slowey doctrine is well grounded in Kentucky law as evidenced by the leading case of Hanks v. McDanell, wherein the court saw fit to expressly overrule the Kentucky cases which seemed to bar a testator from making a gift absolute with power to consume or convey, and then provide a gift-over in the event the property is not disposed of. Under Kentucky law the subject matter of the absolute gift somehow retains the character of property of the testator which he can dispose of by later clauses in the will that seemingly take away the absoluteness of the initial gift. In the Hanks case, the court found "from the four corners of the instrument" the testator intended the devisee to take only a life estate interest rather than a fee interest.

B. Power to Convey an Expectancy

At common law and by the majority view in the United States, if a grantor by warranty deed purports to transfer title to a land interest, he does not then own, but later acquires the title under the doctrine of Estoppel by Deed, sometimes called the Doctrine of After Acquired Title, the title received by the warranting grantor by force of law shoots into the grantee. Sometimes the doctrine is explained as an effort by the courts to prevent circuity of action, since the grantee has, at common law, an action for breach of warranty against the then titleless grantor. The Kentucky cases show that the Doctrine of Estoppel by Deed has a limited application, and its precedents in this area depart radically from the general view prevailing in other jurisdictions.

For example, let us suppose that the grantor is the sole heir of his uncle, O, owner of Blackacre. O is an old man about to die. Grantor is impatient to enjoy the fruits of the land he will inherit from his

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105. 307 Ky. 243, 210 S.W.2d 784 (1948).
ing to the this situation the Kentucky statute\textsuperscript{110} which declares a deed to land held adversely by another as null and void seems improper. The statute declares the deed void as an instrument effective to convey such land, but the doctrine of estoppel operates to close the mouth of one who would seek to deny his own act to the detriment of one who relied on the representations of the person estopped. The court based its conclusion that there could be no estoppel on the fact that since the Riddles had no estate at the time to convey there was no land to which the estoppel by deed could attach. In reaching this result, the court relied upon \textit{Spacey v. Close}\textsuperscript{111} and \textit{Hunt v. Smith}\textsuperscript{112}. It is true that the Consolidated Coal people have no one to blame but themselves, for a careful title search at the time of the conveyance would have shown no title in the conveyances, but the doctrine of estoppel has never depended upon lack of diligence or the contributory negligence, a tort doctrine, of the person duped.

In \textit{Spacey v. Close}, the testator created remainders in his children at the termination of a life tenancy, with a provision that if any child die, his share would go to the other children. It was held that a conveyance of the allotted land by a child did not pass any later acquired interest which should thereafter come under the terms of the will. The attempted conveyance of what may be received later is an attempted transfer of a mere expectancy. The court stated that only an actual remainder, either vested or contingent, can be the subject matter of a conveyance; a mere expectancy is not alienable under Kentucky law. The court continued to say that the doctrine of estoppel will not apply for the reason that a warranty given by the holder of a mere expectancy is a fraud on the true owner and, as the deed of conveyance is void, so is the warranty expressed therein.

In \textit{Hunt v. Smith}, a child, potential heir of his father who was the owner of land, conveyed his “interest” in the land to X while the father lived. The child later inherited the land. The court held that the deed was inoperative and that the doctrine of estoppel did not apply. The court claimed that it was following the common law in holding that a conveyance of an expectancy passes nothing: “If a son and heir bargain and sell the inheritance of his father, this is void, because he hath no right in himself.”\textsuperscript{113} The court said that a trans-

\begin{footnotes}
\item[111.] 184 Ky. 523, 212 S.W. 127 (1919).
\item[112.] 191 Ky. 443, 230 S.W. 936 (1921).
\item[113.] \textit{Hunt v. Smith}, 191 Ky. 443, 447, 230 S.W. 936, 938 (1921) (quoting \textit{Coke, Commentar-
fer of a mere expectancy is void as against public policy, apparently on the theory that if the courts refused to enforce, fewer such transfers would be made in defraud of the true owner. The Kentucky court, in effect, said that an estoppel in Kentucky will arise only when the grantor purports to convey a present interest, not some nebulous interest that may or may not actually vest in the grantor.

The thrust of these Kentucky cases makes it mandatory on every prospective purchaser of a land interest to conduct a careful title search. Query: Would the Kentucky courts enforce a contract by a potential titleholder wherein, for a consideration, he promises to convey the land interest if and when he receives title by inheritance, or otherwise?

Again in the case of Riggsby v. Montgomery, the court reiterated its stand by declaring that deeds covering a mere expectancy of inheritance are void, and that after-acquired title does not inure to the benefit of the grantee of a general warranty deed made while the land was held in the possession of one adverse to the grantor.

C. Rights of Children in Gifts to Children or Heirs of the Body When Coupled with Gift to a Parent

Ambiguities in wills and deeds arise when a careless testator or grantor uses language which renders dubious whether children or heirs of the body of the devisee or grantee are to take under the will or deed, and if so, what kind of an estate—a present interest or a remainder. In such a confused state, sometimes the issue is raised as to what extent a reconveyance from the original grantee back to the grantor will affect “children” or “heirs of the body.”

First, at common law, where there was a conveyance of land to a
parent and his children, who got what was dependent upon the status of the family at the time of the conveyance. Suppose O conveys to A and her children under circumstances that the entire fee was being conveyed (e.g., with use of the phrase, "and heirs"), and at the time of the conveyance, A had no children. This was construed as a rule of law meaning: To A "and the heirs of her body," and A got an estate tail. But, if at the time of the conveyance, A had children, A and the children took equal and concurrent estates—co-tenants in fee as tenants in common.

In some states today, the Resolutions of Wild's Case are still applied, not as rules of property but as rules of construction meaning that if other indications of intention are present in the instrument, the Wild's Case rules may not be applied. A minority of state courts do not follow the Wild's Resolutions uniformly, notably Virginia, where the limitation, "and her children" has been equated to "and her heirs," thus giving A the fee. In Pennsylvania, this language would give A a life estate with a remainder in fee in the grantee's children.

Kentucky very early adopted a construction that the parent takes a life estate with a remainder in the parent's children in situations in which ordinarily the application of the first resolution of Wild's Case would give a fee tail, and, thus, a fee simple to the parent. The Kentucky courts were first influenced by the fact that in a devise to the testator's wife and children where there were no children, if the wife were to take a fee simple estate, the land could be taken out of the blood line of the testator. Later this construction was adopted even in cases where there was no need to preserve the property for the testator's blood relatives. So, in Kentucky it

115. Wild's Case, 6 Co. 16b, 77 Eng. Rep. 277 (1599) (First Resolution).
116. Wild's Case, 6 Co. 16b, 77 Eng. Rep. 177 (1599) (Second Resolution). Note that in the original case, the court ruled that life estates were created and that the co-tenancy was held jointly. Later the common law swung from a preference of joint tenancy construction to that of tenancy in common, which is the preference in the law today.
120. Carr v. Estill, 55 Ky. 309 (1855).
121. Shelman & Co. v. Liver's Exec., 224 Ky. 90, 16 S.W.2d 800 (1929); Lacey's Exec. v. Lacey, 170 Ky. 166, 185 S.W. 495 (1916); Lynn v. Hall, 101 Ky. 738, 43 S.W. 402 (1897); Brand v. Rhodes Adm'r, 17 Ky. L. Rep. 97, 30 S.W. 597 (1895); Koenig v. Kraft, 87 Ky. 95 (1888).
would appear that the construction of life estate in the parent with remainder in the children is preferred, absent special language, facts, or circumstances dictating a different construction. Nothing else appearing to the contrary in the instrument creating the interests, a transfer to a named grantee or devisee and his children will be considered to create a life estate in the parent and a fee in the children by way of remainder.

However, when there are special factors present indicating an intention that the parent and children are to take concurrent estates, then such a construction will be given. Sometimes the propensity for the life estate remainder in children construction leads to an incongruous result, as in \textit{Johnson v. Houchins}, where the court held that the use of the term "children" indicated an intention that parent take a life estate and a remainder in fee to the children. In this particular case, such a construction does not make sense in the light of the fact that the devisee was a sixty-one year old woman who had never had any children!

In the recent case of \textit{Franklin Real Estate Co. v. Music}, the Kentucky Court of Appeals construed the word "children" to mean bodily heirs, when the deed of conveyance was captioned to "Laura B. Music and Children," but twice made reference to Laura B. Music "and her bodily heirs." Hence, the life estate-remainder construction was rejected, and Music took a fee-tail converted by Kentucky statute to a fee simple.

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125. Hatcher v. Pruitt, 231 Ky. 731, 22 S.W.2d 133 (1929) (will contained a direction to the executor to purchase farm and convey it to testator's wife and children, and the will further provided "the land not to be divided until children arrived at the age of 21"); Eakins v. Eakins, 191 Ky. 61, 125 S.W. 130 (1921) (devise to daughter and children, "to enjoy for herself and children, forever"); Rice v. Klette, 149 Ky. 787, 149 S.W. 1019 (1912) (where the gift was to A and his children, "so to be divided that my son and his children will get the 21 acres willed to them"); Hood v. Dawson, 98 Ky. 285, 33 S.W. 75 (1895) (where the will provided a gift over if parent had no children, the court holding that parent took indefeasible fee simple upon dying without having children); Bullock v. Caldwell, 81 Ky. 566 (1884) (devise to daughter and her children under circumstances court found testator's intention daughter and children take concurrent estate).
126. 330 S.W.2d 114 (Ky. 1959).
127. 392 S.W.2d 66 (Ky. 1965).
Where required to carry out the testator-father’s intention, being a remainder to testator’s son “and his children,” the will providing no gift-over if there be no children, the word “children” will be construed as words of limitation, like “heirs,” and the son will be given the fee. 129

In Martin v. Adams, 130 the owner of land conveyed it to his daughter “and her children,” conditioned upon the care and support of the father-grantor for his life, and the deed contained a provision that, in the event the condition of support was not fulfilled, the title in the grantees would be forfeited. Later, a disagreement arose between the father and the daughter, and the daughter reconveyed the land back to the father who thereafter conveyed the same land to the plaintiff. The daughter’s children did not join in the deed of conveyance to the father. In a suit to establish a claim to the land by the children, the court upheld the title of the plaintiff. A breach of condition forfeited the estate according to the terms of the original conveyance, and the act of reconveying the land back to the father was an acknowledgment of unfulfillment of the divesting condition. The same condition was binding upon the children. Perhaps one can infer from the result in the Martin case that the court did not consider that the conveyance by the father to the daughter and her children created any interest in the children, and that the daughter took the fee. This view is strengthened by the language in the opinion that “the infant grantees had no interest in the land.”

130. 171 Ky. 246, 188 S.W. 318 (1916).

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COMMENTS

KENTUCKY WORKMEN'S COMPENSATION
BENEFITS—APPORTIONMENT AND COMPUTATION

The practice of Kentucky Workmen's Compensation law involves the study and use of several interrelated disciplines. This article is an attempt to view the current trends in a limited area, that of computation and apportionment of Workmen's Compensation benefits.

The occasional practitioner of Kentucky's compensation law may have difficulty maintaining a proper perspective, as it is a "state of the arts" practice which is continually renovated by court decisions and legislative enactments. The most dramatic recent changes have occurred in the area of benefits. This comment explains those changes and their implications within a practical framework for practical application.

Essentially, Kentucky Workmen's Compensation law provides that four types of benefits may be awarded to an employee: medical benefits; scheduled benefits; occupational disability benefits; and death benefits.1 The actual monetary compensation received by an injured worker is determined by several variables. These variables, average weekly wage, statutory maximum, statutory minimum, statutory percentage, Special Fund liability and apportionment, and lump sum compensation, must be examined before benefits can be discussed.

I. THE PRELIMINARIES

A. Average Weekly Wage

Average weekly wage of an employee is the basis for the determination of most benefits. Maximization of the weekly wage figure allows optimum recovery for the employee and optimum compensation for the attorney.

For workmen's compensation purposes, the term "wages" is defined as follows:

"Wages" means in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, fuel or similar advantages received from the employer, and gratuities received in the course of employment from other than the employer as evidenced by the employee's federal and state tax returns.2

1. Death benefits are outside the scope of this comment.
Basic, yet essential, to the computation of average weekly wage is the inclusion of all tips and all employer-furnished fringe benefits received by an employee.

Average weekly wage is based upon earnings “at the time of the injury,” and is calculated according to the method prescribed by Kentucky Revised Statutes section 342.140(1):

If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:

(a) The wages were fixed by the week, the amount so fixed shall be the average weekly wage;

(b) The wages were fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve (12) and divided by fifty-two (52);

(c) The wages were fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by fifty-two (52);

(d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury.

(e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

(f) The hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees.

However, overtime or premium pay, traditionally viewed as monies payable after forty normal work hours, is generally excluded in determination of average wage. But if evidence exists to support a finding that a claimant normally worked more than forty hours per

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week, compensation should be computed on that basis. The present standard to determine an employee’s average hours is based on the number of hours he “normally and regularly worked.” In the recent case of *R. C. Durr Co., v. Chapman*, the court stated that the statutory exclusion of overtime or premium pay “refers to pay in excess of the employee’s regular hourly rate because of the extra hours worked. It does not restrict calculation of the employee’s average weekly wage to the forty hour week.” The import of *Durr* is that all hours worked per week may be included in wage determination at the regular hourly rate, *i.e.*, not at a “time and a half” or premium rate.

The average weekly wage for an employee whose occupation is seasonal is computed under section 342.140(2):

In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one-fiftieth (1/50) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the injury.

In the Workmen’s Compensation Board decision of *Truett v. Jackson County Board of Education*, testimony recounting that the job was to continue “until school started back up” was sufficient to establish seasonal employment, thus entitling the claimant to 1/50th of the total wages earned from all occupations in which she engaged during the twelve calendar months immediately preceding the injury. But an exception to the general rule for computing seasonal wages is provided by section 342.140(4) for an employee who is a minor, apprentice, or trainee and establishes “that under normal conditions his wages should be expected to increase during the period of disability . . . .” Such an employee’s expectancy of increased wages may be considered in computing his average weekly wage.

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8. 563 S.W.2d 743 (Ky. App. 1978).
9. *Id.* at 745 (emphasis added).
10. For example, if an employee receives $5.00 per hour for each hour he works up to forty hours, and receives “time and a half,” or $7.50 per hour for each additional hour he works, for those weeks in which he has worked more than forty hours, the additional hours would be included in the average weekly wage determination exclusive of premium pay, and, therefore, enter the average at $5.00 per hour rather than at $7.50 per hour.
wage. In this case, the claimant, Kathy Truett, was sixteen years of age. She sustained a work related injury when a floor she was cleaning with gasoline was ignited by a nearby gas stove. The Board thought it "grossly unfair" to compute Kathy Truett's earnings under the seasonal employee formula "in light of her age . . . and a marked discrepancy between her future earning capacity as compared to her earnings during the preceding year" and, "[i]n an attempt to resolve this dilemma and in an effort to arrive at a solution fair and equitable to both parties," made a finding as to average weekly wages pursuant to section 342.140(4). The Board found the claimant's seasonal hourly wages to be representative of her earning ability and computed weekly wages under section 342.140(1).

Determination of the average weekly wage of an employee who works for more than one employer is governed by section 342.140(5): "When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation." Where evidence of dual employment is readily available, failure by the Workmen's Compensation Board to comply with section 342.140(5) has been termed a "palpable miscarriage of justice," and, similarly, a failure to amend an award so that it conforms to the requirements of the section has been viewed as "an abuse of discretion.

B. The Statutory Maximum.

All occupational disability benefits, scheduled benefits, and most death benefits are subject to a statutory maximum, the maximum weekly monetary amount that a claimant can ever be entitled to or receive. The figure is based upon Kentucky's average weekly wage as determined and certified by the Secretary of the Department for Human Resources. The actual compensable maximum weekly amount is sixty percent of the state's average weekly wage computed to the "next higher multiple of $1.00." The upper limit is

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14. Id.
set yearly, based on the state's average weekly wage of two years prior, and is published by the Workmen's Compensation Board in a "Schedule of Weekly Workmen's Compensation Benefits." The applicable maximum is determined by the date of injury, not the date of compensation. The current schedule of weekly benefits is as follows:

<table>
<thead>
<tr>
<th>Injuries Occurring</th>
<th>Maximum</th>
<th>Minimum</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/1/74 to 1/1/75</td>
<td>$84.00</td>
<td>$28.00</td>
</tr>
<tr>
<td>1/1/75 to 1/1/76</td>
<td>$88.00</td>
<td>$29.00</td>
</tr>
<tr>
<td>1/1/76 to 1/1/77</td>
<td>$96.00</td>
<td>$32.00</td>
</tr>
<tr>
<td>1/1/77 to 1/1/78</td>
<td>$104.00</td>
<td>$35.00</td>
</tr>
<tr>
<td>1/1/78 to 1/1/79</td>
<td>$112.00</td>
<td>$37.00</td>
</tr>
<tr>
<td>1/1/79 to 1/1/80</td>
<td>$121.00</td>
<td>$40.00</td>
</tr>
</tbody>
</table>

C. The Statutory Minimum.

The statutory minimum is equal to twenty percent of the state's average weekly wage. The dollar amount of the statutory minimum is listed in the schedule of weekly benefits. The statutory minimum does not apply to cases in which the minimum income benefit exceeds the average weekly wage of the injured employee.

Minimum compensation as prescribed by Chapter 342 of the Kentucky Revised Statutes had never been viewed as placing a lower limit on the amount of compensation which the Workmen's Compensation Board could award until the landmark case of Apache Coal Co. v. Fuller. When Apache was decided, section 342.730(1) provided that "[i]ncome benefits for disability shall be paid to the employee . . . subject to the maximum and minimum limits specified in KRS 342.740." The minimum limits are set forth in section 342.740(1): "The minimum weekly income benefits for disability shall not be less than 20 percent . . . of the average weekly wage of the state . . . ." Relying upon these statutes, the Apache court affirmed the decision of the Pike Circuit Court which had increased

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21. Id.
26. 541 S.W.2d 933 (Ky. 1976).
an award of $20.40 to the statutory minimum of $27.00.29 The court made it clear that all compensation awards were subject not only to an upper limit but to a lower limit as well:

The legislature has . . . limited its largesse by providing that the maximum weekly income benefits shall not exceed sixty percent of the average weekly wage of the state . . . but in an effort to avoid the label of parsimony it has also provided that the \textit{minimum weekly income benefits for disability} shall not be less than twenty percent of the average weekly wage of the state . . . . Cries for moderation should be addressed to the legislature.30

The immediate consequence of \textit{Apache} was to substantially increase the benefits recoverable for a minor injury. Apparently hearing employers' "cries for moderation," the Kentucky General Assembly, by special session in December of 1976, amended section 342.730(1)(b) to provide that "notwithstanding any section of KRS Chapter 342 to the contrary, there shall be no minimum weekly income benefits for permanent partial disability."31 Although the amendment clearly halted prospective application of the statutory minimum to Workmen's Compensation awards, the question remained whether \textit{Apache} could be applied retroactively so that earlier cases in which the Board had awarded benefits below the statutory minimum could be reopened. It was answered in the recent decision of \textit{Keefe v. O.K. Precision Tool & Die Co.}32 The Court in \textit{Keefe} held,

The effect of \textit{Apache} was that for the period beginning January 1, 1973, until the statute was amended effective January 1, 1977, there was a minimum amount that must be awarded in any workmen's compensation claim where the Board found the claimant to have a partial permanent disability as the result of a work related injury. [W]e interpret the decision in \textit{Apache Coal Co. v. Fuller} . . . to be applicable to claims arising prior to January 1, 1977, the effective date of the new statute, and not finally decided prior to November 12, 1976, the date of denial for rehearing of \textit{Apache}.33

Thus, any claim which arose between January 1, 1973, and January 1, 1977, is subject to the statutory minimum, provided the claim was still pending prior to November 12, 1976.34 As for claims adjudi-

29. \textit{Apache Coal Co. v. Fuller}, 541 S.W.2d 933 (Ky. 1976).
30. \textit{Id.} at 934-35 (emphasis by the court).
32. 566 S.W.2d 804 (Ky. App. 1978).
33. \textit{Id.} at 805 & 808.
34. \textit{Id.} at 808.
cated before November 12, 1976, the Keefe court explained that the principle of res judicata "takes precedence over the statutory scheme that would allow the reopening of an award for erroneously not applying the minimum benefits statute." The logical deduction to be drawn from the Keefe holding is that cases decided after November 12, 1976, which involved claims for injuries sustained between January 1, 1973, and January 1, 1977 and in which the amount of benefits awarded was below the statutory minimum, can be reopened on the basis of misapplication of the law. The doctrine of res judicata does not apply.

D. The Statutory Percentage

The statutory percentage performs solely a mathematical function in the calculation of benefits, reducing the average weekly wage figure of the claimant. Workmen's Compensation is not meant as an avenue to provide windfall profits or replace in full that which is lost; rather it is intended to supplement the employee for his loss of earnings. The applicable statutory percentage depends solely on the date of injury.

Before it was amended, section 342.730(1) of Kentucky Revised Statutes prescribed the statutory percentage as follows:

Income benefits for disability shall be paid to the employee as follows:

(a) For total disability, 55 per cent of his average weekly wage during such disability, and two and one-half percent (2.5%) of his average weekly wage for each dependent up to a maximum of three (3).

(b) In all other cases of permanent partial disability . . . 55 per cent of the average weekly earnings of the employee at the time of the injury, and two and one-half per cent (2.5%) of his average weekly wage at the time of injury for each dependent up to a maximum of three (3) . . . .

Effective January 1, 1977, the statutory percentage was increased to 66 2/3 percent of the average weekly wage without any provision for dependents.

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35. Id. at 809.
36. Id.
38. KY. REV. STAT. § 342.730 (Supp. 1978). For cases other than death, dependency is determined in accordance with KY. REV. STAT. § 342.075(2)-(3) (1977):
   (2) In all other cases the relation of dependency in whole or in part shall be determined in accordance with the facts of each case existing at the time of the accident.
   (3) No person shall be considered a dependent in any degree unless he is living in
In summary, for an injury occurring during the period from January 1, 1973 to January 1, 1977, the statutory percentage is 55 percent plus 2.5 percent for each dependent up to a maximum of three dependents. For injuries occurring from January 1, 1977, to the present, the statutory percentage is 66 2/3 percent.39

E. Special Fund and Apportionment

The Special Fund is a legislative creation funded by revenues acquired through taxation of all insurance carriers that sell Kentucky Workmen's Compensation coverage.40 Apportionment refers to a method of distributing the burden of payment of a compensation award.41 The Special Fund is made a party and apportionment becomes necessary when either or both of the following appears:

(a) The employe is disabled, whether from a compensable injury, occupational disease, pre-existing disease, or otherwise, and has received a subsequent compensable injury by accident, or has developed an occupational disease;
(b) The employe is found to have a dormant nondisabling disease or condition which was aroused or brought into disabling reality by reason of a subsequent compensable injury by accident or an occupational disease.42

Upon a finding of either (a) a pre-existing active condition or (b) a pre-existing dormant condition, the employer may "spread his loss" or burden of payment. The employer is "liable only for the degree of disability which would have resulted from the latter injury or occupational disease had there been no pre-existing disability or dormant but aroused disease or condition."43 Generally, pre-existing active disability is the burden of the employe,44 and the Special

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42. Id.
43. Id.
Fund pays the difference between that amount and the total amount to which the employe is entitled for the combined effect of his active or dormant condition and the present injury. Apportionment seeks to prevent an employer from "being held responsible for more of a compensation award than is attributable to a disability incurred in the course of an employe’s employment with him," and to prevent an employer from discriminating against disabled workers in hiring policies.

Apportionment can take one of three basic forms: (1) between successive employers; (2) between an employer and a second injury fund; and (3) between an employer and an employe. Kentucky allows all three. Although an employer is liable only for that portion of the disability that would have occurred had there been no pre-existing dormant condition, if the work related injury would have independently produced the entire disability, then there is no apportionment. But where the employe has a pre-existing active disability, "the percentage of occupational disability which existed immediately prior to the subsequent injury is noncompensable and must be excluded from any award." The balance of disability remaining is then the sole responsibility of the Special Fund.

Beginning with the case of Yocum v. Layne, the seemingly simple concept of apportionment became one of the least understood in Kentucky workmen’s compensation law. In Layne the court upheld a decision of the Workmen’s Compensation Board in which the Board apportioned the liabilities of the employer and the Special Fund in the same ratio as the findings of disability and reduced the award in the same ratio for a pre-existing active disability. The
later case of Yocum v. Reid\textsuperscript{55} qualified Layne, by limiting the Layne
court's method of apportionment "to those cases in which the average weekly wage of the employe is either unknown or exactly the same as that wage which would result in the maximum weekly benefit provided by computation under [section] 342.740."\textsuperscript{56} This limitation was thought necessary to allow the apportionment of an award to come within the purview of the Pennington rule.\textsuperscript{57} The Reid court applied Pennington to the apportionment situation and decided that disability benefits should be apportioned not with regard to the proportionate liabilities of the parties, but with regard to which party, the employer or the Special Fund, should bear primary liability. Deciding that the employer bore primary liability, the court set forth the following method of apportionment. First, the employer's liability is computed by multiplying the "percentage of wage figure"\textsuperscript{58} times the percentage of disability. If the result is less than the statutory maximum, the Special Fund's liability is then computed by the same formula. If the combined liabilities of the employer and the Special Fund exceed the statutory maximum, the Special Fund's liability is reduced, so that the total liability equals the statutory maximum. But if the total liabilities do not exceed the statutory maximum, then the Special Fund's liability is not reduced.\textsuperscript{59} Proportionate reduction of liability was held inapplicable and inappropriate where an employe's average weekly wage was known.\textsuperscript{60}

The Reid court's method of apportionment was approved by the court of appeals in Transport Motor Express, Inc. v. Finn.\textsuperscript{61} Citing Reid, the court held that the percentage of pre-existing noncompensable disability "shall be excluded from consideration" but not "deducted from the compensation . . . . In no event shall the non-compensable disability be applied to reduce the allowable income

\textsuperscript{55} 24 Ky. L. Sum. 9 at 9 (Ky. App. 1977).
\textsuperscript{56} Id.; see Yocum v. Hopkins, 548 S.W.2d 151 (Ky. App. 1977).
\textsuperscript{57} C.E. Pennington Co. v. Winburn, 537 S.W.2d 16 (Ky. 1976). Pennington was not an apportionment case. However, of relevance is the court's holding that the amount of an award should not be computed by multiplying average weekly wage times the statutory percentage times the percentage of occupational disability. The total award, however, should be limited to the statutory maximum.
\textsuperscript{58} "Percentage of wage figure" is the employe's average weekly wage times the statutory percentage. Transport Motor Express, Inc. v. Finn, 568 S.W.2d 509 (Ky. App. 1977), \textit{reversed on other grounds}, 25 Ky. L. Sum. 12 at 20 (Ky. 1978).
\textsuperscript{59} Yocum v. Reid, 24 Ky. L. Sum. 9 (Ky. App. 1977); see also Transport Motor Express, Inc. v. Finn, 568 S.W.2d 509 (Ky. App. 1977), \textit{reversed}, 25 Ky. L. Sum. 12 at 20 (Ky. 1978).
\textsuperscript{60} Yocum v. Reid, 24 Ky. L. Sum. 9 at 9 (Ky. App. 1977).
benefits which a claimant may receive . . . ." The court of appeals' decision in *Transport* resulted in discriminatory apportionment of disability awards. The employer, viewed as principally liable, could be required to pay a percentage of an award higher than his percentage of occupational disability as determined by the Workmen's Compensation Board. In the extreme case, an employer's liability could be ten percent occupational disability, and the Special Fund's liability the remaining ninety-percent, and yet, the employer could be held responsible for the total award if ten percent of the weekly wage factor equaled the statutory maximum.

To avoid the inequities of *Transport*, the Kentucky General Assembly amended section 342.120, effective June 18, 1978 to provide as follows:

(5) If it is found that the employee is a person mentioned in paragraphs (a) or (b) of subsection (1), and a subsequent compensable injury or occupational disease has resulted in additional permanent disability, so that the degree of disability caused by the combined disabilities is greater than that which would have resulted from the subsequent injury or occupational disease alone, and the employee is entitled to receive compensation on the basis of the combined disabilities, and when applying the formula for income benefits to the employer's and Special Fund's percentage of disability, and the income benefits exceed the limitation contained in KRS 342.740, then in that event the Special Fund's and employer's liability shall be reduced proportionately to the point where the shares of each, when combined, do not exceed the limitation established by KRS 342.740.

The Supreme Court of Kentucky reversed the court of appeals' decision in *Transport Motor Express, Inc. v. Finn*. The court stated that *Pennington* had "no direct application to apportionment under KRS 342.120," and that "this is a distortion of the computation process and impermissibly nullifies the effect of the exclusion language of KRS 342.120." Noting that there are three principle forms of apportionment, between successive employers, between the employer and the Special Fund, and between the employer and the employee, the court stated,

Our statute is a hybrid. It allows apportionment of the responsibility for the loss among all three parties. The intent is manifest that where

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62. *Transport Motor Express, Inc. v. Finn*, 568 S.W.2d at 511.
63. *Id.*
65. 25 Ky. L. Sum. 12 at 20 (Ky. 1978).
66. *Id.* at 20.
67. *Id.* at 21.
a portion of the resultant disability is attributable to a prior "disabling" disease or condition or injury, the employee must bear responsibility. This court has no choice but to give effect to this exclusion."

In the court's view, the "proper approach . . . is to employ the methodology of KRS 342.730 to determine the amount to which the claimant is entitled by the whole of his disability." In other words, the total disability award equals the average weekly wage times the statutory percentage times the percentage of disability. The court stated,

If apportionment is required by operation of KRS 342.120, the formulas provided therein are then applied to the total amount therefore determined to give effect, in terms of dollar amounts payable or non-payable, to the apportionment between the interested parties, the employer, the employee, and the Special Fund. This procedure gives effect to the exclusion language of KRS 342.120(4). It also has the effect of maintaining responsibility for payment of dollar amounts in the same proportions among the various elements and with the same relationship to the total award as the proportionate responsibility for the total resultant disability was determined to be by the evidence.

This decision and the amendment to section 342.120 achieved the same results, except that the decision has retroactive effect.

F. Lump Sum Compensation

Section 342.150 provides for lump sum compensation:

Whenever compensation has been paid for not less than six (6) months, thereafter, on the application of either party and upon notice to the other party, in any case where the board determines that it will be for the best interests of either party and will not subject the employer or his insurer to an undue risk of overpayment, future payments of compensation or any part thereof may be commuted to a lump sum of an amount which will equal the total sum of the probable future payments so commuted, discounted at four per cent (4%) true discount compounded annually on each payment. Upon payment of such lump sum all liability for the payments therein commuted shall cease.

Lump sum agreements will be approved by the Board only when they substantially comply with section 342.265. Section 342.265

68. Id.
69. Id.
70. Id.
71. Id.
73. Skaggs v. Wood Mosaic Corp., 428 S.W.2d 617 (Ky. 1968).
provides that an agreement between an employe and employer “conforming to the provisions of this chapter” must be filed with the Board. If approved by the Board, the agreement becomes an enforceable award. 74 “The plain purpose of the statute is that the board be given an opportunity to pass upon the terms of compensation settlements, and thus protect the interests of the workmen.” 75

Lump sum payment “equal[s] the total sum of the probable future payments . . . discounted at four percent (4%) true discount compounded annually on each payment.” 76 “Probable future payments” are determined by use of the “American Experience Table of Mortality,” computing a claimant’s life expectancy based on the claimant’s age at date of injury. The “four percent (4%) true discount” is determined by use of the “Present Worth Table.” The claimant’s life expectancy in years is converted to the number of equal weeks and the number of weeks is reduced by use of the table to achieve a true four percent discount. For example, a claimant, age 43 at the date of injury, is determined by the Board to be forty percent occupationally disabled, which is calculated in this example as $75.00 per week for life. For lump sum payment, the claimant’s life expectancy is determined to be 26.00 years. Twenty-six years is converted to 1352 weeks (26 x 52 = 1352). Using the Present Worth Table, 1352 weeks is determined as having a present value of 845.9109 weeks. If weekly payments are to be made, the claimant would be entitled to compensation of $75.00 times 1352 weeks or a total amount of $101,400.00. Based on a lump sum payment, the claimant would be entitled to compensation of $75.00 times 845.9019 weeks or a total amount of $63,443.32.

G. The Penalty

Section 342.165 of Kentucky Revised Statutes provides for an increase or decrease in compensation when either the employe or employer fails to comply with a safety law or regulation. 77 The amount of a compensation award payable by the employer may be increased by fifteen percent if the Workmen’s Compensation Board determines that the employer violated a statute or regulation dealing with the safety of the employes or the public. 78 The employe may be similarly penalized by a fifteen percent decrease in the amount

75. Skaggs v. Wood Mosaic Corp., 428 S.W.2d 617, 619 (Ky. 1968) (emphasis added).
78. Id.
of compensation he may receive if the Board finds that the "accident is caused in any degree by the intentional failure of the employe to use any safety appliance furnished by the employer or to obey any lawful and reasonable rule, order or regulation of the board or the employer for the safety of employes or the public." 79

An employer will not be penalized unless it is established that he violated a specific safety regulation, and that the employer had either actual knowledge of the safety regulation or that a sufficient period has elapsed from the effective date of the regulation so that the employer's knowledge may be implied. 80 In Gibbs Automatic Moulding Company v. Bullock, 81 the claimant lost three fingers while operating a punch press machine on which the safety lever had been tied back. He filed a claim for compensation and a fifteen percent increase, alleging that his employer had violated a safety regulation which had been in effect for ten days. The court affirmed the decision of the Board that the employer had lacked actual knowledge of the regulation and that insufficient time had elapsed to imply the knowledge. Failure to maintain a safety guard over a meat grinder has been held to entitle an employe to a fifteen percent increase in his award. 82 But in Church v. Ashland Fabricating & Welding, 83 the employer's failure to provide required guardrails on a scaffold was not held to be a violation of section 342.165 because the absence of rails was viewed as "necessary for the achievement of a plausible purpose." 84

An employe who violates a company rule may have his compensation award decreased by fifteen percent. 85 Both Standard Elkhorn Coal Co. v. Stidham, 86 and Big Elkhorn Coal Co. v. Burke 87 involved employes who were killed while riding empty coal cars in direct violation of company safety rules. In each case, the Board's decision to reduce by fifteen percent the workmen's compensation benefits received by the beneficiaries was affirmed.

79. Id.
81. Id.
84. Id.
85. Standard Elkhorn Coal Co. v. Stidham, 242 Ky. 228, 46 S.W.2d 120 (1931); Big Elkhorn Coal Co. v. Burke, 206 Ky. 489, 267 S.W. 142 (1924).
86. 242 Ky. 228, 46 S.W.2d 120 (1931).
87. 206 Ky. 489, 267 S.W. 142 (1924).
II. Medical Benefits

Medical expenses incurred by the injured employee are required by section 342.020(1) to be paid by the employer:

In addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury or occupational disease such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease.  

In addition, the employer must pay for any necessary apparatus when the "injury or occupational disease results in the amputation of an arm, leg or foot, or the loss of hearing, or the enucleation of an eye or loss of teeth . . . ."  

These involve artificial members, such as arms and legs and braces "where required." An employee is entitled to select his own physician to treat his injuries and the hospital in which he shall be treated. The employer may claim that the physician or hospital selected is inadequate and will substantially affect or delay the employee's recovery, or that the physician or treatment selected will substantially prejudice the employee in any workmen's compensation proceeding. Upon a finding of either, the Board may allow the employer to select the treating physician and the hospital for treatment. Medical fees must be fair and reasonable and can be reduced by the Board based on the general fees charged in the same community. A failure to follow advice may reduce or terminate an employee's benefits within the statute. 

In South 41 Lumber Co. v. Gibson, the claimant "departed from the hospital without the approval of a physician during the course of a physical therapy program." Gibson removed an orthopedic device and failed to perform the special exercises required for his therapy program. The Board's reduction of his occupational disability award from 100 percent to 40 percent was affirmed on appeal.

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90. Id.
93. Id.
95. Ky. Rev. Stat. § 342.035(2) (1977); see also South 41 Lumber Co. v. Gibson, 438 S.W.2d 343 (Ky. 1969); Gennett Lumber Co. v. Sizemore, 441 S.W.2d 429 (Ky. 1969).
96. 438 S.W.2d 343 (Ky. 1969).
97. Id. at 346.
98. Id.
In *Gennett Lumber Co. v. Sizemore*, when the claimant refused to submit to surgery which represented no threat to his life or health, the court terminated all further benefits under Chapter 342.

A finding of occupational disability is not required for the Workmen's Compensation Board to award medical benefits. "It is not impossible for a non-disabling injury to require medical attention." Medical benefits are not apportionable and the liability for such benefits remains solely the responsibility of the employer. In *Young v. Terwort*, an employe was determined to be 100 percent occupationally disabled because of the arousal of a pre-existing dormant disease. The Board apportioned the total burden to the Special Fund, but required the employer to pay all of the medical expenses. The employer appealed, contending that medical expenses should also be the responsibility of the Special Fund. The court held that section 342.120 "unequivocally and squarely places the liability on the employer," even in cases of total apportionment. The *Terwort* decision was reaffirmed in *Yocum v. Reid*, in which the court said that "to hold otherwise would result in utter chaos."

In the past, chiropractic manipulations per se were not viewed as medical treatment within section 342.020 and were, accordingly, not compensable by Workmen's Compensation. But by Legislative Act effective June 18, 1978, services rendered by a duly licensed chiropractor were made compensable.

III. SCHEDULED BENEFITS

A. The Principles

When an injury to a claimant causes loss or loss of use of a specific body member, Kentucky Workmen's Compensation law provides an

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99. 441 S.W.2d 429 (Ky. 1969).
101. *Id.* at 161-62.
102. 459 S.W.2d 136 (Ky. 1970).
103. *Id.*
104. *Id.* at 138.
106. *Id.*

A doctor of chiropractic, licensed to practice under the provisions of KRS Chapter 312, shall have his services to employees covered by the workmen's compensation provisions of KRS Chapter 342. An employe claiming benefits under the provisions of KRS Chapter 342 shall have the right to choose the services of a licensed doctor of chiropractic.
arbitrary schedule of the number of weeks for which compensation is payable for that loss.\textsuperscript{109} Section 342.730(1)(c) lists nineteen losses, sometimes referred to as "price tag" injuries, and the number of weeks compensable for each:

<table>
<thead>
<tr>
<th>BODILY LOSS</th>
<th>WEEKS OF DISABILITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Arm</td>
<td>340</td>
</tr>
<tr>
<td>2. Leg</td>
<td>340</td>
</tr>
<tr>
<td>3. Hand</td>
<td>312</td>
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<tr>
<td>4. Foot</td>
<td>216</td>
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<tr>
<td>5. Thumb</td>
<td>86</td>
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<tr>
<td>6. Index finger</td>
<td>54</td>
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<tr>
<td>7. Middle finger</td>
<td>43</td>
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<tr>
<td>8. Ring finger</td>
<td>22</td>
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<td>9. Little finger</td>
<td>16</td>
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<tr>
<td>10. Great toe</td>
<td>30</td>
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<td>11. Second toe</td>
<td>20</td>
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<tr>
<td>12. Third toe</td>
<td>15</td>
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<tr>
<td>13. Fourth toe</td>
<td>8</td>
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<tr>
<td>14. Fifth toe</td>
<td>5</td>
</tr>
<tr>
<td>15. Total loss of binaural hearing</td>
<td>156</td>
</tr>
<tr>
<td>16. Total loss of vision of one eye</td>
<td>150</td>
</tr>
<tr>
<td>17. Total loss of bilateral vision</td>
<td>520</td>
</tr>
<tr>
<td>18. Total loss, or total loss of use, of both hands, both arms, both feet or both legs</td>
<td>520</td>
</tr>
<tr>
<td>19. Phalanges: For loss of distal phalanx, one-half (1/2) of the income benefits for loss of the entire digit. For loss of more than the distal phalanx of a digit, the same as loss of the entire digit.\textsuperscript{110}</td>
<td></td>
</tr>
</tbody>
</table>

As noted in the landmark case of Osborne v. Johnson,\textsuperscript{111} "loss of members' compensation . . . is not based on any concept of occupational disability. It is simply a schedule of purely arbitrary allowances for loss of specified functional members of the body."\textsuperscript{112}

\textsuperscript{110} Id. The schedule of benefits also prescribes the number of weeks of disability for loss of 2 or more digits, total loss of use of a member, partial loss or partial loss of use of a member, loss of hearing or partial loss of bilateral vision, loss or loss of use of more than one member, and disfigurement of exposed areas. Ky. Rev. Stat. § 342.730(1)(c) 20-25 (Supp. 1978).
\textsuperscript{111} 432 S.W.2d 800 (Ky. 1968).
\textsuperscript{112} Id. at 802 n.1.
In the initial application of the scheduled income benefits, a claimant suffering a severance of a body member specified in the enumerated injuries list was strictly limited to the award prescribed by the statute and not allowed occupational disability benefits. In *Holt v. West Kentucky Coal Company* the claimant's leg was amputated four inches below the knee. Despite the Board's finding that the employee was "totally disabled from performing the only kind of work for which he was trained," the employee was denied recovery of occupational disability benefits which were substantially greater than the scheduled benefits, because the benefits recoverable for the employee's loss of his leg were specifically covered in the scheduled benefits statute. On appeal, the court affirmed the Board's decision and stated that "in all cases in which the employee's disability is caused solely by severance of a member of the body, KRS 342.105 prescribed the exact formula for the award of compensation, and the Board may neither increase or decrease that amount regardless of the actual disability resulting therefrom." Explaining the apparent discrepancy between this holding and the purpose of Workmen's Compensation law, the *Osborne* court stated that "consistency of theory or philosophy has never been a feature of our Workmen's Compensation law."  

A trend away from the strict holding in *Holt* began with the decision in *Illini Exploration, Inc. v. Ashby*, where the court held, "In situations wherein the effect of the injury to or loss of a member extends beyond the member so that it adversely affects the worker's general ability to labor, or limits his occupational opportunities to obtain the kind of work he is customarily able to do, he is entitled to compensation for such disability and is not limited by the schedule of benefits provided in KRS 342.105." The language of *Illini* was incorporated in a 1970 amendment to section 342.730. The current version of section 342.730(c) (27) conforms to the 1970 legislation and provides as follows:

If the board finds as a fact that the effects of any of the injuries, or disabilities, from occupational diseases, or losses, mentioned in this

114. Id.
115. Id. at 156 (emphasis added).
116. Id. at 160 (emphasis added). See also Stewart v. Workmen's Comp. Bd., 407 S.W.2d 723 (Ky. 1966).
117. Osborne v. Johnson, 432 S.W.2d at 802 n.1.
118. 430 S.W.2d 330 (Ky. 1968).
119. Id. at 332.
120. 1970 Ky. Acts, ch. 6, § 3(22).
section adversely affect a workman's ability to labor, or limit his occupational opportunities to obtain the kind of work he is customarily able to do; his compensation benefits shall not be limited to the amounts provided by this section, and he shall be awarded compensation benefits under some other applicable or appropriate section of this chapter which would provide more compensation benefits for his disability.\(^{121}\)

Still, if the claimant's disability does not limit "his occupational opportunities to obtain the kind of work he is customarily able to do . . . he is limited to the schedule of benefits."\(^{122}\)

In a practical light, the scheduled benefits now act as "merely a minimum."\(^{123}\) In *Blair v. General Electric Co.*,\(^{124}\) the court held that the amount of compensation for an employe who had lost an eye should not be limited to that provided in schedule of benefits:

> It is not possible for a laboring man to lose the use of any eye and not suffer some loss of his "ability to labor" and some limitation of his "occupational opportunities to obtain the kind of work he is customarily able to do." . . . If the injury "adversely affects" the workman's "ability to labor" or his "occupational opportunities" then "his compensation benefits should not be limited" to the schedule.\(^{125}\)

To come within the ruling, however, an employe must still prove occupational disability. Decided the same day as *Blair*, the court in *Messomore v. Peabody Coal Co.*\(^{126}\) upheld a limitation of an award to the scheduled benefits absent proof of occupational disability. The claimant suffered an injury to his left knee with "some limitation in the flexion" and "a good chance that these symptoms would gradually subside."\(^{127}\) The claimant had also returned to full-time employment earning more than at the time of his injury. The court found no evidence to support a finding of limitation to the claimant's occupational opportunities.

When an employe suffers a partial loss or partial loss of use of a bodily member, scheduled income benefits are provided "for a period proportionate to the period benefits are payable for total loss . . . as such partial loss bears to total loss."\(^{128}\) When a loss involves

\(^{124}\) 25 Ky. L. Sum. 6 at 18 (Ky. 1978).
\(^{125}\) Id.
\(^{127}\) Id.
more than one bodily member, the employe receives scheduled income benefits for the loss of use of each member, and the periods of benefits are to run consecutively.129

B. Apportionment

Apportionment of scheduled benefits becomes necessary generally where the loss or loss of use of a body member existed before the occurrence of the work related injury for which compensation is claimed.

The appropriate method of apportionment in such cases was set forth in Young v. Kentucky Baptist Hospital.130 The claimant sought compensation following the loss of his right eye. He had lost his left eye when he was twelve years old. The Workmen's Compensation Board awarded him full compensation for total permanent disability, allocating full responsibility to the employer and releasing the Special Fund. The employer appealed and the circuit court remanded the case with directions to enter an award allowing the claimant compensation for 100 weeks against the employer and 325 weeks against the Special Fund. The Special Fund appealed contending "that any disability under which [the claimant] was laboring by reason of the loss of the sight of his left eye, when he was 12 years of age, is noncompensable and should be deducted from the disability chargeable to the Special Fund."131 The court agreed. To determine the employer's liability, the court applied section 342.120(3) which provides that "the employer shall be liable only for the degree of disability which would have resulted from the latter injury or occupational disease had there been no preexisting disability or dormant, but aroused disease or condition."132 The court viewed the statute as clearly limiting the employer's liability "to the extent and consequence of the subsequent injury had there been 'no preexisting disability.'"133 Thus, the claimant was not entitled to compensation from his employer for a total disability, but only for the loss of one eye. The Special Fund's liability was determined under section 342.120(4):

The remaining compensation for which such resulting condition would entitle the employe, including any compensation for disability resulting from a dormant disease or condition aroused into disabling

130. 483 S.W.2d 148 (Ky. 1972).
131. Id. at 149.
133. Young v. Kentucky Baptist Hosp., 483 S.W.2d at 150.
realism by the injury or occupational disease, but excluding all compensation which the provisions of this chapter would have afforded on account of prior disabling disease or injury had it been compensated thereunder, shall be paid out of the special fund.

This section together with the fact that the claimant had not been compensated by anyone for the loss of his left eye required the court to exclude from the "remaining compensation" the amount of compensation which would have been awarded the claimant had compensation been provided for the loss of the left eye. Thus, the employer was ordered to pay 100 weeks of compensation for the loss of the right eye, and the Special Fund was ordered to pay the balance of the compensation, less 100 weeks excluded for the loss of the left eye.

Thus, where an employe has a preexisting disability and suffers a new compensable injury resulting in additional permanent disability, which, when combined with the preexisting disability causes a degree of disability greater than that which would have resulted from the new injury alone, the employer is liable only for the degree of disability which would have resulted had there been no preexisting condition. The Special Fund is liable for the remainder, including any disability resulting from the aggravation of a preexisting condition, less the amount of compensation which would have been awarded for the preexisting condition had it been compensated for under chapter 342.

C. Computation

The calculation of a scheduled benefits award is not complicated. The formula for total loss is average weekly wage (A.W.W.) times the statutory percentage (stat. %) subject to the statutory minimum (if applicable) and the statutory maximum times the number of weeks provided as compensation. For example, where an employe whose average weekly wage is $200.00 completely severs his right eye.

135. The court expressly overruled Cabe v. Stamps, 429 S.W.2d 361 (1967). The claimant's vision in his left eye had been impaired since birth and an occupational injury resulted in total loss of sight in his right eye. Nearly blind, the claimant was found 100% permanently disabled and was awarded scheduled benefits based on total blindness. The employer was held liable for the payment of benefits based on the loss of one eye, and the Special Fund was held liable for the remainder. The Special Fund contended that the loss of use of the left eye was a preexisting active condition for which it should be credited pursuant to Ky. Rev. Stat. § 342.120(4) (1977). However, the court held that the employe had not been compensated for the condition of his left eye and, therefore, the exclusion from compensation prescribed by section 342.120(4) was not applicable.
index finger in an accident occurring in June of 1976, the compensation is as follows:

1. $200.00 (A.W.W.) x 55% (stat. %) = $110.00.
2. $110.00 exceeds the 1976 statutory maximum of $96.00, and therefore, the amount is reduced to $96.00.\(^{137}\)
3. The loss of an index finger entitles the claimant to disability benefits for 54 weeks.\(^{138}\)
4. $96.00 per week x 54 weeks = $5,184.00.

Thus, the employee's total award is $5,184.00.

Had the employee suffered only a partial loss, the formula would be A.W.W. times statutory percentage times the percentage of the loss, subject to the statutory minimum (if applicable) and the statutory maximum, times the number of weeks for which compensation must be paid.\(^{139}\) Assume that the board determines that the partial loss to the employee in the example represents a forty-five percent disability to the hand as a whole. The computation is as follows:

1. $200.00 (A.W.W.) x 55% (stat. %) = $110.00.
2. $110.00 x 45% (disability to the hand as a whole) = $49.50.
3. $49.50 is above the statutory minimum and below the statutory maximum, and, therefore, remains unchanged.
4. The loss of a hand entitles the claimant to disability benefits for 312 weeks.\(^{140}\)
5. $49.50 per week x 312 weeks = $15,444.00.

The employee's total award is $15,444.00.

In the apportionment situation, the formula for total loss or partial loss remains the same. Upon determining the ultimate weekly recovery of the employee, the award is proportioned between the responsible parties. Following the above example, suppose the board determines the loss of the index finger to represent a twenty-five percent disability to the hand as a whole. Suppose further that it is determined that the severance caused the arousal of a dormant non-disabling condition, such as arthritis, into disabling reality. The board then determines that fifty percent of the disability is due to the arousal of the dormant condition and fifty percent is due to the severance. The computation is as follows:

137. Had the product of A.W.W. x stat. % been less than $32, the 1976 statutory minimum, the amount would be increased to $32 inasmuch as the statutory minimum would apply in computing awards for 1976 injuries. Keefe v. O. K. Precision Tool & Dies Co., 666 S.W.2d 804 (Ky. App. 1978).
1. $200.00 (A.W.W.) x 55% (stat. %) = $110.00.
2. $110.00 x 25% (disability to the hand as a whole) = $27.50.
3. Because the $27.50 is below the applicable statutory minimum of $32.00, the amount is increased to $32.00.
4. The proportionate liability of the employer is 50%. $32.00 x 50% = $16.00.
5. The proportionate liability of the Special Fund is 50%. $32.00 x 50% = $16.00.
6. Loss of a hand entitles the employee to payments for 312 weeks.
   $32.00 per week x 312 weeks = $9,984.00.

The employee is entitled to 312 weekly payments of $32.00 per week, or $9,984.00. This amount is paid in full by the employer who is then reimbursed by the Special Fund for its proportionate share. 4

IV. OCCUPATIONAL DISABILITY BENEFITS
A. The Principles
1. Disability Defined

The term “disability” is defined by section 342.620(1)(a) as follows:

“Disability” means, except for purposes of KRS 342.730(1)(c) relating to scheduled losses, a decrease of wage earning capacity due to injury or loss of ability to compete to obtain the kind of work the employee is customarily able to do, in the area where he lives, taking into consideration his age, occupation, education, effect upon employee’s general health of continuing in the kind of work he is customarily able to do, and impairment or disfigurement.142

Larson defines it as “inability, as the result of a work connected injury, to perform or obtain work suitable to the claimant’s qualifications and training.”143 And in the leading case of Osborne v. Johnson,144 the court explained that “disability” as used in workers’ compensation law means occupational disability as distinguished from functional disability (mere bodily impairment).145

Because “occupational disability” is the impairment of the earning capacity of an injured employee, the ultimate issue in any compensation case is “to what extent has the injured workman’s earning

143. A. LARSON, supra note 45, at § 57.00 (1978).
144. 432 S.W.2d 800 (Ky. 1968).
145. Id. at 802 (emphasis by the court).
capacity been impaired?" 146 To determine "impairment to earnings," the basic factors to be considered were listed in Osborne:

(1) What kind of work normally available on the local labor market was the man capable, by qualifications and training, or performing prior to injury; (2) what were the normal wages in such employment; (3) what kind of work normally available on the local labor market is the man capable of performing since his injury; and (4) what are the normal wages in such employment? 147

The court stated that "[t]he proper balancing of the medical and wage-loss factor is . . . the essence of the 'disability' problem in workmen's compensation." 148

Medical testimony in a compensation case deals with functional disability or bodily impairment ratings; but, such percentages are not determinative of occupational disability. 149 The board, being the fact-finder, considers the claimant's testimony, education, work experience, and physical condition, together with the medical evidence, to determine occupational disability. 150

A finding of compensable disability may be based on mental disability as well as physical disability. 151 Occupational disability may be awarded on the likelihood of future impairment to earning capacity. 152 The fact that an employee returns to regular employment at a higher rate of pay will not necessarily negate the finding of occupational disability. 153

Occupational disability can be classified into four categories: temporary total; temporary partial; permanent total; and permanent partial. 154 Little controversy surrounds awards for temporary total or temporary partial disability. These awards generally encompass the period of time required for healing and are directly evidenced by time off and wage loss. 155 In contrast, permanent partial or permanent total awards are constantly subjects of controversy.

146. Id. at 803.
147. Id.
148. Id. (citing 2 A. Larson, Workmen's Compensation Law § 57.10 (1st ed. 1975).
149. Osborne v. Johnson, 432 S.W.2d 800, 803 (Ky. 1968).
150. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968); See Tackett v. Sizemore Mining Co., 560 S.W.2d 17 (Ky. 1977); R.C. Durr Co. v. Chapman, 563 S.W.2d 743 (Ky. App. 1978).
151. Yocum v. Pierce, 534 S.W.2d 786 (Ky. 1976).
152. Couliette v. International Harvester Co., 545 S.W.2d 936 (Ky. 1976); Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968).
155. 2 A. Larson, supra note 45 at § 57.10.
because they involve payments for the duration of an employee's life and possibly longer in the event he dies as a result of the work related incident.\footnote{156}

An award of a permanent nature requires probative evidence to support a finding that the claimant sustained an injury of appreciable proportions.\footnote{157} For permanent total disability, the claimant must establish an evidentiary foundation "sufficient to support, but not to compel, a finding by the Board" that the claimant is "incapable of performing any kind of work of regular employment . . . ."\footnote{158} A claimant who continues to engage in "regular" work cannot be awarded benefits based on total disability.\footnote{159} Menial work does not prevent the employee from receiving an award for total disability, because menial work does not qualify as "regular" employment.\footnote{160} Neither is part-time employment a bar to a total disability award.\footnote{161} In Yocum v. Yates\footnote{162} the court held that although the claimant worked as a bus driver for two and one-half hours per day for twelve and one-half hours per week, he could still be totally disabled:

"Total disability" in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial . . . .

The rule followed by most modern courts has been well summarized by Justice Matson of the Minnesota Supreme Court in the following language:

"An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled."\footnote{163}

2. Lost Wages

Lost wages as a viable method of computing occupational disability benefits, reigned but briefly. Halted by legislative amendment effective June 18, 1978\footnote{164} and past applicability eradicated by
Transport Motor Express Inc. v. Finn, the theory of lost wages was that "any person who has lost wages by reason of his disability [is] to be entitled to compensation during the compensable period in an amount equal to the wages lost, as long as this amount does not exceed the applicable-maximum compensation."

The history of the lost wages theory was discussed in the Osborne court's analysis of disability. In Osborne, lost wages were held to perform an evidentiary function and not to provide the appropriate method for computation:

The degree of disability depends on impairment of earning capacity, which in turn is presumptively determined by comparing pre-injury earnings with post-injury earning ability; the presumption may, however, be rebutted by showing that post-injury earnings do not accurately reflect claimant's true earning power. ....

[A] conclusion would seem to be that if the injured worker for the present time can earn the same wages as before being injured, he is not disabled at all for workmen's compensation purposes. However, we believe that to adopt such a proposition would be to treat earning capacity as being static and perfectly measurable (which of course it is not), and to ignore the attrition from the mere passing of the years. KRS 342.110 requires that consideration be given to the nature of the injury and to the age of the workman.

The case of Apache Coal Co. v. Fuller addressed itself to "lost wages" in an interpretation of section 342.620(9) which provided in relevant part as follows:

A person who has lost wages by reason of his disability, and who is otherwise eligible for compensation, is entitled to compensation during the compensable period in an amount equal to the wages lost, so long as this amount does not exceed the applicable maximum compensation. For purposes of determining wages lost under this section, it is assumed that wage earning capacity prior to injury is the average weekly wage as calculated under KRS 342.140. An individual entitled to benefits under permanent partial disability shall be entitled to either his lost wages due to injury of his body or functional disability benefits, whichever is greater.

165. 25 Ky. L. Sum. 12 at 20 (Ky., 1978).
167. Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968).
168. Id. at 802, 804 (citing 2 A. Larson, Workmen's Compensation Law § 57.00 (1st ed. 1975)) (emphasis added).
169. 541 S.W.2d 933 (Ky. 1976).
The court also construed section 342.730(1)(b) which provided, in part that "the individual entitled to benefits under permanent partial disability shall be entitled to income benefits based on lost wages or body functional disability benefits, whichever is greater."171 In an opinion by Justice Lukowsky, the court stated that "[i]t is apparent that what the legislature has done is adopt two theories for the computation of benefits and provide that the employee is entitled to be paid pursuant to the theory which will grant him the greater return."172 Apache, finding a claimant was entitled to the greater of "lost wages" or "occupational disability," was the first case to indicate that "lost wages" was a viable method of computation as contrasted with occupational disability.173

Under the theory of "lost wages," a claimant becomes entitled to total wages lost subject only to the statutory maximum. The computation of occupational disability benefits is important only when there is no substantial and immediate loss of wages. In the court of appeals decision in Transport Motor Express, Inc. v. Finn174 Judge Park pointed out the policy reasons for rejecting the lost wages theory:

To award 100% of lost wages as income benefits violates every accepted theory of American workmen's compensation law.

If an employee receives 100% of his wage loss, there is no incentive for him to return to work. In order to provide an incentive for the employee to return to work and a disincentive to remain unemployed, workmen's compensation laws customarily provide income benefits that are less than 100% of the employee's wages lost.175

The Kentucky Supreme Court reversed the court of appeals decision and rejected lost wages as a separate theory for determining disability. The Court returned to the principle enunciated in Osborne, that lost wages played only an evidentiary role:

Lost wages play an integral role in the determination of disability under this theory; but it cannot be construed as providing a separate

172. Apache Coal Co. v. Fuller, 541 S.W.2d 933, 934 (Ky. 1976).
173. The lost wages theory was discussed in Liberty Engr. & Mfg. Co. v. Granger, 548 S.W.2d 845 (Ky. App. 1977), and in Couliette v. International Harvester Co., 545 S.W.2d 936 (Ky. 1976). The theory was actually applied in Mills v. Parsley, 24 Ky. L. Sum. 7 at 12 (Ky. App. 1977). It should be noted that inertia of a claimant has barred entitlement to lost wages computation. Yocum v. Bentley, 25 Ky. L. Sum. 1 at 21 (Ky., 1978).
175. Transport Motor Express, Inc. v. Finn, 568 S.W.2d at 513-14 (Park. J., concurring).
and distinct method of computing benefits within the total context of the statute.

Wage earning capacity prior to injury is the average weekly wage. The most persuasive relevant evidence, though not the only evidence, of wage earning capacity subsequent to injury is the wage the claimant is actually able to earn. The difference between the two—wage loss—is presumptive evidence of the decrease in wage earning capacity or disability. The presumptive type evidence can be rebutted by other evidence of the sort indicated in KRS 342.620(9).\[176\]

Justice Lukosky, in his concurring opinion, directed his concern to the "intellectual sophistry" by which his colleagues seemed to "write out" the lost wages language of sections 342.620(9) and 342.730(1)(b): "The vitality of the quoted statutory language and the interpretation we place on it in Apache Coal Co. v. Fuller ... cannot be philosophized away."\[177\] The majority's decision to deny lost wages a separate and distinct role in the computation of benefits resulted from their finding of a "distinct contradiction" between section 342.620(9), which provided that "[a] person who has lost wages ... is entitled to compensation ... in an amount equal to the wages lost ...,"\[178\] and section 342.730(1)(b) which stated that "an individual entitled to benefits under permanent partial disability shall be entitled to compensation based on lost wages or body functional disability benefits, whichever is greater."\[179\] The court reasoned that a literal acceptance of the language of section 342.620(9) would render section 342.730(1)(b) "impotent."\[180\] The court viewed the language of section 342.730(1)(b) as indicative of the legislature's intent that lost wages were to serve as an evidentiary factor in determining disability:

> A statutory construction which renders specific statutes meaningless in a given set of cases is to be avoided.

Construing "wages lost" as serving an evidentiary function within the earning capacity theory of determining disability, instead of presenting a distinct alternative theory for the computation of benefits, achieves a congruence between and gives effect to the two sections in terms of what we conceive to be their evident purpose and function which cannot be achieved by the other construction which we made

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177. Id. (Lukosky, J., concurring).
and on which the Court of Appeals' opinion quite properly felt bound.\textsuperscript{181}

B. Apportionment

The employe, the Special Fund, and the employer share proportionately the liability for a workmen's compensation award, based upon the assessment of each party’s percentage of disability.\textsuperscript{182} The actual assessment of percentage of disability "is a factual determination and a legal concept" made by the Board in view of all relevant evidence.\textsuperscript{183} Although the medical evidence is very relevant to the apportionment, it is not determinative or controlling.\textsuperscript{184} Apportioned awards are always paid by the employer, who may then have reimbursement from the Special Fund.\textsuperscript{185}

When a disability is partially caused by a work related incident, the employer is liable only for that portion of the disability caused by the work related incident.\textsuperscript{186} The remainder of the disability is apportioned to the Special Fund and/or the employe.\textsuperscript{187} In \textit{Ligon Preparation Plant Company v. Hamilton}\textsuperscript{188} an employe sustained two separate injuries in the same employment. The employer was liable for the disability attributable to both injuries. The court held,

If the latter injury would independently have totally disabled the employe, the employer is liable for compensation for total disability. But if the second injury alone would not have totally disabled the employe, and if the evidence establishes that the degree of functional disability resulting from the combination of the two injuries is greater than that which would have resulted from simply adding the percentages of functional disability attributable to the injuries separately, the board must make an apportionment, assigning some percentage of occupational disability to the combination factor and charge that against the Special Fund.\textsuperscript{189}

Apportionment by the board becomes more difficult where there is a "dormant, non-disabling disease aroused into disabling reality."\textsuperscript{190} The disability is no longer the product of a single event, but a series of events, years of aggravation and normal aging processes

\begin{itemize}
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} Ky. Rev. Stat. § 342.120(5) (Supp. 1978).
\item \textsuperscript{183} See Hudson v. Owens, 439 S.W.2d 565, 570 (Ky. 1969).
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} Yocum v. Stewart, 24 Ky. L. Sum. 15 at 14 (Ky. App. 1977).
\item \textsuperscript{186} See, e.g., Yocum v. Layne, 553 S.W.2d 52 (Ky. 1977).
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} 482 S.W.2d 762 (Ky. 1972).
\item \textsuperscript{189} \textit{Id.} at 764.
\item \textsuperscript{190} Ky. Rev. Stat. § 342.120(4) (Supp. 1978).
\end{itemize}
in the body. The board is required to determine "that portion of the disability that probably would exist regardless of the work," and then assess that percentage to the Special Fund; the remainder, that attributable to the work, is assessed against the employer. 191 A prior disabling condition or injury must be excluded from compensation and hence the burden is the responsibility of the employe." 192 Whether compensated previously or not, active disability proportionately reduces compensation. 193

C. Non-Apportionment

The case of Pennington v. Winburn 194 controls in the non-apportionment, permanent partial disability cases. In Pennington, it was contended that if the claimant's average weekly wage, reduced by the statutory percentage, exceeded the statutory maximum, then compensation should be based on the percentage of occupational disability times the statutory maximum. The court rejected this contention and established the formula for computing permanent partial disability: average weekly wage times the statutory percentage times percentage of occupational disability, subject to the statutory maximum.

D. Computation

The basic formula for computation of disability benefits, whether or not apportionment is required is "[a]verage weekly wage times the statutory percentage times the percentage disability figure." 195 The amount derived equals the combined or total disability figure, 196 and is subject to the statutory minimum (if applicable) and the statutory maximum. 197

1. Non-Apportionment

For example, where an employe whose average weekly wage is $600.00, and who has four dependents, is determined to be twenty percent occupationally disabled as a result of an injury sustained in November of 1976, the computation is as follows:

1. $600.00 (A.W.W.) x 62.5% (55% + 2.5% for each dependent, subject to a maximum of three) = $375.00.

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193. Id.
194. 537 S.W.2d 167 (Ky. 1976).
196. Id.
197. Id.
2. $375.00 x 20% (occupational disability %) = $75.00.
3. The sum of $75.00 is below the 1976 statutory maximum of $96.00 and above the statutory minimum of $32.00, and therefore remains unchanged.
4. The employee is entitled to weekly compensation payments of $75.00.

Had the employee been determined to be forty percent occupationally disabled, the computation would be as follows:
1. $600.00 (A.W.W.) x 62.5% (55% + 2.5% per dependent) = $375.00.
2. $375.00 x 40% (occupational disability %) = $150.00.
3. The sum of $150.00 exceeds the statutory maximum of $96.00 so the figure is then reduced to $96.00.
4. The employee is entitled to weekly compensation payments, based on a 40% occupational disability, equal to the statutory maximum, $96.00.

As a second example, an employee with an average weekly wage of $140.00 and two dependents, whom is determined to be twenty percent occupationally disabled because of an injury that occurred in June of 1977, the computation is as follows:
1. $140.00 (A.W.W.) x 66 2/3% = $93.32.
2. $93.32 x 20% (occupational disability %) = $18.66.
3. The sum of $18.66 is below the statutory maximum of $104.00 for 1977. The statutory minimum is not applicable to 1977 injuries.  
4. The employee is entitled to weekly compensation payments, based on a 20% occupational disability, of $18.66.

In the above example, had the injury occurred in 1976, the computation would differ as follows:
1. $140.00 (A.W.W.) x 60% (55% + 2.5% per dependent) = $84.00.
2. $84.00 x 20% (occupational disability %) = $16.80.
3. The sum of $16.80 is below the 1976 statutory minimum of $32.00, so the award is then increased to $32.00.
4. The employee is entitled to weekly compensation payments, based on a 20% occupational disability, of $32.00.

2. Apportionment

As an example of a case where apportionment would be necessary,

198. See Keefe v. O. K. Precision Tool & Die Co., 566 S.W.2d 804 (Ky. 1977).
assume the employe has an average weekly wage of $200.00, and that he has two dependents. He is injured in April, 1977 and is determined to be one hundred percent occupationally disabled, ten percent of which is apportioned to the Special Fund and ninety percent to the employer. The computation is as follows:

1. $200.00 (A.W.W.) x 66 2/3% = $133.32.
2. $133.32 x 100% (occupational disability) = $133.32.  
3. The sum of $133.32 exceeds the 1977 statutory maximum of $104.00, so the figure is reduced to $104.00.
4. The Special Fund’s liability is 10% of $104.00 or $10.40. The employer’s liability is 90% of $104.00, or $93.60.
5. The employe is entitled to weekly compensation payments of $104.00 based on a 100% occupational disability.

As a second example, suppose an employe with one dependent and an average weekly wage of $200.00 is injured in 1975 and is determined to be seventy-five percent occupationally disabled, twenty-five percent of which is apportioned to the Special Fund, forty percent is apportioned to the employer, and ten percent to the employe for a pre-existing condition. The computation is as follows:

1. $200.00 (A.W.W.) x 57.5% (55% + 2.5% per dependent) = $115.00.
2. $115.00 x 75% (occupational disability %) = $86.25.
3. The sum of $86.25 does not exceed the statutory maximum of $88.00 and is not below the statutory minimum of $29.00.
4. The Special Fund’s liability is 25% of 75%, or 1/3 of the total award of $86.25. The proportionate liability is $28.75. The employer’s liability is 40% of 75%, or 40/75 of the total award of $86.25. The proportionate liability is $46.00 (0.40 x $86.25 / 75 = $46.00). The employe’s liability is 10% of 75% or 10/75 of the total award of $86.25. The proportionate liability is $11.50. The total of all liabilities, $28.75 + $46.00 + $11.50 = $86.25.
5. The employe is entitled to weekly compensation payments of $74.75. The employe is not compensated on 10% of 75% occupational disability as that portion, $11.50, is his responsibility.

V. Conclusion

The evaluation of Kentucky Workmen’s Compensation law is a
continual process perhaps requiring some "settling" of the concepts presented throughout the recent legislation and judicial decisions. The approach has been to disentangle the piecemeal case law in the areas of computation and apportionment of benefits. Apportionment has been made more equitable, each party sharing proportionately in the burden of compensation. Whether this achievement was born of judicial legislation is inconsequential. The trend evidences neither liberal nor conservative policies, but rather a straightforward approach to compensating the injured employee. The courts and the legislature seem to have achieved a balance between Workmen's Compensation law and the practical application of its benefits.

JOSEPH M. SCHULTE
SEPARATION OF CHURCH AND STATE: EDUCATION AND RELIGION IN KENTUCKY

So Built we the Wall . . . .  

Nehemiah 4:6

The First Amendment has erected a wall between Church and State. That wall must be kept high and impregnable. We would not approve the slightest breach . . . .

And he brought me to the door of the court, and when I looked, behold a hole in the wall . . . .

Education in Kentucky is currently beset with renewed controversy over the application of the constitutional mandate of separation of church and state. The general assembly has enacted a statute authorizing the department of libraries to purchase and distribute free textbooks to pupils who attend nonpublic schools. Another new statute requires that the Ten Commandments be displayed in every public schoolroom in the Commonwealth. On the other hand, the Franklin Circuit Court has ruled that the state board of education lacks the authority to accredit private fundamentalist schools.

In addition to recent assaults on the doctrine of separation, other constitutionally questionable Kentucky laws remain in effect. One such law requires teachers to read passages from the Bible daily. Another permits the recitation of the Lord's Prayer in public classrooms. A third allows a public school teacher to teach the Biblical

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2. Ezekiel 8:7.
6. Ky. Rev. Stat. § 158.170 (1971) provides as follows:
   The teacher in charge shall read or cause to be read a portion of the Bible daily in every classroom or session room of the common schools of the state in the presence of pupils therein assembled, but no child shall be required to read the Bible against the wish of his parents or guardian.
theory of evolution, supporting it with pertinent Bible readings.8

The current tension between religion and education in Kentucky calls for reexamination of the wall that separates church and state. Its age, history, and strength must be considered; its height and width measured. Ultimately, it must be determined whether the wall should be restored and refurbished or left to decay and ruin.

I. TEXTBOOKS FOR NONPUBLIC SCHOOLS.

With the enactment of Kentucky Revised Statutes section 171.215, Kentucky joined the minority of states that has enacted legislation authorizing the loan of textbooks to students attending nonpublic schools.9 The statute painstakingly provides that all

8. KY. REV. STAT. § 158.177 (Supp. 1978).
9. KY. REV. STAT. § 171.215 (Supp. 1978). The statute provides as follows:
   (1) The department of libraries shall purchase textbooks from publishers whose books have been adopted by the state textbook commission for distribution without cost to pupils attending grade one (1) through grade twelve (12) of the state’s nonpublic schools which have been accredited by the state department of education.
   (2) The chief school administrator of each eligible school may file a requisition with the state librarian for the books needed for the next ensuing school term. Textbooks eligible for distribution by grade level or subject shall conform to the schedule in use by the state board for elementary and secondary education for distribution to the public schools.
   (3) The state librarian shall develop rules and regulations governing the purchase, requisition, distribution, assignment to students, care, use and return of textbooks, and a plan for permanently labeling the textbooks as the property of the department of libraries. The rules and regulations shall provide for the allocation of textbooks in a manner reflecting, and not to exceed the expressly limited appropriation to fund the allocation. The rules and regulations shall be developed in consultation with the department of education and shall conform, within statutory limits, to the rules and regulations already established by the state board for elementary and secondary education for distribution to the public schools.
   (4) All textbooks purchased under the provisions of this section are the property of the state. Each school administrator obtaining books through the department of libraries is custodian of the books in his school. He shall issue the books to the student according to the rules and regulations formulated by the state librarian.
   (5) Funds appropriated by the general assembly to the department of libraries for this purpose shall not be expended for any textbooks which present a particular religious philosophy and shall not be considered as or commingled with common school funds and shall be allocated each year to the nonpublic school students as provided by rule and regulation of the department of libraries to the extent allowed by the appropriation provided in Acts 1978, ch. 139, § 2.

Other states that have enacted statutes permitting the expenditure of public funds to furnish textbooks to students at nonpublic schools include Illinois, Nonpublic State Parochial Grant Act, Pub. Act No. 77-1891, § 4-10, 1972 Ill. Laws, rejected in People ex rel. Klinger v. Howlett, 56 Ill.2d 1, 305 N.E.2d 129 (1973); Louisiana, Free Textbook Act, Pub. L. No. 100, § 1, 1928 La. Acts (current version at LA. REV. STAT. ANN. § 17:351 (West Supp. 1978)), upheld in Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (valid under United States Constitution) and Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929) (valid under state constitution); Mississippi, MISS. CODE ANN. tit. 37, ch. 43 (1972),
books remain the property of the state,\textsuperscript{10} that no textbooks may be purchased which present a "particular religious philosophy,"\textsuperscript{11} and that no part of the funds appropriated may "be considered as or commingled with common school funds."\textsuperscript{12} These provisions are ultimately the ones upon which the Act's fate will hinge should it be


The former South Dakota statutes on the subject, S.D. COMPILED LAWS ANN. §§ 13-34-16 to 16.1 (1975), were held violative of the South Dakota Constitution in McDonald v. School Bd., 246 N.W.2d 93 (S.D. 1976). Chief Justice Dunn dissented and would have upheld the statute under the child benefit theory. See text accompanying note 45 infra. In 1977, two of the justices in the majority in McDonald were succeeded by two new justices. Subsequently, the legislature, relying on Chief Justice Dunn's dissenting opinion, enacted a new textbook statute. S.D. COMPILED LAWS ANN. § 13-34-16.2 to .3 (Supp. 1978). Perhaps the new version will fare better than did its predecessor because of the change in the make-up of the court.

12. Id. Section 171.215 originated as House Bill 168. Section 1(1)(b) of the original bill authorized the expenditure of funds for "supplementary instructional materials of a nonreligious nature." 1978 KY. HOUSE J. 834. This provision was eventually dropped. The only other significant difference between the Act as first proposed and the final version passed is the amount appropriated. Initially, H.B. 168 appropriated $1,407,128 for the 1978-1980 biennium; the final version appropriates only $25,000 for fiscal year 1978-1979, "which sum shall not lapse but shall be carried forward to the next fiscal year." See generally 1978 Ky. Acts ch. 139, § 2. The Act will face its most serious challenge, on the practical side, when appropriations are sought at the next regular session of the Kentucky General Assembly.

Subsection (3) of the Act empowers the state librarian to "develop rules and regulations governing the purchase, requisition, distribution, assignment to students, care, use and return of textbooks, and a plan for permanently labeling the textbooks as the property of the department of libraries." KY. REV. STAT. § 171.215(3) (Supp. 1978). Emergency regulations were promulgated on September 28, 1978. 5 Ky. Reg. 305 (1978). These regulations defined an eligible nonpublic school as one providing education for pupils in grades one through twelve in a school accredited by the department of education. Subsequently, new regulations effective Dec. 6, 1978, were promulgated. These were identical to the original regulations except that "accredited" was changed to "approved." 5 Ky. Reg. 541 (1979) (to be codified in 725 K.A.R. 2:050).
challenged under the Kentucky or Federal Constitution.

An analysis of the strengths and weaknesses of the Act requires examination of the basic constitutional guidelines surrounding separation of church and state in Kentucky, including the constitutional foundations of the common school system and the common school fund. And, because the Act, even if upheld under the Kentucky Constitution, could still be attacked under the Federal Constitution, the requirements of the United States Constitution must also be considered.

A. Kentucky Constitution: Freedom of Religion

Freedom of conscience, a basic tenet of American ideology, is embodied in sections one and five of the Bill of Rights of Kentucky’s current constitution. This tenet has been part of Kentucky’s constitution from the Commonwealth’s inception. Sections three and four of Kentucky’s first constitution recognized the broad general grant of religious liberty. Section twenty-eight excepted the rights enumerated in the Bill of Rights from the general powers of government and preserved them inviolate.

13. Ky. Const. § 1 lists “the right of worshipping Almighty God according to the dictates of their consciences” among the “certain inherent and inalienable rights” which all men have. Section 5 elaborates on the right of religious freedom:

No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

14. Kentucky's original constitution is noteworthy because its Bill of Rights was authored by Thomas Jefferson. A. Stokes, Church and State in the United States 444-45 (1950).

15. Ky. Const. of 1792, art. XII, cl. 3 provided:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no men of right can be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can in any case whatever control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship.

16. Ky. Const. of 1792 art XII, cl. 28:

To guard against the high powers which have been delegated, we declare that everything in this article is excepted out of the general powers of government, and shall
The same liberal concept of religious freedom was carried forward into the constitutions of 1799 and 1850, but only the latter provided for public education. Article XI of the 1850 constitution created the common school fund and the office of superintendent of public instruction. However, this constitution contained no specific requirement that education and religion be kept separate. Perhaps this omission arose from an awareness on the part of the delegates to the convention of 1848-1849 that the new public school system would require flexibility in its formative stage. This desire for flexibility is evident from the fact that the provisions finally drafted focused on the school fund rather than on the framework for the schools themselves.

The Constitution of 1891 further strengthened the state’s control over the school fund by specifically establishing the infrastructure of the common school system. The sanctity of the school fund was further ensured by a provision that expressly prohibited the allocation of any funds for sectarian purposes. More significantly, section five was amended to guarantee that “no man be compelled to send forever remain inviolate; and that all laws contrary thereto, or contrary to this constitution, shall be void.

See generally 4 W. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 112-237 (1975). Clauses 3, 4, and 28 of article XII of the 1792 constitution were carried forward into the 1799 constitution as sections 3, 4, and 28 of article X, with only minor editorial changes.

It is interesting to note that section 26 of the present constitution is nearly identical to Jefferson’s original draft of article XII, clause 28 of the 1792 constitution.

17. In the Constitution of 1850, Article X of the 1799 Constitution became Article XIII, and sections 3, 4, and 28 became sections 5, 6, and 30, respectively. See 4 W. SWINDLER, supra note 18, at 182-83.

18. Ky. Const. of 1850, art XI.

19. See JOURNAL AND PROCEEDINGS OF THE CONVENTION OF THE STATE OF KENTUCKY 115 (Frankfort 1849) (proposed resolution of Mr. Alfred M. Jackson, delegate from Muhlenburg County):

WHEREAS, Any plan or system of Common School instruction which can be adopted in this Constitution, will necessarily demand frequent alterations, conformable to the progress of society, to the improvements in systems of education, and to the means which the state may be able, from time to time, to bestow. Therefore,

Resolved, That it is inexpedient to establish in this Constitution a system of Common School instruction, but that the Legislature be required by a provision in this Constitution, to maintain inviolably the present Common School Fund . . .

The history of the sum designated as the common school fund is traced in Higgins v. Prater, 91 Ky. 6, 14 S.W. 910 (1890). It is interesting to note that case’s impact upon the Convention of 1890. See also Phelps, About the Making of Kentucky’s Constitution, 10 Ky. St. B.J. 132 (1946), for a discussion of the Constitution of 1891, and as to all four Constitutions see Dietzman, The Four Constitutions of Kentucky, 15 Ky. L.J. 116 (1927).


his child to any school to which he may be conscientiously op-
posed.” 22 The Constitution of 1891 thus set the stage for confronta-
tion between church and state in the realm of education.

Kentucky’s new textbook statute faces its most serious problems
when measured against those provisions of the constitution designed
to protect the common school fund from expenditures for purposes
other than education in the common schools. The careful wording
of Kentucky Revised Statute section 171.215(1) evidences its draf-
ters’ awareness of these potential problems. It provides that
“[f]unds appropriated by the General Assembly to the department
of libraries for this purpose shall not be considered as or commingled
with common school funds. . . .” A complete evaluation of the con-
stitutionality of the Act requires a review of the cases in which
Kentucky’s highest court construed the purposes sought to be ac-
complished by sections 183 through 189 of the constitution.

The focal language is contained in section 184: “The interest and
dividends of said fund, together with any sum which may be pro-
duced by taxation or otherwise for purposes of common school edu-
cation, shall be appropriated to the common schools, and to no other
purpose.” 23 The court of appeals interpreted the predecessor to this
section, Article XI, section 1 of the Constitution of 1850, in Higgins
v. Prater. 24 After discussing the history of the school fund, the court
stated, “This language, taken literally, includes every dollar raised
in the State for purposes of education; whether by taxation, private
subscription or donation. Evidently, however, the intention was to
include only public money raised by public authority for public
education . . . Thus we see the entire article can not be taken
literally.” 25

Contemporaneously with the rendition of the Higgins decision,
delegates to the constitutional convention of 1890 were redrafting
the constitutional articles on education. 26 Article XI, section 1 be-
came section 184 of the constitution. This section was interpreted
in Pollitt v. Lewis as limiting legislative power to appropriate or
expend money for education in the common schools. The court con-
strued section 184 as expressive of the legislature’s intention to pro-

24. 91 Ky. 6, 14 S.W. 910 (1890).
25. Id. at 13, 14 S.W. at 911 (emphasis by the court).
26. The Higgins court knew of the convention’s deliberations and felt that it was an appro-
priate time for the court to address the appropriations issue. See id. at 9, 14 S.W. at 910.
27. 269 Ky. 680, 108 S.W.2d 671 (1937).
hhibit the expenditure of funds to support nonpublic schools.\textsuperscript{28} The more liberal approach suggested by Higgins was not followed, the court opting for a literal interpretation.\textsuperscript{29}

Section 186 of the constitution of 1891 controls the distribution of the school fund created by section 184. It provides that "[a]ll funds accruing to the school fund shall be used for the maintainence of the public schools of the Commonwealth, and for no other purpose. . . ."\textsuperscript{30} In Talbott \textit{v. Kentucky State Board of Education},\textsuperscript{31} the court examined the interplay between sections 184 and 186 and arrived at an even more restrained definition of the constitutional limitation on the expenditure of funds for educational purposes:

It is immaterial that money produced by taxation is appropriated for school purposes after the tax is levied or the money collected. It becomes, as soon as the appropriation is made, a part of the school fund, and its distribution is controlled by these sections of the Constitution. Calling it a fund for the equalization of educational opportunities does not change its character. It is spent in precisely the same manner and for the same purposes as other state school funds, except the method of distribution is changed.\textsuperscript{32}

Clearly, under the Talbott court's interpretation of sections 184 and 186, funds from the common school fund cannot be expended other than for the benefit of the public schools. And more importantly, when funds are earmarked for an educational purpose, such

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{28} It is manifest that the very wording on the provision of section 184 quoted imports that there are schools of a character different from common schools as mentioned therein. It is equally clear that the framers of the Constitution must have had in mind that they were placing a limitation upon legislative power to expend money for education other than in common schools. \textit{Id.} at 682-83, 108 S.W.2d at 672.
\item \textsuperscript{29} It is equally plausible that the delegates sought to establish an educational system that would benefit the entire state. The inclusion of a provision for submitting any changes to the voters, demonstrates that the delegates considered the possibility that the voters might choose a system other than one comprised exclusively of public schools. Accordingly a compulsory education provision was not incorporated in the constitution. \textit{See} 3 \textit{OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION 4456 (1890)} (remarks of Delegate Jacob). The emphasis on religion in the early days of Kentucky's public education system is demonstrated by the following statement of one of the delegates to the 1890 convention:

\begin{quote}
Is it necessary, at this late day, and before this intelligent body of gentlemen for me to enter into an argument to defend education by the State? It has become the fixed policy of our American system, and is not only the bulwark and hope of freedom, but the handmaid of religion.
\end{quote}
\textit{Id.} at 4460 (remarks of Delegate Beckner). \textit{See generally} A. \textsc{Johnson} \& F. \textsc{Yost}, \textit{SEPARATION OF CHURCH AND STATE IN THE UNITED STATES} ch. II (Greenwood reprint 1969).
\item \textsuperscript{30} \textsc{Ky. Const.} § 186.
\item \textsuperscript{31} 244 \textsc{Ky.} 826, 52 S.W.2d 727 (1932).
\item \textsuperscript{32} \textit{Id.} at 832, 52 S.W.2d at 730.
\end{itemize}
\end{footnotesize}
funds immediately become part of the school fund. A literal reading of *Talbott* and *Pollitt* leads to the conclusion that no expenditure can be made for any other purpose. Under these precedents, the textbook statute is constitutionally defective because it mandates the expenditure of funds which, when appropriated, become school funds *eo instanti* for books to be used in nonpublic schools.33

Despite the strictures of *Talbott* and *Pollitt*, an appropriation of public funds for use by private school has been upheld where the organization fills a need not met by the public schools,34 or where the funds are used to protect the health, safety, or general welfare of the pupils in a private school.35 Presumably, such appropriations are upheld on the theory that "a governmental body may choose a private institution as an instrumentality for the accomplishment of a public purpose . . . ."36 Arguably, the textbook statute could be upheld under the same theory, inasmuch as nonpublic schools are designated the indirect recipients of state aid to accomplish a public purpose—education of the commonwealth's youth.

There is another reason to believe that *Pollitt* and *Talbott* do not sound the death knell for the textbook statute. In *Hodgkin v. Board for Louisville & Jefferson County Children's Home*,37 in which the court considered whether public funds could be used to support a children's care facility, the court stated, "[S]ections [183 to 186] of the Constitution neither authorize appropriations of the Common School Fund to such schools [which are not members of the common school system], nor do they bar the use of other state funds for such schools."38 This statement is directly contrary to the assertion in *Talbott* that an appropriation becomes part of the school fund as soon as it is made. This difference of opinion concerning constitutional limitations on expenditures for educational purposes was recognized, though not resolved, in *Butler v. United Cerebral Palsy of Northern Kentucky, Inc.*39 Speaking through Justice Pal-

33. The rationale of *Talbott* and *Pollitt* was questioned in *Butler v. United Cerebral Palsy of N. Ky., Inc.*, 352 S.W.2d 203, 207 (Ky. 1961) (dictum).
34. See, e.g., *Butler v. United Cerebral Palsy of N. Ky., Inc.*, 352 S.W.2d 203 (Ky. 1961) (schools for "exceptional children").
37. 242 S.W.2d 1008 (Ky. 1951).
38. Id. at 1010.
39. 352 S.W.2d 203 (Ky. 1961).
more, the court questioned whether the Pollitt and Talbott interpretations of sections 184 and 186 were valid.\textsuperscript{40} However, the court avoided a resolution of the conflict by characterizing the appropriations issue before it as one involving welfare and not education.\textsuperscript{41}

The divergent interpretations of the constitution must be resolved before the constitutionality of the textbook statute can be determined. Considering the exceptions to the prohibition against appropriation of public funds for use by private schools,\textsuperscript{42} the better view is that of the Hodgkin court. The language of section 184 conclusively demonstrates that it was designed only to limit funds raised, collected, or appropriated for education in the common schools.\textsuperscript{43} This interpretation is bolstered by the requirement that voters must approve any expenditure for education other than in common schools.\textsuperscript{44} The general purpose of sections 184 through 186 is to ensure the financial stability of the public schools. Reasonably, then, if the funds earmarked for public school financing are preserved, the general assembly could expend funds out of general state revenues for valid public purposes, including limited or indirect support of nonpublic schools, under its inherent powers.

In addition to overcoming a constitutional challenge under sections 184 through 186, the textbook statute must also surmount the obstacles posed by section 189 of the constitution. Section 189 expressly prohibits the school fund or any fund raised for educational purposes to be appropriated to, used by, or in aid of any religious or denominational school. Section 189 and section 5 form a strong wall of separation between church and state that the textbook statute must confront. The statute may, however, prevail under the child benefit theory, a theory used by courts in other states to uphold similar textbook laws.

B. \textit{The Child Benefit Theory}

Stated simply, the child benefit theory represents "the concept that the state may extend certain welfare aid to students attending..."
church-related schools in situations where general aid to the parochial schools themselves would be unconstitutional.\(^*\)

The essence of the child benefit argument is that the aid provided flows directly to the child who is compelled to attend school under the state's compulsory education laws, and only indirectly, if at all, to the parochial school.

The only problem with using the child benefit theory to support the Kentucky textbook statute is that it was rejected in Sherrard v. Jefferson County Board of Education.\(^*\) However, later decisions of the court of appeals indicate that Kentucky may be following a child benefit theory of its own—whose focus is on those programs that are beneficial to the child's general welfare.\(^*\) It has been suggested that the child benefit theory may be redefined to fall within the range of constitutionally permissible exercises of state police power, thus providing a means by which laws, such as the textbook statute, can avoid a conflict with the establishment clause,\(^*\) "if and only if the aid provided by the state is given to a child attending a sectarian school in his capacity as a child and not as a parochial pupil."\(^*\) The cases in which courts have considered the constitutionality of statutes permitting the state to provide free bus transportation for pupils who attend nonpublic schools indicate that this redefinition of the child benefit theory more closely approximates the Kentucky high court's definition.

In Sherrard v. Jefferson County Board of Education,\(^*\) the court of appeals was required to rule upon the constitutionality of a statute "providing for the transportation of school children attending schools other than public schools."\(^*\) On its face, this statute was an equalizing measure: "Pupils attending private schools shall be entitled to the same rights and privileges as to transportation to and from school as are provided herein for pupils of public schools."\(^*\)

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47. Compare the welfare characterization of the educational aid made in Butler v. United Cerebral Palsy of N. Ky., Inc., 352 S.W.2d 203, 207 (Ky. 1961) with the child benefit definition from La Noue, supra note 45, at 79.
48. U.S. Const. amend. I.
50. 294 Ky. 469, 171 S.W.2d 963 (1942).
52. Id. It should be noted that equal protection arguments have not fared well in textbook cases, especially in state courts. See Hans v. Independent School Dist. No. 1, 69 S.D. 303, 9
The Jefferson County Board of Education defended solely on the ground that the act was "a valid exercise of the police power of the State for the benefit and aid of the children and not for the school." The Board relied upon Cochran v. Louisiana State Board of Education, the case which has been subsequently characterized as having given birth to the child benefit theory. Choosing not to follow Cochran, the court followed the rule in Gurney v. Ferguson, which struck down a similar Oklahoma busing statute and strongly rejected the child benefit theory. It is doubtful whether the reasoning of the Gurney court is still controlling, or whether it and similar cases, including Sherrard, currently represent the "... great weight of authority." There are at least three reasons why reasoning similar to that used in Gurney may no longer have a persuasive effect on Kentucky courts. First, although Gurney expressly refuted the child benefit theory, subsequent Oklahoma decisions have adopted a countervailing theory which accomplishes similar results. Secondly, precedents relied on in Gurney have been overruled. And third, the Gurney court's fear that the child benefit theory would be unworkable because of the difficulty in distinguishing expenditures that benefit the child from those that benefit the school can be allayed by appropriate safeguards.

N.W.2d 707 (1943) (nonpublic school pupil not entitled to same textbook privileges as public school pupil); accord, Or. Ky. Att'y Gen. No. 72 - 73 (1972). But see Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941) (statute requiring surrender of right to use books on transfer from public school would constitute a denial of equal privileges on sectarian grounds).

53. Sherrard v. Jefferson County Bd. of Educ., 294 Ky. at 475, 171 S.W.2d at 966 (emphasis in original).
54. 281 U.S. 370 (1930).
55. See Comment, supra note 54, at 125-28.
57. Sherrard v. Jefferson County Bd. of Educ., 294 Ky. at 478, 171 S.W.2d at 968.
60. The Gurney court was wary of the domino effect that the child benefit theory could have:

Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and the upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such. Yet the same argument is equally applicable to those expenditures as to the present one.

122 P.2d at 1004. The Sherrard court cited the same cases which the Gurney court cited, only
Although the legislative purpose sought to be accomplished by the act ruled unconstitutional in Sherrard was thwarted, a subsequent, similar enactment was upheld in Nichols v. Henry.\(^2\) The act under challenge in Nichols contained an extensive preamble which unmistakably demonstrated that it was a general welfare measure.\(^2\) More importantly, however, the preamble declared that the existing system of public school bus transportation was to be funded by the common school fund and acknowledged that bus transportation for nonpublic school pupils could not be paid for by monies from the common school fund.\(^3\) The preamble further provided that the cost of such a program could legally be paid "from general funds only."\(^4\)

The act was upheld, and, by implication, so was the provision that general funds could be used to transport students to and from private schools. Although the court did not specifically speak in terms of child benefit, it is clear that the benefits flowing to children under the act greatly influenced the court's decision:

Neither can it be said that such legislation, or such taxation, is in aid of a church, or of a private, sectarian, or parochial school, nor that it is other than what it is designed and purports to be . . . legislation for the health and safety of our children, the future citizens of our state. The fact that in a strained and technical sense the school might derive an indirect benefit from the enactment, is not sufficient to defeat the declared purpose and the practical and wholesome effect of the law.\(^5\)

one of which, Williams v. Board of Trustees, 173 Ky. 708, 191 S.W. 507 (1917), was a Kentucky case. And only in a roundabout way did the Williams court discuss the child benefit theory:

But no odds how beneficial to the graded school or children the scheme may have been, it cannot be doubted that it was opposed to the spirit of the laws, and its invalidity is not to be condoned because the trustees of the graded school and a majority of the patrons of the school approved it.\(^6\)

\(^{10}\)\(\text{Id. at 726, 191 S.W. at 514.}\)

The domino effect of the "bus wedge" is discussed in La Noue, supra note 50, at 90-92. See also note 88 and accompanying text, infra.

The proper curative measure is not complete abstention from appropriations, but the establishment of proper safeguards to ensure (1) direct aid to the child; (2) complete governmental control over the administration and expenditure of public funds; and (3) a ban on any religious use of any public aid provided.

Fears similar to those enunciated in Gurney were most strongly stated in Dickman v. School District No. 62C (Oregon City), 232 Ore. 238, 366 P.2d 533 (1961), cert. denied, 371 U.S. 823 (1962). The entire child benefit argument is soundly criticized in Cushman, Public Support of Religious Education in American Constitutional Law, 45 ILL. L.J. 333 (1950).

61. 301 Ky. 434, 191 S.W.2d 930 (1945).
62. \(\text{Id. at 436-37, 191 S.W.2d at 931.}\)
63. \(\text{Id. at 437, 191 S.W.2d at 931.}\)
64. \(\text{Id.}\)
65. \(\text{Id. at 443-44, 191 S.W.2d at 934-35.}\)
Sherrard and Nichols evidence the confused state of the law in Kentucky as to the constitutionality of statutes that permit appropriations of public funds for use by nonpublic schools. Sherrard upheld the sanctity of the common school fund and prohibited school boards from appropriating school funds to pay for the transportation of nonpublic school pupils. Nichols permitted such a transportation program because the county fiscal court made the appropriations from general funds. The Sherrard court focused on the more specific constitutional provision, section 189. The Nichols court premised its decision on the more general provision, section 5. Nichols appears to permit indirectly that which cannot be done directly. As long as an expenditure is out of general revenues and is regulated by a separate body, which acts to prevent the use of school funds, an expenditure for the health, safety, or general welfare of pupils attending nonpublic schools may be made validly. The fact that the nonpublic school realizes an indirect benefit does not invoke the prohibitions of sections 5 and 189.

The payment out of general funds and the intervention of an instrumentality not associated with the state department of education adequately guard against commingling and other confusion so as to prevent the expenditure of school funds for private purposes. The incorporation of these safeguards in the textbook statute should prevent a successful constitutional attack. The Act can be upheld if a characterization similar to that in Butler v. United Cerebral Palsy of Northern Kentucky, Inc. is made, and the court acknowledges that the provision of nonsectarian textbooks to nonpublic school pupils advances the general welfare of all pupils in the state.

C. Textbooks and the Federal Constitution

Although the textbook statute might survive a constitutional attack under Kentucky’s constitution, a challenge under the first amendment of Federal Constitution is possible. The establishment
clause of the first amendment prohibits the enactment of a "law respecting the establishment of religion." If the challenged statute's intent is a secular or neutral one, it will be upheld. A long line of first amendment cases had established a three-pronged test to determine whether the challenged statute possesses the requisite neutrality: (1) the statute must have a secular legislative purpose; (2) the statute's primary purpose must be one which neither advances nor inhibits religion; and (3) the statute must not foster an excessive governmental entanglement with religion. To be held constitutional, the challenged statute must meet all three tests.

The Kentucky statute meets all three tests. It aids education, it neither advances nor inhibits religion, and the provisions for the school administrator's request for books under the Act prevents excessive governmental entanglement.

The statute is similar to the one upheld in Board of Education v. Allen. A New York statute provided that the state could loan textbooks to students required by the state's compulsory education laws to attend school. The statute recited that "public welfare and safety require that the state . . . give assistance to educational programs which are important to our national defense and the general welfare of the state." The court found the statute constitutional, despite the fact that some of the aid flowed to parochial schools, on the ground that the financial benefits flowed to the parents and children and not the schools. The record before the Court disclosed no potential abuse of the program by school authorities who, it was assumed, were competent to select textbooks for use by all children.


71. U.S. Const. amend. 1.
76. 392 U.S. 236 (1968).
78. Board of Educ. v. Allen, 392 U.S. at 239 (emphasis added); cf., Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930 (1945)(similar language).
79. Id. at 243-44.
80. Id.
More importantly, the Court recognized the dual purposes of parochial schools—to provide secular education and to provide spiritual education—and laid the ground work for a presumption of constitutionality for textbook loan programs:

In judging the validity of the statute on this record we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in public schools because of religious content.

This “unique presumption” will not be extended by the Court: Board of Education v. Allen has remained law, and we now follow as a matter of stare decisis the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes. In more recent cases, however, we have declined to extend that presumption of neutrality to other items in the lower school setting. . . . When faced, however, with a choice between extension of the unique presumption created in Allen and continued adherence to the principles announced in our subsequent cases, we choose the latter course.

This statement indicates that the Allen presumption may not be favored over the usual neutrality test applied in first amendment cases. The Court followed Allen and upheld a Pennsylvania textbook act in Meek v. Pittinger but indicated a willingness to uphold such programs when they satisfied the three-prong test. The Court has acknowledged the apparent tension between Allen and Meek. This tension may have arisen through a fear of the “bus wedge”

81. Id. at 245.
82. Id.

In Meek v. Pittenger, 421 U.S. 349 (1975), the Court focused on the entanglement portion of the test to invalidate a statutory scheme which provided for appropriations to finance the purchase of supplementary educational materials, which by their nature could be diverted to religious purposes. The Court found Pennsylvania’s biennial appropriations sufficient to create the forbidden degree of entanglement. The Kentucky act contained a provision for supplementary educational materials which was dropped prior to passage. See note 12 supra. The entanglement test was used to invalidate a textbook loan program in Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff’d mem., 417 U.S. 961 (1974), where the statute required the Commissioner of Education to reimburse parents of nonpublic school children for money spent to purchase secular texts for use in parochial schools.

84. In Wolman, six of the justices favored the textbook provisions of the Ohio statute under review. But Justices Marshall and Stevens indicated a willingness to overrule Allen. Wolman v. Walter, 433 U.S. at 257 (Marshall, J., concurring and dissenting); Id. at 265 (Stevens, J., concurring and dissenting).
86. Id. at 358-59.
effect, under which one form of aid to sectarian schools provides the foundation for another type of aid to those schools.

[In constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop.]

An alternative to the tension between neutrality and presumed neutrality would be the intervention of a general welfare standard, with the line being drawn "between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the program's target populations and programs of educational assistance." This standard would not necessarily invalidate all statutes providing for textbook loans, because the loaning of state-approved, secular school books, as an integral part of a whole educational program, could conceivably further the state's general welfare. However, a higher standard of proof would be necessary to demonstrate the potential benefit to the state's general welfare. Under such a standard, the constitutionality of the Kentucky statute appears questionable.

However, under Allen, the textbook statute is constitutional. The aid flows to the children in the nonpublic schools, and only secular, state-approved texts may be loaned. The statute is an equalizing measure, and the fact that the state's policy is accomplished in two separate statutes is not fatal.

II. STATE REGULATION OF NONPUBLIC SECTARIAN SCHOOLS

A. The Free Christian Schools Case

The enactment of the textbook statute is not the only event that has intensified the clash between church and state in Kentucky. A recent attempt to maintain the impregnability of the wall separating them met with at least temporary success in Hinton v. Kentucky Board of Education, better known as the Free Christian Schools Case.

88. See La Noue, supra note 45.
91. Such a showing might entail scientific studies indicating improved test scores after use of an approved text or other similar quantitative proof.
Case. In *Hinton*, the Franklin Circuit Court held that an attempt by the state board of education to regulate privately supported fundamentalist Christian schools violated the first amendment to the United States Constitution and section five of the Kentucky Constitution.

The *Free Christian Schools Case* was brought by four ministers, thirty-two parents, four Baptist churches, and an independent Christian school association against the board of education, the department of education, their chief executive officers, five county school boards, their directors of pupil personnel administration, and the Commonwealth.

The action was filed in anticipation of truancy prosecutions after the Attorney General filed an opinion stating that the parent of a child enrolled in a nonapproved private school would be deemed truant. His opinion advised the state board of education to direct local pupil personnel directors to initiate legal proceedings "against anyone violating the compulsory attendance laws through attendance at a non-approved private school." Subsequently, the state board of education began taking action and, at the time of filing, prosecutions appeared imminent. Accordingly, a temporary restraining order enjoining such prosecutions was entered against all defendants and against

all other officers, members, agents, servants and employees, and all persons in active concert or acting under orders or directives from, or participating with, all or any of the Defendants, including "all Directors of Pupil Personnel and local Boards of Education, or agents thereof, for all those school districts in which there are nonpublic Christian schools not approved and/or not accredited, or which may have jurisdiction or claim jurisdiction over any pupil (or parents of said pupils) attending any of such schools as operated by the church plaintiffs herein or any similar schools . . . "

The case was extensively briefed for both sides. The plaintiffs

95. Findings of Fact and Conclusions of Law at 10.
97. Id. The prosecutions would have been brought under Ky. Rev. Stat. § 159.180 (1971) and § 530.070(1)(c) (1975). Section 159.180 provides that "[e]very parent, guardian or custodian of a child residing in any school district in this state is legally responsible for any violation of [the compulsory attendance laws]." Section 530.070(1)(c) penalizes any person who "knowingly induces, assists or causes a minor to become a habitual truant. . . ."
98. See Complaint for Declaratory Judgment and Injunctive Relief, Exhibit B (directive from board of education to pupil personnel administrators to initiate legal proceedings); Exhibit C (letter to pupil personnel administrators); Exhibits D & E (notices threatening criminal prosecutions against individual plaintiffs).
argued that (1) the state lacked authority to regulate private, non-tax supported schools; (2) the regulations of the board of education amounted to an unconstitutional delegation of legislative power; (3) enforcement of the regulations would violate plaintiffs' religious liberty under the Federal and State Constitutions; (4) enforcement of the regulations would interfere with the parents' primary responsibilities to educate their children, thereby depriving them of a liberty interest protected by the due process clause of the fourteenth amendment; (5) inconsistent application of the compulsory attendance laws would violate plaintiffs rights to equal protection of the laws. The defendants argued that (1) the state had a compelling interest in prescribing basic curriculum, hours of instruction, teacher certification, and textbooks used in all schools, public and private; (2) the regulations did not chill the free exercise of plaintiffs' religious freedom; and (3) standardized competency testing would not adequately further the state's interest in insuring that every child receive a fundamental education. After a three day trial, judgment was entered for plaintiffs. The court determined that the attempted regulation of private religious schools violated the free exercise clause and the establishment clause of the first amendment to the United States Constitution, and section 5 of the Kentucky Constitution. Additionally, the court held that the regulatory scheme developed by the board amounted to an unconstitutional delegation of legislative authority, and that even if the delegation of power were valid, the record in the case disclosed a mere "scintilla of [a] colorable state interest" as against the [plaintiffs'] first amendment right to the free exercise and expression of religion.

The trial court was impressed by the apparent willingness of the plaintiffs to submit to reasonable fire, safety and health standards for all schools, and to "uniform, standardized testing as the means of earning [approval] for their schools." Having observed the demeanor of the witnesses for the plaintiffs, the court was convinced of the firmness of plaintiffs' religious convictions and attitudes.

100. Brief for Plaintiffs; Plaintiffs' Reply Brief to Defendants' Supplementary Brief.
101. Brief for the Defendants; Supplementary Brief for the Defendants.
103. Findings of Fact and Conclusions of Law at 10.
104. Memo Opinion and Judgment at 1.
105. Id.
106. Id. at 2.
107. [Plaintiffs'] incontrovertible proof shows—and the demeanor of the witnesses
The board of education was permanently enjoined from enforcing its regulations against the free Christian schools and from prosecuting the individual plaintiff parents and ministers.\textsuperscript{108}

B. \textit{Constitutional Principles}

Any discussion of a state's authority to regulate private schools must begin with \textit{Pierce v. Society of Sisters}.\textsuperscript{109} In holding that a state does not have a sufficient interest in secular education to require attendance exclusively in public schools, the Supreme Court stated,

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.\textsuperscript{110}

From this reasoning arose an awareness that a religious school "pursue[s] two goals, religious instruction and secular education."\textsuperscript{111} The state's interest in education can then be served through the secular curriculum of the religious school.\textsuperscript{112} The state may not specifically designate the religious school's curriculum, but it may require that specific secular subjects be taught.\textsuperscript{113}

In furtherance of this interest, and bolstered by the state's compulsory attendance laws, the state may reasonably require that secular instruction be given in religious schools "which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction."\textsuperscript{114} Most recently, the power of the state has been defined as the power "to impose reasona-
ble regulations for the control and duration of basic education.\textsuperscript{115} The court's reference to \textit{Pierce} in making this assertion indicates that the use of the term "reasonable regulations" signals the advent of no new standard.\textsuperscript{116} It can thus be inferred that the areas of regulation originally enumerated in \textit{Pierce} are \textit{prima facie} reasonable subjects of state regulation. Where the state seeks to impose additional requirements, it has the burden of proving their reasonableness. In the face of a claimed religious infringement, the state must demonstrate a compelling state interest in enforcing the regulation.\textsuperscript{117}

The establishment clause of the first amendment prevents the expenditure of state funds for state-mandated programs in private schools if those programs lack sufficient safeguards to prevent diversion for religious purposes.\textsuperscript{118} Similarly, the state's interest in public education must face a balancing of interests test when confronted by a free exercise clause claim. Clearly, state regulation of non-public schools has limits, ill-defined, but nonetheless, limits.\textsuperscript{119}

C. Standards to be Applied in Free Exercise Cases

The plaintiffs in the \textit{Free Christian Schools Case} presented a strong free exercise claim against regulation by the board of education. Essentially, the plaintiffs argued that their religious beliefs so pervasively influence instruction in their schools that the approval and accrediting policies of the board interfere with the free exercise of their fundamentalist beliefs. They maintained that the role of religious instruction in their schools was so integral a part of their program of education that it was doubtful whether there were two separate and distinct lines of instruction—one educational and the other sectarian.\textsuperscript{120} An argument could be made that the plaintiffs'
were contending that their religious beliefs placed them above the law. However, this argument would be clearly erroneous.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hinderance from the state, not the state may not exercise that which except by leave of religious loyalties is within the domain of temporal power. Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.121

Generally, a two part balancing test is employed in free exercise cases: "[I]t must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection . . . ."122 Before the balancing test may be utilized, however, the individual must show that his beliefs are "religious" and "truly held."123

The truth of an individual's belief may not be questioned,124 but the individual must meet the threshold requirement of sincerity. The factual determination must be made, "Is the belief truly held?"125 The Hinton court determined that the plaintiffs satisfied this criterion.126 There can be little doubt that the beliefs are religious.127

The next consideration is whether the plaintiffs have demonstrated an infringement of their free exercise rights. While the plain-
tiffs in *Hinton* challenged the state's authority to "approve" or accredit private schools, their specific objections to the state's regulation centered on five items: (1) teacher certification; (2) textbooks; (3) curriculum; (4) community involvement; and (5) guidance counseling. The first three fell within the *prima facie* rule inferred from *Pierce*. The last two clearly presented free exercise claims. The Free Christian schools are part of a community of fundamentalists who separate themselves from the mainstream of ordinary life. The primary purpose of their school system is to provide guidance in fundamentalist Christian ideology. For the state to demand guidance counseling as a separate educational requirement in these schools seems to undermine the purpose of the schools. And the trial court found that the imposition of textbook and curriculum requirements violated the religious freedom of the plaintiffs by attempting to substitute the state's educational philosophy for their own.

D. Subsequent Legislation Having an Impact Upon Determination of the Issues in *Hinton*.

1. State-mandated Competency Testing

From the outset, the plaintiffs in *Hinton* professed a willingness to demonstrate the level of secular educational competency attained by the church-school pupils as reflected in nationally recognized standard achievement tests. The Kentucky General Assembly recently enacted *The Educational Improvement Act of 1978*, which provides for "a statewide assessment program . . . of measuring and reporting student progress and achievement in the basic

129. Brief for plaintiffs at 12, "[T]he State has attempted to expand a drop of statutory power over private schools into an ocean of regulations."
130. See text accompanying notes 114-17 infra. The plaintiff's objections to teacher certification hinged on the unreasonableness of the standards. A public school teacher is required to hold a bachelor's degree and have specialized training in education. A private school teacher need only have a bachelor's degree—in any subject. Plaintiffs also objected because the state was free to change teacher certification requirements at will. Brief for Plaintiffs at 28-29. The only qualification for a teacher in one of the plaintiff schools was that any prospective teacher be a "born again Christian."
132. Id. at 4; Complaint for Declaratory Judgment and Injunctive Relief at 6: The Parent Plaintiffs also believe that the education of their children should be of good quality. They therefore desire . . . that their children be tested by their schools in basic skills by means of nationally recognized standardized achievement tests, the results thereof to be made available to the Department of Education.
skills in grades 3, 5, 7 and 10.”

Under the Act, the department of education is required to purchase or develop basic achievement tests for annual use. The test results are to be used “for the development of educational improvement plans.” Local school districts and boards of education are required to develop and implement plans for improving education, and detailed reporting requirements must be satisfied. The department of education must also make numerous reports, and is obligated to assist local school districts on request.

This Act poses interesting problems for the Hinton case. At trial, the plaintiffs fully demonstrated their willingness to submit to reasonable fire, health, and safety regulations, and uniform competency testing as a method of earning “approval” for their schools. Undeniably, the trial court’s judgment was swayed by this willingness.

If imposed on the Christian schools, the testing would be in addition to the other regulatory provisions. The plaintiffs sought competency testing as the “least detrimental alternative” to pervasive state regulation of their schools because testing would demonstrate the commercial value of their schools as an alternative “market” to the public schools. But the acknowledged purpose of the Act is to internally generate raw data for the improvement of the public school system. If applied to the Christian schools, the detailed reporting requirements imposed by the Act would foster an impermissable degree of entanglement between the church schools and

136. Ky. Rev. Stat. § 158.690(4)(Supp. 1978). The test results cannot be used to evaluate teachers or administrators in considering promotion, demotion, transfer, or dismissal. Id.
137. Ky. Rev. Stat. § 158.710 (Supp. 1978). Section 158.710(4) lists eight elements which a local educational improvement plan must include:
140. Memo Opinion and Judgment at 2.
142. Brief for Plaintiffs at 9:
Aside from discussion of the logical intendment of the statutes, it should be noted that expert testimony in this case has shown . . . that assurances of quality are to be found, not in the wasteful vague and confusing public school “minimum standards” . . . but in the “market mechanism” of parents who demand the quality they pay for . . . and in the readiness of private schools, alert to the “market” to exhibit the results of nationally standardized achievement tests.
143. Ky. Rev. Stat. § 158.660 (Supp. 1978): “It is the intention of the general assembly . . . to assure the right of each student in the public schools of this state to acquire . . . basic knowledge and learning skills . . . .” (emphasis added).
administrators of the Act. Because the state department of education is required to purchase the tests, administering them in private religious schools would entail serious entanglement problems and possess no sure guarantee that the tests or portions thereof could not be utilized for religious purposes. 144

2. Textbooks and Approval of Materials for Private and Parochial Schools

Kentucky Revised Statute section 171.215 provides that the state shall purchase textbooks for private school pupils attending "accredited" private schools. 145 The use of the term "accredited" is indicative of the more stringent qualifications imposed upon private schools, i.e., "accreditation" rather than "approval," 146 before their pupils can benefit from this indirect state assistance. Were the Christian schools not adamantly opposed to the selection of state-approved textbooks, this statute could provide an inducement for them to comply with accreditation procedures.

The 1978 General Assembly enacted legislation providing for approval of textbooks in parochial or private schools which are appropriate for the grade level in which approval is sought, despite the fact that the text may include some religious elements. 147 This new legislation strives to achieve a parity between state and church goals in the selection and approval of basic school texts. A private school may submit for approval a religiously oriented textbook which cannot be disapproved on religious grounds if it adequately covers the basic secular subject to be taught in a particular grade. 148 This leni-

144. See Levitt v. Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973) (reimbursement of expenses for reporting and administering internally generated achievement tests held unconstitutional).
146. The Hinton court termed these words as words of art, each having particular legal significance. See Findings of Fact and Conclusions of Law at 2.
147. Ky. REV. STAT. § 156.445(2) (Supp. 1978) in effect until July 1, 1979 provides as follows: "In approving text materials for private and parochial schools for the purposes of KRS 156.160(8) and 159.030 such text materials may be appropriate to the grade level in question.

After July 1, 1979, the section will read as follows: "In approving text materials for private and parochial schools for the purposes of KRS 156.160(8) and 159.030 such text materials shall be approved if they are comprehensive and appropriate to the grade level in question notwithstanding the fact if [sic] they may contain elements of religious philosophy." (emphasis added).

148. It is questionable whether state funds could be used to purchase textbooks of a religious character. The problems with the state purchasing textbooks which present a particular religious philosophy are discussed in Board of Educ. v. Allen, 392 U.S. 236, 254 (1968) (Douglas, J., dissenting).
ency in approval requirements undermines the plaintiffs’ contention that state textbook approval imposes state educational philosophy upon the church schools.

E. Hinton: Other Considerations

1. Primary Responsibility for Education: State or Parent?

The state does not have an absolute power to require standardized education exclusively in public schools. The state must defer to the interests of the child’s parents, for “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations.” But the rights of the parents, even when bolstered by a religious freedom claim, must yield if the exercise of those rights threatens the health, safety, general welfare of the child, or potentially burdens significant social aims. The privacy of parental rights respecting education is thus significantly curtailed. Thus, there is required an interrelationship and a balancing in each instance in which the educational philosophy of the state collides with the educational/religious philosophy of the parent, because education, just like the child, is not a mere creature of the state. Both parent and state share the burden of adequately educating a child. Accordingly, a parent may not completely usurp the state’s program of education by undertaking to educate his children exclusively in the home. Conversely, the state may not completely trammel the parent’s beliefs.

The proper balance lies between this mutual non-exclusivity. The

149. This argument was raised by the defendants. See Brief for the Defendants at 15. It was apparently rejected in favor of the plaintiffs’ claim that the degree of leniency rested on the whim of the particular state administrator in charge of approval.


151. Id. at 535.


state may regulate the temporal education, and the parent, the spiritual. Of necessity, there can be no wall between these areas, but only a shifting, amorphous boundary—subject only to the power of the electorate, upon whom the school system’s authority ultimately rests. It is in this power that the parent’s interests can legitimately prevail.

2. Delegation: “Approval” and “Accreditation”

Kentucky Revised Statutes section 159.030(b) exempts children attending approved private or parochial schools from compulsory attendance at public schools but not from the compulsory attendance laws. Section 156.160(7) gives the state board of education power to adopt rules and regulations for “[a]pproval of private and parochial schools.”

Authorization to open a nonpublic school “does not constitute approval or accreditation by the State Board of Education.” The Hinton plaintiffs’ challenge to these regulations was two-fold. First, they claimed that the state has absolutely no power to regulate privately funded religious schools, and second, that the state had impermissibly extended the power to approve into the power to accredit.

The state’s regulatory scheme evidences that “accredit” and “approval” are separate and distinct words of art. The trial court’s ruling to this effect is supported by statute and regulations. It is apparent that a three-tiered system of regulation is contemplated. Initially, the school must be authorized to open. Then it must be

156. Ky. Rev. Stat. § 156.160(7) (Supp. 1978). These regulations require that before a private school is opened, local health and fire regulations must be complied with, the building and grounds must be approved by the department of education, the school must state that it will comply with the state’s prescribed minimum school term, the program of studies must be acceptable to the department of education, teachers must meet state certification requirements, a minimum of twelve pupils must be enrolled, and a minimum school day of six hours will be maintained. 704 K.A.R. § 6:010 (1978). The regulations challenged in Hinton included the requirement that a minimum of 12 pupils be enrolled in an elementary school. This requirement was dropped in the 1978 regulations.
160. 704 K.A.R. § 6:010 (1977) appears to be the first attempt to promulgate rules for approval of private schools, although rules for proprietary schools were in existence before then. See 705 K.A.R. § 10:010 (1975).
approved so that the school's pupils will be exempt from public school attendance requirements. The final step is accreditation. Earning accreditation, as an option, would allow the nonpublic school to participate in a broader range of state programs, such as textbook loans and state administered competency testing. Permissive accreditation would prevent state infringement upon free exercise rights.

The *Hinton* court's holding that the regulations amounted to a prohibited delegation of legislative authority is questionable. In relying upon several older decisions which utilized a "standards" approach, the court ignored more recent decisions which applied an "adequate safeguards" test. Under this test, the agency regulations must be reasonable, must have been issued under proper procedures, and must fall within the granted powers. All three tests are met by the challenged regulations. State regulation of private school secular education is reasonable, as are health and safety requirements necessary for authorization. The procedures for promulgation of the regulations were not challenged. The delegating statute gives a blanket approval power. Even under a standards approach, the use of "accreditation" criteria for "approval" would be an adequate standard upon which the delegation may be upheld.

III. THE TEN COMMANDMENT STATUTE AND THE ELEVENTH COMMANDMENT: NEUTRALITY

Kentucky Revised Statutes section 158.178 requires the superintendent of public instruction to "ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide and twenty (20) inches high." This statute is obviously constitutionally defective that it merits only brief attention. There is nothing to distinguish the compulsory display of the Ten Commandments from coerced daily Bible reading and prayer, which have repeatedly been held violative of religious freedoms.

162. See, e.g., Bloemer v. Turner, 281 Ky. 832, 137 S.W.2d 387 (1939).
Kentucky's constitution guarantees absolute freedom of conscience. "No legislative body has the constitutional authority to enact, and no court has the constitutional power to enforce, a law to control or to interfere with the right of conscience." There can be no doubt that the Ten Commandments Act interferes with that freedom of conscience. It will be objectionable to any Kentucky citizen who either embraces no religion, or embraces a belief other than that embodied in the Commandments.

Clearly, the Act is defective under the traditional three part test utilized in establishment clause cases. Despite the fact that the Act contains a religious "disclaimer," it does not have a secular legislative purpose. Its purpose cannot definitely be said to neither advance nor inhibit religion. Since a governmental employee is required to supervise the program excessive governmental entanglement is probable, because that employee must see that each school has the Commandments displayed and that the copy is of the prescribed size and quality.

The drafters of the Act must have been aware that its constitutionality was doubtful, because they incorporated a religious disclaimer into the Act. It provides that "[i]n small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." This language is reminiscent of the discussion in School District v. Schempp, which implied that the state could permit study of the Bible in a secular history study program. Presumably,

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169. Id. at 612.

In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilizations. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. Id. at 255, similar language is found in the statute authorizing local boards to permit recitation of the Lord's Prayer in public schools "[a]s a continuation of the policy of teaching our country's history and as an affirmation of the freedom of religion in this country. . . . Pupils shall be reminded that this Lord's Prayer is the prayer our pilgrim fathers recited when they came to this country in their search for freedom." Ky. REV. STAT. § 158.175 (Supp. 1978) (emphasis added).
this disclaimer converts a religious banner into another innocuous school poster in the classroom.

In addition, a second qualification built into the Act is a provision that only funds received by voluntary contribution shall be used for purchasing the copies required under the Act. This provision was clearly designed to avoid the constitutional prohibition against appropriations of state funds for sectarian purposes. Because state funds are not involved, it can be argued that there is no state involvement. Such an argument loses sight of the fact that a state employee must implement and supervise the Act.

Neither provision can save the Act. "[I]t should be observed that sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones."

CONCLUSION

This comment has examined the church-state confrontation in three areas. It should be apparent that there is no clear line of demarcation between the realm of temporal authority and the domain of spiritual power. The absence of a clear boundary results in the varied types of legislation considered herein. Once a clear standard is devised, there would no longer exist an inducement to seek the enactment of such laws. One could more easily determine in advance the validity or non-validity of legislation, without the delay of protracted constitutional litigation.

But, is a definite boundary necessary? Do we need a wall of separation between church and state? The threat of a church-controlled state or a state-created church that prompted the drafting of the religion clauses, is not as threatening a possibility now as it was then. If indeed we do have a wall of separation between church and state, we must acknowledge that the entities on either side of that wall are not going to stagnate and die. Each will continue to develop and expand. If there is complete separation, this will serve only to make the inevitable confrontation much greater in severity. The more rational approach is to erect not a wall but a less restraining barrier, perhaps only a fence, a fence both strong enough to protect the individual's first amendment rights and flexible enough to accommodate the state's interest in the education and welfare of its citizens.

GARY J. SERGENT

UNION SECURITY CLAUSES AND RELIGIOUS DISCRIMINATION IN EMPLOYMENT

INTRODUCTION

Discrimination in employment on the basis of religion is prohibited by Title VII of the Civil Rights Act of 1964. Union security clauses in labor-management collective bargaining agreements, which require an employee to pay union dues and initiation fees, are allowed under section 8(a)(3) of the Taft-Hartley Act. Where an employee belongs to a religious group which sincerely holds that supporting a union is wrong, and a union security clause requires that the employee be terminated if he or she does not pay the required dues and fees, there is a conflict between the two statutes and the rights of the parties involved.

Five cases in three circuits have considered whether Title VII applies to a union security agreement which is legal under section 8(a)(3) of the National Labor Relations Act. All five courts came down on the side of the plaintiffs who challenged the union security clauses, applying Title VII to the dismissals in question. However, the unanimity of the circuit courts is misleading as to the state of the law. The full effect of the Supreme Court's recent decision in TWA v. Hardison has yet to make an impact.

THE STATUTES—ADMINISTRATIVE AND JUDICIAL INTERPRETATIONS

Prior to the enactment of the Wagner Act in 1935, courts uniformly held that any exclusionary device, such as a closed shop, union shop, or agency shop, was an unlawful conspiracy against an employee's fundamental right to work at his trade. Section 8(a) of

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   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual or otherwise to discrimi-
   nate against any individual with respect to his compensation, terms, conditions, or
   privileges of employment, because of such individual's . . . religion . . . ; or
   (2) to limit, segregate, or classify his employees or applicants for employment in
   any way which would deprive or tend to deprive any individual of employment oppor-
   tunities or otherwise adversely affect his status as an employee, because of such indi-
   vidual's . . . religion . . . .

3. McDaniel v. Essex Int'l, Inc., 571 F.2d 338 (6th Cir. 1978); Anderson v. General Dynam-
   ics, 17 Fair Empl. Prac. Dec. 1644 (9th Cir. 1978); Burns v. Southern Pac. Trans. Co., 17 Fair
   Empl. Prac. Dec. 1648 (9th Cir. 1978); Cooper v. General Dynamics Conair Aerospace Div.,
   533 F.2d 163 (5th Cir. 1976), cert. denied, 433 U.S. 908 (1977); Yott v. North Am. Rockwell
   Corp., 501 F.2d 398 (9th Cir. 1974).
the Wagner Act, the predecessor to Section 8(a)(3) of the present law, prohibited employer discrimination which would encourage or discourage union membership. A proviso of the section allowed closed shop and union shop agreements. In special legislation dealing with labor relations in the railroad industry, Congress has authorized union shops. Under the Taft-Hartley Act, union security clauses ostensibly can take a variety of forms, including the "union shop" and the "agency shop." In a "union shop" arrangement, all present and new employees must become union members within a prescribed period of time and must remain in good standing for the term of the contract. An "agency shop" agreement does not expressly require membership as a condition of employment, but employees must pay a "service charge," usually the equivalent of the initiation fees and periodic dues required of union members. Under both types of agreement, the employer agrees to discharge any employee failing to comply with these requirements.

In practice there is no distinction between the two types of agreement. Section 8(a)(3) of the National Labor Relations Act allows the employer and union to condition continued employment on actual union membership. However, later in the section, the Act

7. It shall be an unfair labor practice for an employer—

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15 Secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

11. The Supreme Court has defined a "member" as one who pledges allegiance to the union constitution, takes an oath of full union membership, attends union meetings, and generally enjoys full union membership. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 196 (1967).
13. [N]othing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day
limits the employer's right to dismiss an employee for non-membership for failure to tender the initiation fee and periodic dues. In effect, union membership is reduced to a "financial core" of union dues and initiation fees uniformly required for obtaining and retaining membership. The employees cannot be required to actually join the union. Therefore, the act authorizes the agency shop as the maximum form of union security provision. The union, on its part, is required to represent all employees, union and non-union alike. The dues and initiation fees paid amount to a "service fee" for the representation the union provides in the collective bargaining with management and in the general course of managing employee relations. This "service fee" has been analogized to a "tax" supporting the collective bargaining activities of the union on behalf of all employees. The Congressional intent in allowing such union security devices was to eliminate "free riders." "Free riders" are those employees who would obtain the benefits of collective bargaining agreements negotiated by the union without financially supporting the union.

The statutory authorizations permitting union security agreements have been challenged by members of the Seventh Day Adventist Church as violating the first amendment guarantee of the free exercise of religion. There is no dogma which directs all Seventh Day Adventists to refrain from joining or supporting a labor

following the beginning of such employment or the effective date of such agreement, whichever is the later.


14. [N]o employer shall justify any discrimination against an employee for non-membership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Id.


18. "It seems to us that these amendments remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by elimination of 'free riders,' the right to continue such arrangements." S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947). See, e.g., Machinists v. Street, 367 U.S. 740, 761 (1960).

Nevertheless, it is a commonly held belief within the church that support of unions is inconsistent with the commandment to "love one's neighbor," since unions encourage strife with management. In *Cooper v. General Dynamics Conair Aerospace Division*, the trial court evaluated the tenet and concluded it was specious. The Fifth Circuit Court overruled, relying on the principle developed in *United States v. Seege* and *Welsh v. United States* that it is not for the courts to evaluate the logic or validity of religious beliefs sincerely held.

While the Supreme Court has never considered the Seventh Day Adventists' constitutional challenges, the lower courts have consistently rejected claims based on them. The courts have held that the free exercise guarantee is not absolute and religious scruples must yield to the compelling governmental interest of promoting industrial peace.

Although the constitutional challenges to union security clauses have failed, the 1972 amendment of Title VII of the Civil Rights Act of 1964 has given rise to fresh challenges charging religious discrimination. As originally enacted, Title VII prohibited discrimination based on religion in employment, but failed to define precisely what beliefs were being protected. The Fifth Circuit observed that the courts construed the statute to apply only to the observance of the Sabbath. The Equal Employment Opportunity Commission (EEOC) was empowered to issue guidelines to clarify the statute so

21. Id.
27. Id.

The amendment was offered from the floor by Senator Randolph (D. W.Va.), himself a member of the Seventh Day Baptists, a group that worships on Saturdays. The amendment was adopted unanimously by the Senate with 55 senators voting, 118 Cong. Rec. 731 (1972).

employers could cope with the religious needs of employees and potential employees. The original guidelines did not require accommodation to employees' religious needs in the absence of an intent on the part of the employer to discriminate.

In 1967 the guidelines were revised to require an affirmative accommodation of the employees' religious needs. The new affirmative duty of accommodation standard was not well received by the courts. It was thought to exceed the mandate from Congress expressed in the statute. In 1972, in response to judicial hostility to the EEOC guidelines, Congress amended Title VII, incorporating the EEOC standard into the statute. The amendment had two major effects. First, it expanded the religious rights protected to include "all aspects of observance and practice." Second, the statute clearly adopted the EEOC's affirmative duty of accommodation standard, placing the burden on the employer to prove that no reasonable accommodation could be made. Despite the amend-

31. The employer may prescribe the normal work week and foreseeable overtime requirements, and absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligation is not entitled to demand any alteration in such requirements to accommodate his religious needs.

32. The Commission believes that the duty not to discriminate on religious grounds required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodation to the religious needs of employees and prospective employees where such an accommodation can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

Id.
34. I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.

This amendment is intended, in good purpose, to resolve by legislation—any in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved.
35. For a general examination of the move away from the subjective intent standard, see
ment, the extent of the employer's obligation to accommodate the religious beliefs of employees was still unclear. The legislative history of the provision indicates that Congress intended that the particular fact situations of each case be given great weight in determining what amounted to a reasonable accommodation.36

The standard established in the statute has been criticized as violative of the establishment clause of the first amendment.37 While the Supreme Court has not ruled on the question, both the Sixth Circuit Court of Appeals38 and the Eighth Circuit Court of Appeals39 have upheld it. Nevertheless, the federal district court, which heard Yott v. North American Rockwell Corp.40 on remand from the Ninth Circuit,41 declared the statute unconstitutional, despite the fact that the appellate court had not questioned its constitutionality, and the remand was simply to determine whether any accommodation could be made without undue hardship.

The EEOC itself did not originally believe that Title VII applied to union security clauses. In its Sixth Annual Report42 the commission gave special attention to a conflict between a union shop requirement and a religious belief:


36. "Senator [Dominick] correctly follows me in the thinking that I have placed in the language of the amendment, that there would be such flexibility, there would be this approach of understanding, even perhaps of discretion, to a very real degree." 118 CONG. REC. 706 (1972) (remarks of Senator Randolph).


39. Hardison v. TWA, 527 F.2d 33, 43 (8th Cir. 1975), rev'd, 432 U.S. 63 (1977). The petitioners, International Association of Machinists (IAM) and TWA, argued that the religious accommodation provision of Title VII conflicted with the "establishment of religion" clause of the first amendment. Brief for Petitioner IAM at 48-79; Brief for Petitioner TWA at 21-46. But the majority opinion of the Supreme Court did not address the issue. However, Justice Marshall argued that the majority should not have construed the accommodation provision narrowly to avoid the first amendment issue. 432 U.S. at 89-90 (Marshall, J., dissenting). Marshall concluded that the provision was constitutional. Id.


42. 6 EEOC ANN. REP. (1972), cited in Yott v. North American Rockwell Corp., 501 F.2d 398, 399 n.2 (9th Cir. 1974).
The commission was also required to determine whether an employee in a union shop may refuse to pay union dues on the grounds that such payments are prohibited by his religious beliefs. The commission held that "a union shop is not unlawful" and that charging party's refusal on religious grounds is protected by neither Title VII nor the First Amendment.\(^43\)

Apparently, however, the commission reconsidered its position, as it entered an amicus brief on behalf of the Seventh Day Adventist plaintiff in *Yott*\(^44\) and asked leave to enter on behalf of McDaniel on the district court level.\(^45\)

Congress, on its part, has declined to enact a general exemption to union security devices for those whose religious convictions do not allow them to belong to a union.\(^46\) However, in 1974 Congress amended the Taft-Hartley Act to cover employees of private nonprofit health care institutions.\(^47\) The amendment specifically permits employees of a private health care institution who cannot join or financially support a union because of religious beliefs to pay an amount equal to the initiation fees and dues to a non-religious, tax-exempt charity. In *Cooper*\(^48\) and in *Yott*,\(^49\) two circuit courts of appeal dealt with the applicability of Title VII to union security

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\(^{44}\) *Yott v. North Am. Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974).


\(^{46}\) One bill designed to exempt persons with religious convictions from the union membership requirements of the National Labor Relations Act was referred to committee but no further action was taken. H.R. 11666, 89th Cong., 1st Sess., (1965). A bill to protect persons conscientiously opposed to union membership was defeated. S. 3202, 89th Cong., 2d Sess., (1966). A third bill, which would have made it an unfair labor practice under the National Labor Relations Act to require anyone who opposed union membership to join a union, was similarly unsuccessful. S. 3153, 89th Cong., 2d Sess., (1966).

\(^{47}\) Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment: except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiations fees to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of [the Internal Revenue Code], chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.


\(^{49}\) *Yott v. North Am. Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974).
clauses before the Supreme Court's decision in Hardison.\(^5\) In both cases Title VII was held to apply to an employee's religious belief beyond the observance of holy days and the Sabbath. In Cooper the plaintiffs had at one time belonged to the union, but due to their religious beliefs, had withdrawn some years previous to the controversy. For a number of years they had worked for the employer without being members of the union or financially supporting it. In 1972, the union and the employer entered into a collective bargaining agreement which provided for an "agency shop." The agreement conflicted with the plaintiffs' strongly held religious beliefs. Plaintiffs challenged the required dues payment on the basis of Title VII. The district court found for the employer, holding that plaintiffs' beliefs were illogical, and therefore, no accommodation was required.\(^5\)

On appeal, the three-judge panel filed three separate opinions.\(^5\) All agreed that Title VII placed a duty of accommodation on both the employer and the union. The court divided over whether the accommodation should extend to union dues and whether the hardship exemption should apply to the union as well as the employer. Judge Gee\(^5\) and Judge Brown\(^4\) agreed that payment of union dues to a secular charity was a possible accommodation. Judge Brown thought hardship to the union must be considered in any accommodation. Judge Rives\(^5\) agreed with Judge Brown as to the hardship question, but dissented because he thought non-payment of dues could never be a reasonable accommodation. Judge Rives said that he would remand to the district court for the limited purpose of determining whether accommodations such as a transfer of these employees to an open shop can be made without undue hardship; and would direct that in no event should the district court extend the scope of accommodation to provide an exemption from the payment of dues under an agency shop agreement.\(^5\)

In Yott\(^5\) the Ninth Circuit Court of Appeals faced another Seventh Day Adventist challenge to a union security clause. The court

\(^5\) Cooper v. General Dynamics Conair Aerospace Div., 533 F.2d 163 (5th Cir. 1976).
\(^5\) Id. at 165, 170.
\(^5\) Id. at 171.
\(^5\) Id. at 173 (Rives, J., dissenting).
\(^5\) Id. at 177.
remanded the case for a determination of whether a reasonable accommodation could be made:

Since we hold that if a reasonable accommodation can be reached between the parties, it must be offered appellant Yott and such determination is for the district court on remand, we leave analysis of whether the "business necessity" test would be met for the district court's determination. We are certain that the court will keep in mind that the purpose of a union security clause is to insure that all who receive the benefits of the collective bargaining agreement pay their fair share. "Free riders" are discouraged. In effect, stability is promoted by reducing potential labor strife, thus increasing the efficient operation of the business.58

The above quotation demonstrates that the Ninth Circuit saw a connection between a hardship to the union and a hardship to the company from the resulting labor strife. The court was not at all sanguine about the possibility of accommodation where religious beliefs conflicted with a union security clause. It took great pains to distinguish that situation from the sabbatarian cases: "We note . . . that this is not a 'refusal to work' case in which a reasonable accommodation is easily provided. We are not certain any accommodation is available."59

The confusion which the two circuit courts of appeal shared over the "undue hardship" and "reasonable accommodation" standard existed in all of the sabbatarian cases to which the courts looked for precedent and guidance in interpreting Title VII.60 In 1977, in an attempt to relieve the confusion, the Supreme Court rendered its opinion in TWA v. Hardison.61 Hardison, the plaintiff, was a member of the World Wide Church of God, a faith which observes the Sabbath from Friday night through Saturday night. For a time the plaintiff had been able to work without a conflict with his religious beliefs by working the night shift. However, after marrying, the plaintiff transferred to days. Eventually he was scheduled to work Saturdays as a substitute for an employee who was vacationing. Plaintiff informed his supervisor and his union representatives of the conflict. A number of solutions were discussed but were rejected by the plaintiff because they would not guarantee that he would not

58. Id. at 402 n.6.
59. Id. at 403.
have to work on his Sabbath. When Hardison repeatedly refused to follow the assigned schedule, TWA discharged him for insubordination. Plaintiff brought suit against both TWA and the union, International Association of Machinists and Aerospace Workers. The federal district court held for the defendants. The court of appeals reversed as to TWA and affirmed as to the union. Both TWA and the union petitioned for certiorari. The Supreme Court ruled that TWA had met the burden of offering a reasonable accommodation.

The Supreme Court considered various alternatives open to TWA and Hardison to determine whether any would cause "undue hardship." Those alternatives which would require variance from the collective bargaining agreement were given particular attention. The Court noted that a collective-bargaining contract...may [not] be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy.

The Court in Hardison was concerned with the burden placed on other employees by any variance in the collective bargaining agreement, particularly one which would change the seniority system:

It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

The Court also set out clearly that a de minimis measure should be used to judge when hardship caused by an accommodation would
become "undue hardship."\(^{70}\)

The first case in which an appellate panel had the benefit of the Supreme Court's decision in *Hardison* in resolving the conflict between union security clauses and Title VII was *McDaniel v. Essex International, Inc.*\(^{71}\) The defendant, Essex International, Inc. (hereinafter referred to as Essex), entered into a collective bargaining agreement with the defendant, Local Lodge 982 of the International Association of Machinists (hereinafter referred to as IAM) prior to the time of the plaintiff's employment. The agreement included a union security clause which required employees to join IAM within forty-five days after employment began. After accepting employment, the plaintiff, Doris McDaniel, informed her employer and the IAM that due to her religious beliefs, she could not join or financially support the union. Ms. McDaniel offered as an alternative to pay an amount equivalent to her periodic dues to a non-religious charity. IAM declined the offer. McDaniel presented a second offer to pay the union an amount equivalent to the percentage of the union budget used for purposes which do not violate her religious beliefs. The remainder of the stated dues would be paid to a charity. This offer was in turn refused. After being warned of the consequences of her continued refusal, McDaniel still refused to pay the full dues and was discharged on December 28, 1972. She was at no time required to assume formal membership in the union or adopt its ideological principles.\(^{72}\)

The plaintiff brought an action under Title VII of the Civil Rights Act of 1964, claiming that both Essex and IAM refused to make any accommodation to her sincerely held religious beliefs. The trial court held that the complaint failed to state a claim "as a matter of law" and entered a summary judgement for both Essex and IAM upon a finding that there were no disputed facts.\(^{73}\) The trial court held that the withholding of dues would be an undue hardship to the union, and that there existed a "balance" between the union security provision of the Taft-Hartley Act and Title VII.\(^{74}\)

The court of appeals reversed construing *Hardison* to demand "some effort to accommodate an employee's religious needs" be made.\(^{75}\) The court was concerned that there was no specific showing

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70. *Id.* at 84.
71. 571 F.2d 338 (6th Cir. 1978).
73. *Id.*
74. *Id.* at 809.
of a hardship to either Essex or IAM. It also voiced its distrust, as it had previously in Draper v. United States Pipe and Foundry Co.,\textsuperscript{76} of "'hypothetical hardship' based on assumptions about accommodations which have never been put into practice."\textsuperscript{77} The court was certain that some attempt at accommodation must be made, yet it really did not come to grips with the district court's arguments, nor did it apply the full scope of the Hardison opinion. Upon analysis, it must be observed that McDaniel does not successfully resolve the question raised in Cooper\textsuperscript{78} and in Yott\textsuperscript{79} of whether conflict between union security clauses and religious beliefs as a category can be resolved under Title VII.

In Anderson v. General Dynamics\textsuperscript{80} and in Burns v. Southern Pacific Transport Co.\textsuperscript{81} the Ninth Circuit Court of Appeals again considered conflicts between Seventh Day Adventists and union security arrangements in the light of Title VII. In both cases the court of appeals reversed the lower court, refusing to treat agency shop arrangements differently from any other practice which might result in the termination of an employee on religious grounds. In Anderson the district court had held that no accommodation was possible because Anderson's offer was to contribute to a charity of his choice rather than one of the union's choice, which imposed an undue hardship on the union.\textsuperscript{82} The court also went on to hold that "the overriding interest of the Union in carrying out its bargaining function with sufficient funds makes an accommodation impossible, given the plaintiff's unyielding position."\textsuperscript{83} The court of appeals noted General Dynamics' failure to take the initial offer of accommodation. "The burden was upon the appellees, not Anderson to undertake initial steps toward accommodation. They cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in Anderson's suggested accommodation."\textsuperscript{84} The court went on to address whether the creation of "free riders" would be an undue hardship:

\textsuperscript{76} 527 F.2d 515 (6th Cir. 1975).
\textsuperscript{77} McDaniel v. Essex Int'l, Inc., 571 F.2d at 343.
\textsuperscript{78} Cooper v. General Dynamics Conair Aerospace Div., 533 F.2d 163 (5th Cir. 1976), cert. denied, 433 U.S. 908 (1977).
\textsuperscript{79} Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974).
\textsuperscript{80} 17 Fair Empl. Prac. Dec. 1644 (9th Cir. 1978).
\textsuperscript{81} 17 Fair Empl. Prac. Dec. 1648 (9th Cir. 1978).
\textsuperscript{83} Id.
\textsuperscript{84} Anderson v. General Dynamics, 17 Fair Empl. Prac. Dec. 1644, 1647 (9th Cir. 1978).
Neither the Union nor the employer offered any evidence to prove that union members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the Union. It relied simply upon general sentiment against free riders.\(^85\)

In the court of appeals view the union and General Dynamics failed to carry the burden of proof.

In \textit{Burns v. Southern Pacific Transport Co.}\(^88\) the trial court held that payment of a dues equivalent to a charity would work an undue hardship on the union by relieving Burns of paying his fair share of union expenses. The court of appeals reversed reasoning that the loss of dues was \textit{de minimis}.\(^87\)

\textbf{ANALYSIS}

Through \textit{McDaniel, Burns,} and \textit{Anderson} a pattern emerges of trial courts giving great weight to the burdens imposed on unions by accommodating Seventh Day Adventists and the appellate courts strictly construing Title VII by demanding that the company and the union make the first steps toward accommodation\(^88\) and that any undue hardship must be shown clearly and specifically.\(^89\) The courts of appeal have uniformly held that the obligation is on the union to make the initial offers of accommodation,\(^90\) but the district court opinion in \textit{Anderson} has merit when it says,

>The controlling question does not turn on subtle procedures which require a party to come forward with an offer of accommodation prior to termination; the touchstone of religious discrimination under the Act is whether a reasonable accommodation can, in fact, be reached between the parties without undue hardship. It would be anomalous to compel an employer and union to accommodate an employee’s religious beliefs, regardless of hardship, simply because the employer failed to offer the employee any accommodations prior to his termination, regardless of whether, in fact, a reasonable accommodation is available.\(^91\)

Despite the holdings in \textit{McDaniel, Anderson,} and \textit{Burns,} it seems

\(^85\) Id.
clear, with the *de minimis* measure adopted in *Hardison*, that the conflict between religious beliefs and union security clauses should be taken out of Title VII, at least as far as requiring accommodation by the union. The *Burns* trial court made an explicit finding that the foregoing of dues to the union by the plaintiff would be an "undue hardship" on the union. The Ninth Circuit disagreed, holding that the financial burden was not so great. Yet in applying the *de minimis* standard in *Hardison*, the Supreme Court considered that paying overtime wages on those occasional and irregular Saturdays that Hardison would have been scheduled to work to cover other employee's excused absences was beyond the *de minimis* level.

In *Burns* the loss to the union would be nineteen dollars in monthly dues per Seventh Day Adventist, and since there were three Seventh Adventists in the local, the total loss would be 684 dollars a year. The exact loss to TWA in accommodating Hardison by paying overtime on selected Saturdays has not been set out, but is probably in a comparable range. When the respective income positions of TWA and the union are considered, the burden to the union in *Burns* would seem greater than the burden to TWA in *Hardison*, which was found beyond the *de minimis* measure.

Neither the Ninth Circuit in *Anderson* and *Burns* nor the Sixth Circuit in *McDaniel* gave much weight to the burden of "free riders" on the membership of the union and the potential labor unrest created by it. The *Anderson* opinion expressed its distrust of relying on a "general sentiment against free riders."

The appellate courts have ignored the natural balance existing between the legitimization of union security agreements through the Taft-Hartley Act and the "undue hardship" standard in Title VII. Congress enacted Section 8(a)(3) in response to the problems and unrest created by employees who receive the benefits of collective bargaining while failing to pay their fair share of the costs. Clearly, Congress viewed "free riders" as burdens on employees who did pay union dues. A problem so great as to warrant legislation would certainly pass the *de minimis* measure. Thus, from the very existence of the legislation, it can be inferred that to allow "free riders"

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97. S. REP. No. 105, 80th Cong., 1st Sess. 6 (1947).
is a burden on the other employees, which is an “undue hardship.” The corollary is that by being a threat to industrial peace, allowing “free riders” is an “undue hardship” on employers. The McDaniel district court spoke to this very point: “Congress effected the reasonable accommodations required by Title VII when it balanced the competing interest in enacting the union shop provisions of the Taft-Hartley Act of 1947.”

The Sixth Circuit misconstrued this point and examined the legislative history of the Taft-Hartley Act for specific intent to balance the religious needs of the individual with the security requirements of unions. The court was correct in holding that no such intention existed, but nonetheless, an implicit balance is struck between the two statutes. “Free riders” were recognized as a burden. As such, to allow “free riders” would be to place an “undue hardship” on the dues paying employees and their representative union.

In Hardison the Supreme Court spoke to the inherent inequity of creating an exception to a seniority system to benefit a believer of a religious creed and at the same time burden a non-believer of that creed. This same inequity should be prevented in the applying of Title VII to religious conflicts with the paying of union dues. Both seniority systems and union security arrangements exist to prevent inequity in labor relations. To modify either for the benefit of an individual or individuals is to place a burden on others.

It is not for the judiciary to carve out exemptions to union security devices by expanding beyond the balance which exists between the Taft-Hartley Act and Title VII. Where Congress deems such an exemption necessary, it shall act as it did in amending the National Labor Relations Act to add 29 U.S.C. § 169.

KEVIN D. HILL

INCREMENTAL SEGREGATIVE EFFECT: THE STRANGE CASE OF PENICK v. COLUMBUS BOARD OF EDUCATION

On June 23, 1977, the United States Supreme Court handed down its decision in Dayton Board of Education v. Brinkman. Since that time, the federal courts have been struggling with the language of that opinion. Penick v. Columbus Board of Education illustrates the problems the courts are having with the Dayton opinion.

The plaintiffs in Penick are parents of children attending Columbus, Ohio public schools. The defendants are the Columbus and Ohio State Boards of Education. The case was tried before Judge Robert Duncan, who found that in 1954 the Columbus board had been intentionally operating a segregated school system. After 1954 the Columbus board did not dismantle the segregated system despite a duty emanating from Brown v. Board of Education to do so.

Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hiring and assignments, and the other such actions and decisions of the Columbus Board of Education in recent and remote history, it is fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions ...

The court in Penick found that the State board had failed to act when it had notice and a clear duty to prevent segregation. The court therefore held both the Columbus and the State Boards of Education liable for the constitutional violations, enjoined them from further violations, and ordered them to submit plans for desegregating the Columbus schools.

After the submission of desegregation plans, but before any action on them by the court, the Supreme Court decided Dayton Board of Education v. Brinkman. The Penick court thereupon reexamined its judgement in light of Dayton. The court reiterated its findings of intentional, systemwide segregation in the Columbus school sys-

2. 583 F.2d 787 (6th Cir. 1978), cert. granted, No. 78-610 (U.S. Jan. 8, 1979).
3. In the district court, the governor and attorney general of Ohio were also defendants, but the trial court found in their favor. Penick v. Columbus Bd. of Educ., 429 F.Supp. 229, 268 (S.D. Ohio 1977). The local and state superintendents were also named as defendants in the suit. Id. at 233.
4. Id. at 236, 260.
7. Id. at 262-63.
8. Id. at 267-68.
tern, and certified its findings for immediate appellate review. The case was subsequently heard by a Sixth Circuit panel. The panel reviewed the 6,600-page transcript and the trial judge's 43-page opinion in light of the Dayton case, and concluded that the findings of fact were not clearly erroneous and the conclusions of law were correct. Consequently, the court affirmed the systemwide remedy ordered by the lower court. However, the court of appeals remanded the case for further findings with respect to the State Board of Education.

I. DESEGREGATION LAW SINCE 1971

A. The Swann Doctrine

Swann v. Charlotte-Mecklenburg Board of Education is an important case for two reasons: first, it articulated the basis of the power of a court to order desegregation and the limitations on that power; and second, the Court discussed the proof of a desegregation case. The power of a court to order desegregation of a school system resides in equity and is, therefore, broad. But, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." The Court was to return to this theme in later cases.

The Court also discussed what constitutes proof of segregation: Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

The doctrine enunciated in Swann that the scope of the remedy is limited by the extent of the violation was reiterated three years later in Milliken v. Bradley. The lower court found constitutional violations in the Detroit school district, but had ordered a remedy touching fifty-three outlying school districts which had not been parties to the original litigation. The Court held that this remedy

11. Id. at 789.
12. Id. at 818.
13. Id.
15. Id. at 16.
19. Id. at 725-33.
was improper. An interdistrict remedy is proper only when a constitutional violation which produces a significant segregative effect in another district is shown. 20 "Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation." 21

One of the defendants in Hills v. Gautreaux 22 was the federal Department of Housing and Urban Development (HUD), which was charged with housing discrimination in the Chicago area. The lower court had found HUD guilty of constitutional violations and had ordered a metropolitan area remedy. The Court explained that this was an appropriate remedy for these violations 23 and distinguished Milliken:

The desegregation order in Milliken requiring the consolidation of local school districts in the Detroit metropolitan area thus constituted direct federal judicial interference with local governmental entities without the necessary predicate of a constitutional violation by those entities or of the identification within them of any significant segregative effects resulting from the Detroit school officials' unconstitutional conduct. Under these circumstances, the Court held that the interdistrict decree was impermissible because it was not commensurate with the constitutional violation to be repaired. 24

B. Proof of Desegregation Cases

In Keyes v. School District No. 1, 25 the Court addressed the problems of proof, who has the burden and when, and what elements are necessary for success in desegregation cases where segregation had not been mandated by state law at the time of Brown v. Board of Education: 26

20. Id. at 744-45. Some commentators indicate that this type of remedy would be available merely if two districts were both shown to have committed constitutional violations, regardless of whether those violations had any interdistrict effect. See Kanner, From Denver to Dayton: The Development of a Theory of Equal Protection Remedies, 72 Nw. U.L. Rev. 382, 389 (1977). The language of the opinion, however, casts some doubt on this conclusion: "Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." Milliken v. Bradley, 418 U.S. at 745. Additionally, the trend of the Court in desegregation cases seems to be toward a cautious approach to any remedy, especially where busing is involved. See Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976)(Powell, J., concurring). But see Hills v. Gautreaux, 425 U.S. 284, 294 (1976).
23. Id. at 291-92, 299.
24. Id. at 294.
[A] finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes . . . a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. [Even if different areas of the district should be viewed independently,] there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system. We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.27

The Court made it clear that "[i]f the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time . . . does not make those actions any less 'intentional.'"28

The Court in <i>Washington v. Davis</i>29 reiterated that intent is an important element in any case alleging racial discrimination in violation of the equal protection clause. To establish a constitutional violation, disproportionate impact alone is not sufficient; intent or purpose to discriminate must also be shown.30 <i>Arlington Heights v. Metropolitan Housing Development Corporation</i>31 expanded on this theme by listing various factors that could be used to determine whether discriminatory intent was a motivating factor. These factors included: (1) whether the action has a disproportionate racial impact; (2) the historical background of the challenged action; (3) the specific sequence of events leading up to the challenged action; (4) departures from the normal sequence of events, be they procedural departures or substantive departures, especially when the normal factors considered by the decisionmaker militate for a contrary result; and (5) the legislative or administrative history of the action, especially contemporary statements by members of the decisionmaking body.32

28. Id. at 210-11.
30. Id. at 239-44. Disproportionate impact is one factor to be considered, but it is not the dispositive factor. Id. at 242.
32. Id. at 266-68. The Court noted that these factors are not exhaustive. Id. at 268.
In the same term that *Arlington Heights* was handed down, the Court emphasized the application of the *Washington v. Davis* criteria to school desegregation cases by remanding *Austin Independent School District v. United States* in light of *Washington*. *Austin* would be of little importance except that Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, wrote a concurring opinion in which he discussed the issue of remedy. Powell indicated that the Court had reservations about the remedy imposed by the lower court. The language of his opinion is very instructive:

As suggested by this Court’s remand premised upon *Washington v. Davis*, the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified. That court also seems to have erred in ordering a desegregation plan far exceeding in scope any identifiable violations of constitutional rights.

Powell already seems to be developing a stricter standard for proof of constitutional violations than had been used previously in desegregation cases. Formerly, where the plaintiffs had managed to prove intentional segregative actions in a substantial portion of the system, they had presented a prima facie case entitling them to broad affirmative relief of whatever nature needed to desegregate the system. It was then up to the school board to show which segregated schools, if any, were not the result of segregative acts of the board. The *Austin* case indicates that, at least to support a

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34. *Id.* at 991-95 (Powell, J., concurring).
35. "I concur in the action of the Court, and agree that there would be no need to address the issue of remedy if the Court of Appeals upon reconsideration of its opinion in light of *Washington v. Davis*, 426 U.S. 229 (1976), should conclude that there was no constitutional violation." *Id.* at 991.
36. *Id.* at 991-92 (footnotes omitted).
37. Although the opinion is couched in terms of the *Swann* decision, Powell goes farther than any previous decisions had explicitly done: "[L]arge scale busing is permissible only when the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past." *Id.* at 995.

Perhaps the strictness of the Court in terms of the burden it imposes on plaintiffs is largely dependent upon whether large-scale busing is involved. If it is, the Court seems to require more proof that the remedy will actually restore the system to the position in which they would have been but for the segregation. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974).
remedy involving busing, one must specifically prove that schools involved in the busing were segregated, to the extent remedied by the busing, by intentional acts of the school board; the prima facie case alone will no longer support the remedy of busing.\(^{40}\)

This change in the Court's position, marked only by a concurring opinion in the summary disposition of \textit{Austin}, hardened in \textit{Dayton Board of Education v. Brinkman}.\(^{41}\) The Court, speaking through Justice Rehnquist, held that the three-part cumulative violation\(^{42}\) which had been found by the lower court did not support the systemwide remedy which had been ordered.\(^{43}\) The case was remanded for new findings in light of \textit{Washington v. Davis}\(^{44}\) and \textit{Arlington Heights},\(^{45}\) and a new remedy in light of \textit{Swann}\(^{46}\) and \textit{Hills v. Gautreaux}.\(^{47}\)

The district court was to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. . . . If such violations are found, the [court] . . . must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.\(^{48}\)

Although this case appears to be merely a reaffirmation of the \textit{Swann} doctrine,\(^{49}\) it imposes a requirement that plaintiffs now prove

\begin{itemize}
  \item No. 1, 413 U.S. at 210-11.
  \item 41. 433 U.S. 406 (1977).
  \item 42. This at least was how the Court characterized the lower court's findings. \textit{Id.} at 414-15. The three-part violation consisted of (1) substantial racial imbalance in student enrollment patterns; (2) the use of optional attendance zones which allowed some white students to avoid attending black schools; and (3) the rescission of resolutions of a former board which had acknowledged responsibility for the attendance imbalance and had called for remedial measures. \textit{See Id.} at 412-13.
  \item 43. \textit{Id.} at 418.
  \item 44. 426 U.S. 229 (1976).
  \item 45. 429 U.S. 252 (1977).
  \item 46. 402 U.S. 1 (1971).
  \item 48. \textit{Id.} (emphasis added).
  \item 49. \textit{See text accompanying note 15 supra.}
what effect the school board’s actions had on segregated schools, compared to what would have happened without such actions. This is contrary to the policy considerations underlying both the Swann and Keyes decisions, and denies the synergistic effect segregated schools have on residential patterns. Keyes places the burden on the school board to rebut the prima facie case by showing that segregative intent was not a factor in the school board’s action with respect to schools which are covered by the Keyes presumption, or by showing that a lesser degree of segregation would not have resulted even if the board had acted in a constitutional manner. Dayton appears to limit the remedy to the scope of the actual violations proved at trial without any resort to the Keyes burden-shifting presumption.

Unfortunately, the Dayton opinion leaves many crucial questions unanswered. What effect does the Keyes opinion still have on such cases? Has it been overruled sub silentio? The Keyes presumption was not even mentioned in the course of the Dayton opinion. Thus, the actual effect of Dayton on Keyes is unknown. Is the Court merely trying to apply well-established principles? Its language would seem to go beyond that simple purpose. What exactly are the standards promulgated by Dayton, and how are they to be applied? And what does the ambiguous phrase “incremental segregative effect” mean? All in all, the Dayton opinion is a splendid example of horrid judicial craftsmanship.

The Dayton opinion is not rendered any more comprehensible by two opinions delivered two days after Dayton. School District of Omaha v. United States and Brennan v. Armstrong were both remanded in light of Arlington Heights and Dayton, because the lower courts had not addressed the Dayton standard with respect to the remedies imposed. The Court’s short opinions, coupled with

54. See Lewis, The High Court: Final... But Fallible, 19 CASE W. RES. L. REV. 528 (1968).
56. 433 U.S. 672 (1977) (per curiam).
If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect
the dissents in each case, make the Court's interpretation of Dayton even more ambiguous.

Justice Brennan, joined by Marshall and concurred in by Stevens, dissented in Omaha because (1) systemwide segregation had been established, (2) the lower court had reviewed its findings in light of Washington v. Davis, and (3) the systemwide violations were appropriately remedied by the comprehensive order of the court, which complied with Dayton's affirmation of the equitable limitation on remedies. Justice Stevens, joined by Brennan and Marshall, dissented in Brennan v. Armstrong because the Court misused its power of summary disposition. The case was on interlocutory appeal from the district court's finding of liability; the question of remedy was not before the Court. The reason for the remand, therefore, was unclear. Arlington Heights "[was] merely a routine application of Washington v. Davis . . . which was correctly construed by the Court of Appeals. [Dayton] is relevant to the issue of liability, if at all, only because it supports the Court of Appeals."

C. The Aftermath of Dayton

There have been nine opinions in the federal district courts and courts of appeal which have attempted to apply Dayton in one form or another. One of the first cases to do so was United States v.
The word “incremefital” merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is “incremental” in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution.  

In the aftermath of Dayton, some courts use Keyes, and some do not. Few courts are willing to define what the Supreme Court meant by “incremental segregative effect,” and most are willing to chant it as an incantation, assuming the district courts will immediately understand. We will now turn to a specific problem raised by this magic formula.

Penick v. Columbus Board of Education illustrates the problems facing the courts in trying to apply the Dayton standards to a case. The Penick case is instructive partially because of the extensive and detailed findings by the district court. The court began by reviewing the findings of segregation at the time of Brown v. Board of Education, concluding, “While the Columbus school system’s dual black-white character was not mandated by state law as of 1954, the record certainly shows intentional segregation by the Columbus Board.” Therefore, the court found that the Columbus school board had been under a duty since 1954 to desegregate its schools.

Turning to the years after 1954, the court first examined pupil assignment in the system. The district court had found that for the 1975-76 school year, over seventy percent of the students in the Columbus system had attended schools which were over eighty percent one race. The board had thus failed to perform its duty, which required the court to affirm the finding of present unconstitutional segregation, even if no other proof of constitutional violations ex-

73. Id. at 257.
75. 583 F.2d 787 (6th Cir. 1978).
78. Penick v. Columbus Bd. of Educ., 583 F.2d at 798.
Texas Education Agency,\(^{63}\) which was the reconsideration of Austin.\(^{64}\) The court reaffirmed its earlier holdings in light of Washington v. Davis\(^ {65}\) but remanded the case in light of Dayton, instructing the lower court to “assess the incremental segregative impact of a school board’s discriminatory actions and policies.”\(^ {66}\) However, the court did use Keyes to place on the school board the burden of proving that the residential concentrations of minorities were unrelated to the segregative school policies.\(^ {67}\)

In Brinkman v. Gilligan,\(^ {68}\) which is the district court opinion in the Dayton case on remand, the court quoted the Supreme Court’s instructions, and said, “We read this language as imposing a burden upon the plaintiffs to prove the effect of any purposeful segregative act, not merely on a theoretical basis, but on a factual basis.”\(^ {69}\) This conclusion was restated later as, “There is a burden upon plaintiffs to establish by a preponderance of evidence both a segregative intent and an incremental segregative effect in order to establish a violation of the Equal Protection Clause . . . .”\(^ {70}\) After construing this to mean that the plaintiffs need prove the effect for each action individually, without ever looking to the effect of violations in concert, the court found that the plaintiffs had not carried their burden.

The appeals court reversed\(^ {71}\) holding that the district court had erred in (1) individually examining each violation as if it were an isolated event and determining its incremental segregative effect, and (2) allocating the burden of proof on both the issue of intent and the issue of specific incremental segregative effect to the plaintiffs.\(^ {72}\) The court relied upon Keyes, and stated that when a systemwide pattern of intentionally segregative actions has been established, the defendants then have the burden to rebut the presumption that the current segregated conditions result from the systemwide violations. Incremental segregative effect was defined in the following terms:

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63. 564 F.2d 162 (5th Cir. 1977).
67. Id.
69. Id. at 1236.
70. Id. at 1253.
The plaintiffs had shown that a meaningful portion of the school system was intentionally segregated, and the Columbus board had not rebutted the presumption raised against it that other segregated schools were also the result of its intentionally segregative acts.

The court also looked at the discriminatory assignment of teachers and administrative personnel. It accepted the lower court's decision that the assignment of teachers and administrative personnel on an intentionally segregative basis had existed, and had continued until a complaint was filed with the Ohio Civil Rights Commission and settled in 1974 by a consent order.

The court identified the next issue as being whether the clearly defined segregation was intentionally created by the school board or rather whether it resulted from neighborhood housing segregation, not the neutral policies of the board. The court noted, with respect to this issue, the "substantial evidence of segregation in pupil, teacher, and administrator assignments" before analyzing the school board's site selection and construction policies and their effect on this question.

Between 1954 and 1975, the pupil population in Columbus more than doubled. The court, besides agreeing with the district court's findings of intentional segregation in site selection and construction of new schools, made two comments. First, of 103 schools which opened between 1950 and 1975, eighty-seven opened racially identifiable, and, at the time of trial, seventy-one were still racially identifiable. The court felt that this fact warranted a "very strong inference of intentional segregation." Secondly, no inference was needed because, despite actual notice to the board in repeated instances of the segregative effect of their site choices, the board did not alter their choices in favor of sites which would have had integrative effects.

The court next considered devices "which allowed white students to avoid attendance at a primarily black school, or which required

81. Id.
82. Id. at 800. The court relied upon Keyes as to the defendants' burden once a meaningful portion of a system has been found to be intentionally segregated. Id. at 801.
83. Id. at 805.
84. Id. at 801. Swann taught how school constructions and closings had been used as "a potent weapon for creating or maintaining a state-segregated school system." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971).
85. Penick v. Columbus Bd. of Educ., 583 F.2d at 802.
86. Id. at 804.
87. Id.
black students to attend a primarily black school in place of a closer white school." The district court found five separate and specific instances, involving two or more schools in each instance, where such techniques had been used to maintain segregated schooling. Of these five instances, the court of appeals said:

These instances can properly be classified as isolated in the sense that they do not form any systemwide pattern. They are significant, however, in indicating that the Columbus Board's "neighborhood school concept" was not applied when application of the neighborhood concept would tend to promote integration rather than segregation.

The court then addressed the specific standards of Dayton, saying, "[S]ystemwide desegregation [is called for] when (and only when) the segregative practices found had a systemwide impact." Discussing the interpretation of the Dayton standards, the court said:

It is clear to us that the phrases "incremental segregative effect" and "systemwide impact" employed in the Dayton case require that the question of systemwide impact be determined by judging segregative intent and impact as to each isolated practice, or episode. Each such practice or episode inevitably adds its own "increment" to the totality of the impact of segregation. Dayton does not, however, require each of fifty segregative practices or episodes to be judged solely upon its separate impact on the system. The question posed concerns the impact of the total amount of segregation found—after each separate practice or episode has added its "increment" to the whole.

In considering the incremental effect of just the major constitutional violations, the court started with the assumption that "policies of systemwide application necessarily have systemwide impact." The court found that each of five major violations had systemwide application and impact individually, and each added an increment to the total violation found. As a result, the systemwide remedy was appropriate.

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88. Id. at 805.
90. Penick v. Columbus Bd. of Educ., 583 F.2d at 805 (emphasis added).
91. Id. at 813.
92. Id. at 813-14.
93. Id. at 814.
94. These five were (1) the pre-1954 policy of creating black schools for black students; (2) the post-1954 failure to perform the resulting duty to desegregate; (3) the segregative school construction policy; (4) the discriminatory student assignment policy; and (5) the pre-1974 discriminatory teacher and administrator assignment policy. Id.
95. Id.
The court rejected a request by the school board for a remand in light of Dayton. There were four reasons for the rejection: (1) the Columbus system, unlike the Dayton system, had been dual\textsuperscript{96} in 1954, and had been so maintained since 1954; (2) the district court here found more than just three isolated violations as the Dayton court had, and, here, the major violations were of systemwide application and impact; (3) the systemwide remedy here is based upon systemwide violations; and (4) both the district court and the court of appeals had the opportunity to consider the Dayton standards and found that the violation and remedy conformed to those standards.\textsuperscript{97}

Thus, the Sixth Circuit in Penick approached the justification for a systemwide remedy in a school desegregation case in this manner: (1) the plaintiff must prove intentional segregation as to a substantial or meaningful portion of a school system;\textsuperscript{98} (2) this proof will establish a prima facie case which will shift the burden of proof to the defendant to show that other segregated schooling in the system is not also the result of intentionally segregative actions on the part of the defendant;\textsuperscript{99} (3) this proof (whether it be that actually produced by the plaintiff or that produced by the unrebutted presumption raised by the prima facie case) must be sufficient to allow the court to find that (a) each violation had systemwide application and impact, and (b) each violation added a sum to the total violation proved.\textsuperscript{100} This is a well-reasoned approach to the standards enunciated in Dayton, and the detailed opinions of both the district court and the court of appeals amply support the findings.

However, at least one member of the Supreme Court does not think this approach is so reasonable. In Columbus Board of Educatin v. Penick,\textsuperscript{101} Justice Rehnquist granted a stay of the judgment of the court of appeals. Rehnquist's opinion indicates a strikingly different interpretation of the Dayton decision than has heretofore been evidenced by any member of the court:

\[\text{[T]he [Penick] District Court concluded that Dayton simply restated the established precept that the remedy must not exceed the}\]

\begin{itemize}
  \item \textsuperscript{96} A unitary school system is one in which there is "no unlawful racial segregation;" a dual school system is one in which "unlawful racial separation" exists. \textit{Id.} at 796.
  \item \textsuperscript{97} \textit{Id.} at 815. The court remanded the case which dealt with the state board, because it felt that the findings were not sufficiently detailed to meet the Dayton standards. \textit{Id.}
  \item \textsuperscript{98} See \textit{id.} at 813 (citing Keyes v. School District No. 1, 413 U.S. 189, 203 (1973)).
  \item \textsuperscript{99} See \textit{id.} at 801.
  \item \textsuperscript{100} \textit{Id.} at 814.
  \item \textsuperscript{101} 47 U.S.L.W. 3089 (1978) (Rehnquist, Circuit Justice).
\end{itemize}
scope of the violation. Since it had found a systemwide violation, the District Court deemed a systemwide remedy appropriate without the specific findings mandated by Dayton on the impact discrete segregative acts had on the racial composition of individual schools within the system. ¹⁰²

[The Dayton district court on remand] concluded that Dayton required a finding of segregative intent with respect to each violation and a remedy drawn to correct the incremental segregative impact of each violation. On that basis the District Court had found no constitutional violations and had dismissed the complaint. The Sixth Circuit reversed, characterizing as a “misunderstanding” the District Court’s reading of our Dayton opinion. ¹⁰³

[Brinkman v. Gilligan]¹⁰⁴ and the instant case clearly indicate to me that the Sixth Circuit has misinterpreted the mandate of this Court’s Dayton opinion. ¹⁰⁵

Rehnquist obviously feels that the Sixth Circuit did not properly handle the Dayton standard. First, Rehnquist noted that the stay had been previously denied by Justice Stewart. “While I am naturally reluctant to take action in this matter different from that taken by him, this case has come to me in a special context.”¹⁰⁶ That special context was the court of appeals opinion in Brinkman v. Gilligan.¹⁰⁷ That fact, plus the fact that Rehnquist felt Brinkman was wrongly decided, were the determining factors in ordering a stay when Justice Stewart had denied one.¹⁰⁸

Secondly, Rehnquist felt the Sixth Circuit had made an “unduly grudging application”¹⁰⁹ of the Dayton case. Joining the court of

¹⁰². Id.
¹⁰³. Id. at 3090 (citation omitted).
¹⁰⁴. 583 F.2d 243 (6th Cir. 1978).
¹⁰⁶. Id. at 3089.
¹⁰⁷. 583 F.2d 243 (6th Cir. 1978).
¹⁰⁹. See R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 861 n.90 (5th ed. 1978), where only two such cases are cited. See also U.S. SUP. CT. R. 50(5) which provides that when a renewed application for a stay is made to another justice after one justice has denied the application, “such renewed applications are not favored,” unless the denial was without prejudice.
appeals opinion in Brinkman with the Penick opinion, he said, "In both cases the Court of Appeals employed legal presumptions of intent to extrapolate systemwide violations from what was described in the Columbus case as 'isolated' instances." He continued,

The Sixth Circuit is apparently of the opinion that presumptions, in combination with such isolated violations, can be used to justify a systemwide remedy where such a remedy would not be warranted by the incremental segregative effect of the identified violations. That is certainly not my reading of Dayton and appears inconsistent with this Court's decision to vacate and remand the Sixth Circuit's opinion in [Brinkman v. Gilligan, 539 F.2d 1084 (6th Cir. 1976)]. In my opinion, this questionable use of legal presumptions, combined with the fact that the Dayton and Columbus cases involve transportation of over 52,000 school children, would lead four Justices of this Court to vote to grant certiorari in at least one case and hold the other in abeyance until disposition of the first."

Finally, Rehnquist determined that the balance of equities for a stay was in favor of the school board. This was based on the administrative difficulties attendant in implementing the order with four weeks left before the start of school, along with the financial difficulties of the school system itself.

II. Penick and the Meaning of Dayton

Before the advent of Dayton, it seems reasonable to say that, to be successful in a school desegregation suit, one had to prove that one's constitutional rights had been violated by (1) intentional acts on the part of the school board to effect segregation, and (2) existing racial segregation. Once these two elements were proven, one was

110. Id. Rehnquist used the word "isolated" out of the context of the Penick court's opinion. See text accompanying notes 94-100 supra. Rehnquist totally ignored the major findings of the case, which did not include the five "isolated instances" Rehnquist complains of, and upon which the court relied for finding the systemwide violations justifying a systemwide remedy.

111. 47 U.S.L.W. at 3090. From his opinion it is difficult to ascertain what he dislikes the most: the Sixth Circuit's use of the Keyes presumptions, or the fact that 52,000 school children would be dislocated unless the application for the stay were granted. Perhaps his invective results from a dislike of the Keyes presumptions themselves. See Keyes v. School Dist. No. 1, 413 U.S. 254 (Rehnquist, J., dissenting). On the other hand, it could be attributed to his longstanding dislike of desegregation principles themselves. See generally Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Committee on the Judiciary, 92d Cong., 1st Sess. (1971). Whatever its source, he seems to indicate that the Brinkman opinion, at least in his mind, effected a far-reaching change in the law, one which would impose on plaintiffs a burden similar to the one expressly disavowed in Keyes v. School Dist. No. 1, 413 U.S. 189, 200 (1973).

entitled to relief. Relief was measured in terms of the extent of the violations: small violation would bring a small remedy; a large violation a large remedy. \textit{Keyes} impacted this calculus by providing that once a plaintiff proved the first element with respect to a substantial portion of the system, a presumption was created against the school board with respect to other segregated schools in the system not covered by the initial proof; \textit{Keyes}, therefore, impacted not only the proof of intention, but also the remedy which could be ordered. It expanded the extent of the violation, which \textit{necessarily} expands the extent of the remedy. The reasons for the creation of the presumption and the consequent expansion of the remedy were very strong policy grounds which were first enunciated in \textit{Swann}, reaffirmed and strengthened in \textit{Keyes}, and which have never been repudiated or attacked by the Court.

What then was the effect \textit{Dayton} was meant to have on the proof of desegregation cases? One possible interpretation is that \textit{Dayton} adds a new element to the case: the plaintiff must now show a causal relationship between the intentional acts of the school board and the existing racial segregation. This would explain the language of the \textit{Dayton} standards. This would also mesh with the statements of some of the other Justices with respect to the \textit{Dayton} case.\footnote{See Buchanan v. Evans, 47 U.S.L.W. 3127 (U.S. Sept. 1, 1978)(No. A-188)(Brennan, Circuit Justice); School Dist. of Omaha v. United States, 433 U.S. 668 (1977)(Brennan, J., dissenting); Brennan v. Armstrong, 433 U.S. 673 (1977)(Stevens, J., dissenting); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 421 (1977)(Brennan, J., concurring in judgement).}

Perhaps the whole problem of interpreting the \textit{Dayton} opinion is the tension between the interpretation of Justice Rehnquist and the district court in \textit{Brinkman v. Gilligan}\footnote{47 U.S.L.W. 3089.} and the interpretation of the court of appeals in \textit{Brinkman v. Gilligan}.\footnote{446 F. Supp. 1232 (S.D. Ohio 1977).} The first interpretation appears to view constitutional violations in isolation from each other, as if the total were merely equal to the sum of its parts. This is a valid assumption in a simple behavioral system where the number of variables is low. However, the more complex the system becomes, the less linear is its behavior; the more a change in one variable creates changes in a whole network of other variables, the less predictable or measurable is the result. The court of appeals is correct when it not only looks at the individual effects of viola-
tions, but also at the whole effect of the violations.

Both the Dayton case\textsuperscript{117} and the Penick\textsuperscript{118} case have been filed
with the Supreme Court, petitioning for a writ of certiorari, and the
Court has agreed to hear and to decide the issues of these cases.\textsuperscript{119}
If the rest of the Court concludes that Justice Rehnquist's view is
the correct one, it will have taken a long step back from the doctrine
enunciated in Keyes:

We have never suggested that plaintiffs in school desegregation cases
must bear the burden of proving the elements of \textit{de jure} segregation
as to each and every school or each and every student within the
school system . . . . [W]here plaintiffs prove that school authorities
have carried out a systematic program of segregation affecting a sub-
stantial portion of the students, schools, teachers, and facilities
within the school system, it is only common sense to conclude that
there exists a predicate for a finding of the existence of a dual school
system.\textsuperscript{120}

\textbf{CHARLES T. LESTER, JR.}

\textsuperscript{117} Id., petition for cert. filed sub. nom. Dayton Bd. of Educ. v. Brinkman, No. 78-627

\textsuperscript{118} Penick v. Columbus Bd. of Educ., 583 F.2d 787 (6th Cir. 1978), petition for cert. filed,

\textsuperscript{119} Brinkman v. Gilligan, 583 F.2d 243 (6th Cir. 1978), cert. granted sub nom,
v. Columbus Bd. of Educ., 583 F.2d 787 (6th Cir. 1978), cert. granted, No. 78-610 (U.S. Jan.

NOTES


INTRODUCTION

Salvatore Finazzo and Dominic Licavoli were suspects in an FBI investigation of loan sharking in Detroit. To aid in that investigation, the district court issued a warrant authorizing the use of eavesdropping devices in accordance with the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.1 Attorneys for the Department of Justice advised the FBI that should federal agents decide that execution of the warrant would require installation of microphones by means of forcible and surreptitious entry, such action was contemplated and permitted by the warrant.2 On two occasions, agents entered the business premises of the appellants, first to install and then to remove microphones. During the course of the eavesdropping, agents overheard a conversation concerning a bribe made to a supervisor of the Small Business Administration. The sum of $18,000 was to be paid to this official by a Cleveland construction company in exchange for an S.B.A. guarantee needed for a 3 million dollar construction project. Appellants Finazzo and Licavoli were revealed to be the agents of the official, as collectors of the bribe. They were indicted for bribery of a federal public official.

At trial, appellants moved to suppress all evidence obtained by means of the eavesdropping devices on the ground that the FBI agents who executed the warrant were not authorized to surreptitiously break and enter the appellants’ offices in order to install the devices. The government contended that the district judge who had authorized the eavesdropping understood that installation of the microphones would require a forcible entry and, therefore, had implicitly authorized this procedure when he issued the warrant permitting electronic surveillance.3

The district court addressed two issues. First, the court was required to determine if the decision to install electronic surveillance

1. 18 U.S.C. §§ 2510-2520 (1976) [hereinafter referred to as Title III].
3. Id.
by forcible entry into private premises necessitated judicial approval, or was to be left to the discretion of the investigative agency. And secondly, what opportunities for abuse would be present should the decision to break and enter be left to the agency’s discretion?

The Sixth Circuit had not previously passed judgment on these issues. Therefore, the district court examined other circuits’ treatment of surreptitious entry to effectuate eavesdropping. The court granted appellants’ motion to suppress evidence. Adopting the view of the Eighth Circuit Court of Appeals, the court held that since surreptitious entry was not explicitly authorized by the warrant to eavesdrop, the agents had overstepped their authority by breaking and entering the business premises of Finazzo and Licavoli. The United States appealed to the Sixth Circuit, which affirmed the decision of the lower court, and held that in the absence of specific statutory authority a judge could not authorize breaking and entering in order to install electronic eavesdropping devices, nor did law enforcement agents have independent statutory or constitutional authority to engage in break-ins to execute eavesdrop warrants.

**History of Eavesdropping**

The history of eavesdropping authorized by the judiciary predates Title III of the Omnibus Crime Control and Safe Streets Act of 1968 by at least forty years. As the following discussion illustrates, it was a checkered past in the area of eavesdropping requiring physical intrusion which led to the promulgation of Title III.

In its first case involving wiretapping, the Supreme Court in *Olmstead v. United States* held that tapping telephone lines and using the evidence thereby gained did not constitute an unreasonable search and seizure. The rationale of the Court reflected the application of the fourth amendment, at that stage of its development, to only tangible items. Conversation was deemed intangible. Therefore, a search or seizure had not occurred because the evidence had been secured by the use of the sense of hearing. The majority did state that “an actual physical invasion of a house or ‘curtilage’ for the purpose of making a seizure,” would constitute a violation

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4. *Id.* at 808.
10. *Id.* at 464.
of the fourth amendment.\textsuperscript{11}

Since \textit{Olmstead}, many challenges to the propriety of physical intrusions for eavesdropping purposes have reached the highest federal court. In differentiating intrusions from nonintrusions, the Court became extremely cautious, and, at times, very technical and literal. In \textit{Goldman v. United States},\textsuperscript{12} the application of a delicate device, a "detectaphone," to the wall of a room adjoining one occupied by the principal targets of the eavesdrop, was held not to be a physical intrusion. The petitioners attempted to distinguish the case from \textit{Olmstead} on the ground that the intention of the speaker there was that his voice leave the room via telephone, while petitioners assumed and intended that their conversation not leave the four walls.\textsuperscript{13} The Court was not persuaded.

In \textit{Silverman v. United States},\textsuperscript{14} the conversation was circulating through a heating duct, where it was being received by a "spike mike" inserted through a wall into the duct. The Supreme Court declared this reception a physical intrusion in violation of the fourth amendment. Precedent dictated that a federal officer, without warrant or consent, could not physically invade a home or office and secretly listen, and later use the conversation as evidence at a criminal trial.\textsuperscript{15} The poking of the microphone through the wall was just such a constitutionally prohibited invasion.

These cases are but a sampling of the varying applications of the fourth amendment to eavesdropping. However, two specific decisions directly influenced the enactment of Title III. \textit{Berger v. New York}\textsuperscript{16} examined the constitutionality of New York's eavesdropping statute,\textsuperscript{17} and declared it invalid because it was overly broad. More

\begin{itemize}
\item \textsuperscript{11} \textit{Id.} at 466 (dictum).
\item \textsuperscript{12} 316 U.S. 129 (1942).
\item \textsuperscript{13} \textit{Id.} at 135.
\item \textsuperscript{14} 365 U.S. 505 (1961).
\item \textsuperscript{16} 388 U.S. 41 (1967).
\item \textsuperscript{17} An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may
\end{itemize}
importantly however, in this decision the court held that the capture of a conversation was a "search" entitled to fourth amendment protections. The Court detailed the requirements which the New York statute failed to include to preserve those protections. Specifically, the statute had not required particularized descriptions of the place to be searched, the crime allegedly being committed, the type of conversation sought, or the existence of probable cause. 18

Some six months later, the Supreme Court in *Katz v. United States*, 19 further expounded on the propriety of physical invasion in light of an individual's fourth amendment rights. The petitioner's conversation had been overheard by means of a listening device attached to the outside of a telephone booth. The Court held that this action was an unconstitutional invasion of privacy stating, "The Fourth Amendment protects people, not places." 22 In conjunction with that statement, *Olmstead* 21 and *Goldman*, 22 which required a trespass for a violation, were overruled. At issue in *Katz* was the absence of judicial scrutiny of the proposed action of the officers. Although the enforcement officials had acted with restraint, 23 the Court decreed that such restraint should have been

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20. Id. at 351.
22. 316 U.S. 129 (1942).
23. [T]he Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.

judicial in origin, in compliance with constitutional standards for obtaining a warrant.

An examination of Title III reveals that Congress relied heavily upon, and indeed, incorporated the judicial interpretations of the fourth amendment made in Berger and Katz into specific provisions of the Act.

TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

Title III of the Omnibus Crime Control and Safe Streets Act regulates the use of wiretapping and electronic surveillance by individuals, as well as those acting under color of law. Because of tremendous advances in the scientific and technical development of eavesdropping equipment, Congress became concerned that incidents of abuse in the use of such equipment had increased comparably. Congress foresaw the possibilities for corruption of business and industry by widespread use of “bugs” and “taps,” to the point where organized crime would become the controlling force of the nation’s economy. Furthermore, Olmstead, Goldman, and Silverman demonstrated that the state of the law regarding the application of the fourth amendment to electronic surveillance was far from settled, and that limitations on judicial and law enforcement authority had not been clearly enunciated.

Legislative efforts on Title III actually began before the Supreme Court’s decisions in Berger and Katz. Yet those opinions produced

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24. The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone.


25. The major purpose of title III is to combat organized crime . . . . [H]ighly organized, structured and formalized groups of criminal cartels . . . have developed into corporations of corruption, indeed, quasi-governments within our society . . . .

Organized crime has not limited itself to criminal endeavors. It has large spheres of legitimate business and union activity . . . . Our free control of businesses has been acquired by the sub rosa investment of profits acquired from illegal ventures, accepting business interests in payment of gambling or loan shark debts, or using various forms of extortion.

the constitutional standards to which Title III conformed. Specifically, Title III incorporated the search warrant requirements that the **Berger** Court had found impermissibly omitted from the New York statute: a description with particularity of the place and person to be searched, a statement of probable cause, and a description of the type of and reasons for electronic surveillance. Judicial scrutiny of these requirements, as emphasized in **Katz**, was similarly included in Title III. 

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27. (4) Each order authorizing or approving the interception of any wire or oral communication shall specify—
   
   (a) the identity of the person, if known, whose communications are to be intercepted;
   
   (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
   
   (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
   
   (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
   
   (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.


28. [T]he judge may enter an ex parte order . . . authorizing or approving interception of wire or oral communications . . . if the judge determines on the basis of the facts submitted by the applicant that—
   
   (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
   
   (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
   
   (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
   
   (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.


29. Each application is required to contain
   
   (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;


30. The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent
"Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." Yet the fact remains that the legislation contains no explicit language regarding the use of surreptitious entry in the course of executing a judicially authorized eavesdrop warrant. The courts have not relied on the absence of express language; rather, they have clung to a common sense viewpoint that eavesdropping, by its very nature, may necessitate secret entry.

A further indication that Congress may have considered the entry problem inherent in the use of electronic surveillance devices is evidenced by an amendment to Title III. This addition compels the assistance of landlords, custodians, and others in providing whatever physical or technical assistance is necessary to accomplish the eavesdropping with a minimum of interference. Even so, Congress has again chosen not to be explicit in its direction to judicial and jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications.


32. United States v. Dalia, 575 F.2d 1344 (3rd Cir. 1978); United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977); cert. denied, 98 S. Ct. 2231 (1978); In re United States, 563 F.2d 637 (4th Cir. 1977); United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976); cert. denied, 429 U.S. 1048 (1977).

33. See, e.g., United States v. Finazzo, 583 F.2d 837, 841 (6th Cir. 1978). Although the court recognized the possibility that the installation of an eavesdropping device could, in some circumstances, require a forcible breaking and entering of a suspect's premises, it stated that such instances were rare: Telephone taps apparently account for most instances of electronic surveillance, and this can be accomplished in most circumstances by placing a tap on the line outside the premises of the suspect. According to the final report of the National Commission for Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, only 26 out of some 1,220 electronic surveillance orders executed between 1968 and 1973 involved a trespassory intrusion.

Id. n.13 (citing NATIONAL WIRETAP COMMISSION, ELECTRONIC SURVEILLANCE 15 (1967), cited in United States v. Ford, 553 F.2d 146, 194 n.12 (D.C. Cir. 1977)).

34. An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian of other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

law enforcement officials and thereby invites a host of interpretations.

**Necessity of Statutory Authorization—Decisions of Other Circuit Courts**

Disposition of the issue of the propriety of using surreptitious means to accomplish eavesdropping has been made by five other courts of appeals. One similarity exists among the decisions: all have held that statutory authority is necessary for the issuance of an eavesdrop warrant by a district court judge. The courts differ, however, in their opinions as to whether surreptitious entry to achieve the installation of devices is permissible and as to whether a surreptitious entry must be expressly or impliedly authorized in the warrant.

In *United States v. Scafidi*, the Second Circuit examined the effectiveness of an eavesdrop order that failed to specify how it would be carried out. The court concluded that the most reasonable interpretation of such an order was that it implicitly authorized any "reasonable" means of executing the warrant, including break-ins. Furthermore, in the court's view, it was unnecessary that law enforcement officers obtain prior judicial approval, since law enforcement officers were more familiar with the equipment and the situations in which eavesdropping devices were likely to be installed. This decision would not require the detailed itemization of such things as method of entry or location of the "bug." All that need be demonstrated is adequate proof that there is probable cause for the installation of a device in a particular location.

In the concurring opinion in *Scafidi*, Judge Gurfein examined Congress' understanding of the necessity for covert installation and found it to be sophisticated. As a basis for that belief, he cited the amendment to Title III which directs landlords or custodians to provide all facilities and technical assistance to federal agents necessary to effectuate an eavesdrop order. Also, this opinion urged that Congress reconcile the needs of law enforcement officials with the rights of individuals to privacy and define the limits of "reasonable" searches.

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36. Id. at 639-40.
37. Id. at 640.
38. Id.
39. Id. at 643 (Gurfein J., concurring).
41. [It is hoped that Congress will provide the national consensus needed to recon-
The Court of Appeals for the Third Circuit in *United States v. Dalia*42 essentially agreed with the Second Circuit that forcible entry can be implicitly authorized by an eavesdropping warrant. However, distinguishing this case on its facts, the court refused to adopt the rule of implicit authorization for every case.43 Also, it is urged by this decision that for the protection of the government agents, it might be prudent to include a statement regarding the need for a surreptitious entry in the request for the eavesdropping warrant.44

The absence in Title III of express authorization of forcible entries into private premises to install listening devices is the basis for the holding in *In re United States*.45 The Fourth Circuit found that the lack of express limitations, in light of legislative intent to “control organized crime,” demonstrated that Congress implicitly left the question of surreptitious entries to the discretion of the district court judge, yet subject to the mandates of the Constitution.46 Furthermore, before a court would countenance forcible entry by federal agents to install listening devices, a statement as to the type of entry, and the ineffectiveness of other methods, must be presented to the judicial officer who issues the eavesdropping warrant.47

The Eighth Circuit is most liberal in its interpretation of Title III. In *United States v. Agrusa*,48 the court, in its holding regarding the use of forcible entry by police officers stated that:

> [L]aw enforcement officers may, pursuant to express court authorization to do so, forcibly and without knock or announcement break and enter business premises which are vacant at the time of the entry of the order to install an electronic surveillance device, provided the surveillance activity is itself pursuant to court authorization, based on probable cause and otherwise in compliance with Title III.49

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42. 575 F.2d 1344 (3rd Cir. 1978).
43. “In rejecting appellant's contention in this case that separate authorization was required for the forcible surreptitious entry, we do not adopt a rule that specific authorization is never required.” *Id.* at 1346 (dictum).
44. “In the future, the more prudent or preferable approach for government agents would be to include a statement regarding the need of a surreptitious entry in a request for the interception of oral communications when a break-in is contemplated.” *Id.* at 1346-47 (dictum).
45. 563 F.2d 637 (4th Cir. 1977).
46. *Id.* at 643.
47. *Id.* at 644.
49. *Id.* at 701.
The court reasoned that the illegality of an intrusion was insufficient to outlaw intrusions as a means of effectuating a search warrant.  

Prior to the Sixth Circuit decision in *United States v. Finazzo,* the most restrictive treatment of surreptitious entry to install eavesdrops was given by the District of Columbia Court of Appeals in a 1977 case, *United States v. Ford.* This decision required two warrants: one to eavesdrop and one to break and enter. The court determined that the physical intrusion to install a microphone was an invasion of privacy separate from the actual eavesdrop, and therefore, each required separate consideration in the warrant procedure.

**Reasoning of the Sixth Circuit**

In affirming the suppression order of the district court in *United States v. Finazzo,* the Sixth Circuit held that since no statute presently authorizes surreptitious entry, such conduct may not be authorized by judicial officers nor engaged in by law enforcement officers without contravening Article III of the Constitution and the fourth amendment. As this was a case of first impression, the panel looked to other circuits for guidance, but found only conflict. However, no court had determined that surreptitious and forcible entry to install eavesdropping devices was reasonable conduct under the fourth amendment, absent implicit statutory authority or specific judicial authority contained in a warrant.

The court was disturbed by the absence of express language in Title III authorizing break-ins to effectuate an eavesdrop warrant. Judge Merritt, author of the majority opinion, admitted that in some circumstances, the only possible way to install electronic "bugs" would be by breaking and entering a suspect’s premises. Yet, he argued that the statutory scheme of Title III did not contemplate breaking and entering, nor its effect, the intrusion upon property and privacy.

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50. Id. at 696.
51. 583 F.2d 837 (6th Cir. 1978).
52. 553 F.2d 146 (D.C. Cir. 1977).
53. Id. at 170.
54. 583 F.2d 837 (6th Cir. 1978).
55. Id. at 849.
56. Id. at 841.
57. Id. In the majority's view, the fact that there are situations where the installation of eavesdropping devices can only be accomplished by means of a trespassory intrusion does not require that authorization for such an intrusion should be implied:
The court considered whether federal judges had the power to authorize break-ins. The development of the common law and the fourth amendment has demonstrated that the power of federal judicial officers was derived from statutes. Absent a statutory delegation, federal judges have no actual, much less inherent, power to authorize search warrants. Progressing logically, neither does the judiciary have inherent power to condone forcible entry to achieve a search.

The court examined the power of investigative agencies to break and enter at their own discretion. Four possible sources of this allegedly inherent power were examined by the court. At common law, the right to break and enter to execute a search warrant existed only after notice was given and admittance refused. Notice would obviously defeat the purpose of eavesdropping. Where there are exigent circumstances, officers can enter forcibly if the occupants know of the officer's presence. No such circumstances existed in Finazzo. By statute, federal agents may not enter a building by surreptitious means, unless there exists some emergency or other perilous circumstances. Finally, the Finazzo court stated that Title III itself does not authorize forcible entry:

We fully appreciate the government's contention that Title III authorizes eavesdropping and, implicitly, the use of any reasonable

[T]he power to break and enter is [not] subsumed in the warrant to seize the words. The breaking and entering aggravates the search, and it intrudes upon property and privacy interests not weighed in the statutory scheme, interests which have independent social value unrelated to confidential speech. We are not inclined to give the government the right by implication to intrude upon these interests by conducting official break-ins . . . .

Id. at 841-42.


59. United States v. Finazzo, 583 F.2d at 844.

60. In the lower court, the government had contended that law enforcement agents had implied authority to break and enter to execute search warrants. United States v. Finazzo, 429 F. Supp. 803, 805 (E.D. Mich. 1977).


62. Id. at 846.

63. The court suggested that the doctrine of "exigent circumstances" "has no application to an entry for the purpose of installing an eavesdrop device, an entry planned in advance to take place when a home or office is unattended and the regular occupants are unaware of the officer's presence." Id. (citing Katz v. United States, 389 U.S. 347, 357-58 (1967)).

64. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

procedures consistent with and limited to the search for incriminating conversation. If surreptitious breaking and entering infringed only conversational privacy and related interests, it would be an appropriate method of executing an eavesdrop order. But it is our view that these actions so aggravate the circumstances of the search and go so far beyond what is encompassed in the scope of the eavesdrop statute, that an eavesdrop executed in this manner is an unreasonable search. 65

Concurring only in the result, Judge Celebrezze found fault with the strict construction of Title III by the majority. 66 Though the forcible entry of appellants' premises lacked the prior approval of the district judge, Celebrezze would not forbid such entry to law enforcement officers if expressly authorized. 67 Rather, he concurred with the Fourth and Eighth Circuits, and would permit the seizure of a conversation and the means of entry to install listening devices to be approved in one court order, 68 upon a showing that other less intrusive means had been or would be ineffective. 69 Furthermore, Celebrezze cited sections 2518(1)(b)(ii), 70 2518(4)(b) 71 and 2518(4) 72 as providing inferential support for authorization of surreptitious entry by a judicial officer:

The first two provisions require the application and court order, respectively, to specify the “nature and location” of the place where the communication is to be intercepted. No limitations are placed on permissible locations. The third provision authorizes a court to

65. United States v. Finazzo, 583 F.2d at 848.
66. Id. at 850-51 (Celebrezze, J., concurring).
67. Although authorization for surreptitious entry is arguably implicit in a court order permitting installation of a listening device in a private office, ... I believe that such intrusive governmental action should require express advance approval. Searches are generally considered per se unreasonable unless expressly authorized in advance by a search warrant. No less should be required where the entry is a discrete part of a prolonged invasion of the subject's privacy. Id. (citations omitted).
68. Id. (citing In re United States, 563 F.2d 637 (4th Cir. 1977); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), cert. denied, 459 U.S. 1048 (1977)).
69. Id. n.1. In Judge Celebrezze's view, a requirement that the applicant for the warrant show that "other less intrusive means of electronic eavesdropping" would not be effective, is consistent with 18 U.S.C. § 2518(1)(c) (1976). That section provides that the applicant state "whether...other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." As further support, Judge Celebrezze cited 18 U.S.C. § 2518(2) (1976), which empowers the judge to "require the applicant to furnish additional testimony or documentary evidence in support of the application." Id.
compel assistance from a "communication common carrier, landlord, custodian or other person" in order to "accomplish the interception unobtrusively." The language of this provision apparently authorizes furtive placement of listening devices by gaining access to telephone lines, by using an apartment master key, or by similar other ploys. It is anomalous to hold that the statute does not authorize the entry involved in this case (through an unlocked window) when it plainly authorizes such an entry when facilitated by a landlord or custodian.\(^3\)

Judge Celebrezze reasoned that the legislative history and overall scheme of Title III invited but one interpretation: that district courts were intended to have authority to approve surreptitious entries, even though not expressly authorized to do so.\(^4\) In further support of this reading of Title III, he cited the broad interpretations of Rule 41 of the Federal Rules of Criminal Procedure\(^5\) and of the All Writs Act\(^6\) by the Supreme Court in *United States v. New York Telephone Co.*\(^7\) There, the Court held that Rule 41 empowered district courts to authorize the installation of pen registers to record the numbers dialed on telephones, and that the All Writs Act authorized district courts to compel public utilities to cooperate in the installation of these devices.

**Analysis**

The issue in *Finazzo* was whether surreptitious or forcible entries could, in some circumstances, be used to facilitate the installation of electronic eavesdropping devices.

To argue that authorization to use forcible or surreptitious entry to install such devices is not implicit in the warrant order, is "to ignore the fact that, unless the monitoring device is to be placed in a public area, some sort of entry into the 'place where the communication is to be intercepted' is a *condition precedent* to the conversations therein being authorized."\(^7\) And unless such an entry can be accomplished surreptitiously, the purpose of Title III would be defeated.

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\(^3\) United States v. Finazzo, 583 F.2d at 851 (Celebrezze, J., concurring).

\(^4\) Id. (citing In re United States, 563 F.2d 637, 642-44 (4th Cir. 1977)).


\(^6\) "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1976).

\(^7\) 434 U.S. 159 (1977).

\(^7\) McNamara *The Problems of Surreptitious Entry to Effectuate Eavesdrops: How Do You Proceed After the Court Says 'Yes'?* 15 AM. CRIM. L. REV. 1, 9 (1977) (emphasis added).
The Finazzo majority's refusal to imply Congressional authority for "official break-ins," on the ground that "not a single line or word of [title III] even mentions the possibility, much less limits or defines the scope of the power or describes the circumstances under which such conduct may lawfully take place," demands that Congress explicitly authorize trespassory intrusions by law enforcement. But, as Judge Celebrezze argued, "it is unreasonable to require such explicit language." Congress was aware of the possibility that surreptitious entries might be necessary to install wiretaps. The fact that it did not provide for specific regulation of surreptitious entries could be interpreted as a grant of broad discretionary powers to judges to determine under what circumstances such entries may be undertaken. Certainly, Congress could not have anticipated nor specifically provided for the great variety of situations in which surreptitious or forcible entries might be necessary to execute an eavesdropping warrant. Moreover, a requirement that official break-ins be expressly approved in advance serves to protect the fourth amendment rights of the person who is the object of an eavesdrop warrant. And protection against abuses of judicial discretion in the authorization of surreptitious entries is afforded by the safeguards already contained in Title III. Specifically, an application for a warrant must include a full and complete statement of other investigative methods that have been tried unsuccessfully or that would be ineffective if employed. Therefore, a judge may not, without reason, permit a surreptitious entry in every case.

CONCLUSION

The Sixth Circuit has taken a hard-line approach to the use of forcible or surreptitious means to install electronic surveillance devices. Proscription of such means of installation defeats the purpose of Title III. In light of other interpretations, the decision to allow a forcible or surreptitious entry to install a listening device should be

79. United States v. Finazzo, 583 F.2d at 841. The court emphasized that [t]his carefully constructed statute is curiously silent, however, on the method for installing eavesdropping devices. The statutory scheme is elaborate, carefully, carefully circumscribing powers of judicial and police officers, but it does not mention or authorize secret entry or break-ins in the execution of warrants.

80. Id. at 851.


82. The application for warrant must contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous . . . ." 18 U.S.C. § 2518(1)(c) (1976).
within the discretion of the district judge. To hold otherwise de-
stroys the efficacy of a potentially valuable investigative tool.

MARY K. MOLLOY
CRIMINAL PROCEDURE—JURY INSTRUCTIONS—PRESUMPTION OF INNOCENCE—DENIAL OF REQUEST REQUIRES AUTOMATIC REVERSAL—Whorton v. Commonwealth, 570 S.W.2d 627 (Ky. 1978).

At his robbery trial in the Jefferson Circuit Court the defendant requested that the trial court give the jury several instructions similar to those allowed by the federal courts. One of the charges requested provided that

[the law presumes an accused to be innocent of crime. He begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit an accused unless the jury members are satisfied beyond a reasonable doubt of the accused's guilt from all the evidence in the case.]

Based upon the long established rule in Kentucky that so long as the trial court instructs the jury on the reasonable doubt standard in a criminal trial, an instruction on the presumption of innocence is not necessary, the Jefferson Circuit Court declined to give the defendant's requested instruction. Instead it instructed the jury that it was authorized to return a verdict of guilty "only if [it] ... believed, (a) from the evidence and (b) beyond a reasonable doubt, that the defendant had committed the acts, with the requisite criminal intent, that constituted the respective offense." Additionally, the jury was instructed pursuant to Kentucky Criminal Rule 9.56 that "if upon the whole case it had a reasonable doubt as to the defendant's guilt it was required to find him not guilty . . . ."

The jury found the defendant guilty of ten counts of first degree robbery, two counts of first degree wanton endangerment, and two counts of first degree attempted robbery. The verdict was substantiated by the competent testimony of fifteen eyewitnesses who positively identified Whorton as the perpetrator of the crimes charged.

2. See, e.g., Swango v. Commonwealth, 291 Ky. 690, 165 S.W.2d 182 (1942); Mink v. Commonwealth, 228 Ky. 674, 15 S.W.2d 463 (1929).
5. Whorton v. Commonwealth, 570 S.W.2d 627,630 (Ky. 1978).
6. Id. at 628.
7. Id. at 637 (Clayton, J., dissenting).
On appeal to the Kentucky Supreme Court, Whorton argued that the reading of the indictment into the record in the presence of the jury unaccompanied by an admonition that it was not to be considered as evidence against him, combined with the trial court’s refusal to give the requested presumption of innocence charge, constituted reversible error. In light of the recent United States Supreme Court decision in *Taylor v. Kentucky*, a case based upon similar facts, the Kentucky Supreme Court reluctantly reversed the trial court’s decision and remanded the case for a new trial.

In *Taylor*, at the defendant’s robbery trial which resulted in his conviction, the trial court instructed the jury as to the prosecutor’s burden of proof beyond a reasonable doubt but refused to give the defendant’s requested instruction on the presumption of innocence. The prosecution’s only witness was the robbery victim, and the defendant was the sole defense witness. In his opening statement, the prosecutor related the circumstances of the defendant’s arrest and indictment, and, in his closing statement suggested that the defendant’s status as a defendant tended to establish guilt. The Kentucky Court of Appeals affirmed the decision of the trial court, holding that the refusal to give defendant’s requested instruction on the presumption of innocence was not error and that the failure to instruct the jury as to the indictment’s lack of evidentiary value did not deny the defendant due process of law. The Supreme Court of Kentucky denied discretionary review and the United States Supreme Court granted certiorari, reversed the Kentucky Court of Appeals' decision and remanded the case for further proceedings consistent with its decision.

The *Taylor* majority held that "the trial court’s refusal to give
petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment. Although the presumption of innocence is not expressly required by the Constitution, the majority noted that it had been adopted as a principle of criminal law by the United States Supreme Court in Coffin v. United States.

In Coffin, the Court stated that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Upon this notion, the Coffin Court based its holding that it is reversible error for a federal court to refuse a request for a proper instruction of the presumption of innocence.

Nevertheless, Kentucky courts were not inclined to adopt the position of the federal courts at the time, choosing instead to follow the rules of criminal procedure that had developed within its own judicial system. This was a legitimate conclusion because it is fundamental that "[b]efore a federal court may overturn a conviction resulting from a state trial [because of an error in the instructions to the jury], it must be established not merely that the instruction is [desirable], undesirable, erroneous, or even 'universally condemned,' but that . . . [the giving or failure to give] violated some right which was guaranteed to the defendant by the Fourteenth Amendment."

Thus, for some time the rule in this Commonwealth has been that it is never proper to instruct the jury as to presumptions of law or fact. In their application of this rule, the courts have sought to avoid the possibility of confusing the fact finder with abstract legal principles, presumptions, comments on the weight of the evidence, or references to the burden of proof. Additionally, it was thought

13. Id. at 490.
14. Id. at 483 (citing Coffin v. United States, 156 U.S. 432, 453 (1895)).
16. Id.
17. Stevens v. Commonwealth, 20 Ky. L. Rep. 48, 45 S.W. 76 (1898) (holding that the court's failure to give an instruction to the jury regarding the presumption of innocence did not operate to the prejudice of the defendant because the court had instructed the jury that the defendant's guilt must be established beyond a reasonable doubt).
20. Mason v. Commonwealth, 565 S.W.2d 140 (1978) (future reference to the presumption
that an instruction on the presumption of innocence was "too favorable to the defendant,"21 and therefore, if the trial court instructed the jury on the doctrine of reasonable doubt, an instruction of the presumption of innocence was unnecessary.22 In other words, it was not error to refuse to give an instruction on the presumption of innocence where an instruction on the doctrine of reasonable doubt achieved the same purpose.

The view of the Kentucky courts presents the question of whether a charge that there cannot be a conviction unless the evidence shows guilt beyond a reasonable doubt encompasses the concept of the presumption of innocence, thus justifying the court's refusal, when requested, to inform the jury of the latter. In light of the United States Supreme Court decision in Taylor, this question must be answered in the negative.

It is generally accepted than an instruction on the presumption of innocence serves as a reminder to the jury that the prosecution bears the burden of persuading the fact finder of the defendant's guilt beyond a reasonable doubt and that, in the absence of such proof, he must be acquitted.23 However, the charge also reinforces the principle that one accused of a crime is entitled to have his guilt or innocence determined on the basis of the evidence introduced at trial, and not on any other grounds or circumstances.24 It is said that the instruction "cautions the jury to put away from their minds all suspicion that arises from the arrest; the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced [at trial]."25

Thus, in practice, the instruction concerning the presumption of innocence accomplishes more than the instruction on reasonable doubt. Initially, it acts as a procedural device allocating the burden of proof.26 Thereafter, it functions to purge the jurors' minds of any extraneous matters not adduced as legal evidence during the course of trial.

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21. "Most of [the] . . . rights embodied in the modern concept of due process are 'favorable to the defendant,' but that is their very reason for existence." Taylor v. Commonwealth, 551 S.W.2d 813, 814 (Ky. App. 1977) (Wilhoit, J., dissenting) (citing Swango v. Commonwealth, 291 Ky. 690, 165 S.W.2d 182, 183 (1942)).
22. Mink v. Commonwealth, 228 Ky. 674, 15 S.W.2d 463 (1929).
25. 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940).
of the trial, thereby avoiding any natural suspicion created by the pretrial criminal process involving the police and grand jury investigations. 27

The presumption of innocence instruction has long been recognized as a method of impressing upon the jury the importance of the right to a fair and impartial trial. 28 In Taylor it was stated that "the Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt,'" 29 and that "'[t]he 'purging' effect of an instruction on the presumption of innocence simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial.'" 30 Thus, in light of the special purpose of a presumption of innocence instruction and the particular need for such an instruction in cases such as Taylor and Whorton, where there exists the possibility that "the jury would convict on the basis of . . . extraneous considerations . . . ," 31 the trial court's failure to give the requested instruction is considered to be a violation of the defendant's right to a fair trial as guaranteed by the due process clause of the fourteenth amendment.

Because a presumption of innocence should now be given whenever requested, the issue is raised "whether the failure to do so automatically becomes reversible error in every case," 32 or whether the harmless error test should be applied to consider the overall prejudicial effect to the defendant's fourteenth amendment right to a fair trial. 33 In Kentucky, it has long been recognized that a refusal to give a requested instruction will not be cause for reversal unless prejudice results therefrom. 34 And where the evidence is such that the jury's verdict could not have been otherwise, the refusal to give a requested instruction is deemed to be harmless error. 35 However, insofar as the presumption of innocence instruction is concerned, the harmless error rule is no longer applicable.

In Whorton v. Commonwealth, the majority of the Kentucky

27. See J. Wigmore, Evidence § 2511 (3d ed. 1940).
28. See, e.g., Reynolds v. United States, 238 F.2d 460, 463 n.4 (9th Cir. 1956).
32. Id. at 637.
33. Id.
34. See, e.g., Boyd v. Morris, 1 Ky. L. Rep. 349 (1880).
Supreme Court strictly interpreted the *Taylor* decision to mean that in any case, the refusal to give a requested presumption of innocence instruction constitutes reversible error. Chief Justice Palmore stated, "Those of us in the majority would like to be able to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid that it might not stick." Without the benefit of the harmless error rule, the *Whorton* court anticipated that the holding in *Taylor* will be applied to "a goodly number of other cases . . . in the process of appeal in this state, Whorton's being but one of them."  

The weight of the evidence against *Whorton* was admittedly far greater than it was against the defendant in *Taylor* and, under the circumstances of the case, it was doubtful that there was any genuine danger that the jury would convict Whorton on the basis of the indictment or any other extraneous considerations rather than on the evidence introduced at trial. And despite the dissenting opinions of Justices Clayton and Stephenson, who argued that the *Taylor* decision was limited to the facts of the case, the majority interpreted *Taylor* to mean that the harmless error rule should not be used to justify unfairness at a criminal trial, regardless of the weight of the evidence against the accused. Otherwise, the defendant would be required to show that he was deprived of a substantial right which, within reasonable possibility, may have affected the verdict. Clearly, the defendant cannot be required to explore the minds of the jurors in an effort to prove that the failure to give the instruction on the presumption of innocence did in fact influence the outcome of the case by allowing them to consider extraneous matters not adduced as legal evidence at trial.  

In view of *Taylor*, *Whorton*, and the many other criminal cases in Kentucky now in the process of being tried where the presumption of innocence is recognized as fundamental to the accused's right to a fair trial, Kentucky Criminal Rule 9.56 has been amended to require inclusion of the presumption of innocence instruction:  

(1) In every case the jury shall be instructed substantially as follows: "The law presumes a defendant to be innocent of a crime, and

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37. *Id.* at 632.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Little v. United States*, 73 F.2d 861 (10th Cir. 1934); see also *Snyder v. Massachusetts*, 291 U.S. 97 (1934).
42. KY. R. CRIM. P. 9.56.
the indictment shall not be considered as evidence or as having weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty."

(2) The instructions should not attempt to define the term "reasonable doubt." 43

In the final analysis, Kentucky trial courts are now compelled to instruct the jury on the presumption of innocence in all criminal trials. No longer is an instruction on the doctrine of reasonable doubt alone considered an adequate safeguard against the potential hazard of the accused being convicted on extraneous considerations or evidence that was not legally adduced at trial. Kentucky's system of criminal procedure, which until now prohibited trial judges from instructing the jury on presumptions and permissible inferences, has indeed been severely shaken by Taylor and Whorton. Although instructions on presumptions other than the presumption of innocence are still prohibited by the system of instructing juries in Kentucky, "[t]he Supreme Court of the United States has made it clear that it will no longer pay homage to 'federalism' by permitting the states to experiment with an ever lengthening list of new found 'fundamental' rights of defendants in criminal cases." 44

After the Kentucky Supreme Court denied the Commonwealth's motion for rehearing and modification, the Commonwealth petitioned the United States Supreme Court for a writ of certiorari in view of the state court's strict interpretation of the Taylor decision. 45 The writ of certiorari was granted on January 8, 1979. 46 The arguments given by the Commonwealth in support of the petition for certiorari included:

(1) that the state court misinterpreted and incorrectly applied the Taylor decision;
(2) that this misinterpretation of Taylor poses a serious hindrance to the effective administration of criminal justice in Kentucky and will require the automatic reversal of numerous state criminal convictions;
(3) that the Taylor decision should be limited to factual situations.

43. Id.
44. Whorton v. Commonwealth, 570 S.W.2d 627, 635 (Ky. 1978) (Lukowsky, J., concurring).
45. Whorton v. Commonwealth, 570 S.W.2d 627 (Ky. 1978), petition for cert. filed, No. 78-749 (U.S. Nov. 6, 1978).
similar to those presented in that case, and that the facts in Whorton do not warrant the application of the Taylor holding; and
(4) that the Whorton decision should at least be reconsidered in light of the applicable harmless error cases.47

In essence, the Commonwealth's position is that the Taylor decision was based primarily on its unique and unusual facts, and that the Kentucky position of requiring an automatic reversal in every case where an instruction on the presumption of innocence is requested and denied, regardless of the circumstances of the case, is an incorrect interpretation of Taylor. The crux of the Commonwealth's position, therefore, is that the denial of due process declared in Taylor was as a result of the "extraneous circumstances" present in that case, such as the harmful inferences suggested by the prosecutor's comments and the fact that Taylor involved a "mere swearing contest between victim and accused," coupled with the denial of the requested presumption of innocence instruction.48 In the Whorton case, and in similar cases,49 where the weight of the evidence against the accused is overwhelming, the Commonwealth argued that the singular fact of the denial of the requested presumption of innocence instruction does not amount to a denial of due process.

It will be interesting to see whether the United States Supreme Court will consider the arguably harmless error committed in Whorton to be of such magnitude as to have infringed upon the accused's right to due process of law. In view of the United States Supreme Court's lengthy "journey . . . [into] the terrain of state procedure,"50 it is unlikely that we have seen the end of the decisional process which has over the years seen fit to condemn local rules of criminal procedure. We are well on our way to a nationalized system of criminal procedure, and Whorton represents Kentucky's latest step toward uniformity with the prescribed norms.

ANTHONY A. WAITS

47. Petitioner's Brief for Certiorari at 10-13.
48. Id. at 11.
Flora Stuart and Kelly Thompson were charged with engaging in unprofessional conduct by the Kentucky Bar Association because they had mailed letters written on their law office stationery to two real estate agencies, advising the agencies that their office handled real estate transactions for specified rates. According to the Kentucky Bar Association, by sending the letter Stuart and Thompson "directly and personally solicited legal business." The letter read as follows:

This is to advise you that our office handles all aspects of legal work concerning real estate transactions. Our fees are as follows:

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<th>Service</th>
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<td>Opinion of title:</td>
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We guarantee that every Opinion of Title from our office is researched by an approved attorney who is a member of the Kentucky Bar Association. We also guarantee that if there are no objections to title, that our opinion will be delivered to the lending institution within 48 hours of the date of your order.

We thank you for your time and consideration in this matter.

Sincerely yours,

Thompson & Stuart

The Board of Governors agreed with the Trial Committee of the Bar Association and found that Stuart and Thompson had violated DR 2-103(A) of the Code of Professional Responsibility of the American Bar Association because the letter constituted "in-person solicitation". The issue before the Supreme Court of Kentucky in Kentucky Bar Association v. Stuart was whether the letter was solicitation within the meaning of the Code or merely a permissible form of advertising. Stuart gave the court its first opportunity to consider attorney advertisements since Bates v. State Bar of Arizona, in

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1. Kentucky Bar Ass’n v. Stuart, 568 S.W.2d 933 (Ky. 1978) (per curiam).
2. Id.
3. ABA Canons of Professional Ethics No. 2, DR-2-103(A) (1974) (amended 1977) provided that "[a] lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate, to a non-lawyer who has not sought his advice regarding employment as a lawyer."
4. 568 S.W.2d 933 (Ky. 1978).
which the United States Supreme Court held that a total prohibition of advertising by attorneys violated the first amendment.

SOLICITATION IN KENTUCKY BEFORE BATES

In Kentucky State Bar Association v. Stivers\(^6\) the Kentucky high court found that the conduct of an attorney who had solicited an auto accident victim by letter, after he had read about the accident in a newspaper article, constituted solicitation in violation of the Rules of the Court of Appeals of Kentucky,\(^7\) (which had adopted the Code of Professional Responsibility of the American Bar Association), even though the solicitation had not been "in-person." Canon 27 of the then existing Code provided that it was unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communication or interviews not warranted by personal relations.\(^8\)

Stivers contended that Canon 27 was merely "persuasive authority"\(^9\) and should yield to what Kentucky courts have said on the subject in Chreste v. Louisville Railway Company\(^10\) and Louisville Bar Association v. Hubbard.\(^11\) In Chreste, an attorney sued his client for breach of a contract, which the attorney had obtained by active solicitation. The client denied responsibility for the fee, contending that the contract was void because it had been solicited. The court concluded that the attorney was entitled to the fee specified in the contract because the attorney's solicitation had not vitiated the contract:

> [M]ere solicitation on the part of an attorney, unaccompanied by fraud, misrepresentation, undue influence or imposition of some kind, or other circumstances sufficient to invalidate the contract, is not in itself sufficient to render a contract between an attorney and client void on the ground that it is contrary to public policy.\(^12\)

In Hubbard, the court tolerated an attorney's solicitation by employed "runners" and personal communication:

> While [solicitation] is not within keeping with the ethics of the profession, and we do not condone it, yet, an attorney may personally solicit business with impunity, where he does not take advantage of

\(^{6}\) 475 S.W.2d 900 (Ky.), cert. denied, 406 U.S. 968 (1972).


\(^{8}\) Kentucky Bar Ass'n v. Stivers, 475 S.W.2d at 903 (emphasis by the court).

\(^{9}\) Id.

\(^{10}\) 167 Ky. 75, 180 S.W. 49 (1915).

\(^{11}\) 282 Ky. 734, 139 S.W.2d 773 (1940).

\(^{12}\) Chreste v. Louisville Ry., 167 Ky. at 84, 180 S.W. at 53.
the ignorance, or weakness, or suffering, or human frailties of the expected clients, and where no inducements are offered them.\textsuperscript{13}

Even though the \textit{Stivers} court recognized that both \textit{Chreste} and \textit{Hubbard} were decided prior to the adoption of the rule recognizing the Canons of Professional Ethics as persuasive authority, it noted that the court in \textit{Petition of Hubbard}\textsuperscript{14} had indicated its "continuing approval"\textsuperscript{15} of the statement in \textit{Louisville Bar Association v. Hubbard} and had added the following to it:

"and where he does not stir up strife and litigation and hunt up defects in title or other causes of action and inform thereof in order to be employed to bring suit or collect judgment,' as condemned in Canon 28 of the American Bar Association."\textsuperscript{16}

Thus, while the \textit{Stivers} court found that Stivers had acted unethically by sending the letter to the accident victim, it did so primarily because Stivers' conduct constituted "solicitation of employment for the purpose of instituting litigation."\textsuperscript{17}

In \textit{Kentucky State Bar Association v. Donoghoe},\textsuperscript{18} in two personal injury cases a member of the family of the injured had received a phone call from a person identifying himself as a state police officer who stated that the family could get a copy of the police report by calling a certain telephone number, which turned out to be that of the respondent Donoghoe. After getting the phone calls, Donoghoe visited the families and presented them with contracts of employment, urging that he be employed as counsel for the injured party. The court concluded that even if the telephone calls were a "remarkable coincidence"\textsuperscript{19} as Donoghoe had contended, by visiting the families with employment contracts and urging them to execute the contracts, and by "indulg[ing] in unprofessional statements which unduly flattered his legal prowess and otherwise offer[ing] such inducement calculated to result in his employment"\textsuperscript{20} Donoghoe had violated the Canons of Ethics and would be suspended from the practice of law for one year.

**POST Bates: ADVERTISING OR SOLICITATION?**

Simply stated \textit{Bates} held that advertising by attorneys is pro-

\begin{footnotes}
\textsuperscript{13} Louisville Bar Ass'n v. Hubbard, 282 Ky. at 739, 139 S.W.2d at 775.
\textsuperscript{14} 267 S.W.2d 743 (Ky. 1954).
\textsuperscript{15} Kentucky State Bar Ass'n v. Stivers, 475 S.W.2d at 904.
\textsuperscript{16} Id. (quoting Petition of Hubbard, 267 S.W.2d 743, 774 (Ky. 1954)).
\textsuperscript{17} Kentucky State Bar Ass'n v. Stivers, 475 S.W.2d at 904.
\textsuperscript{18} 486 S.W.2d 703 (Ky. 1972).
\textsuperscript{19} Id. at 704.
\textsuperscript{20} Id. at 704-05.
\end{footnotes}
tected commercial speech under the first amendment, and that attor-
neys may advertise in newspapers and include the fees charged
for their performance of routine services. The Supreme Court ex-
pressly reserved comment on the permissible scope of state regula-
tion of both in-person solicitation and advertising, but indicated
that the degree to which a state could regulate such conduct rests,
to some extent, on the distinction between in-person solicitation
and advertising: the former is more likely to result in overreaching
and misrepresentation than the latter.21 More recently, the Supreme
Court addressed the question of the permissible scope of regulation
in Ohralik v. Ohio State Bar Association22 and in In re Primus.23

In Ohralik, a lawyer contacted the parents of an eighteen year old
woman who he heard had been injured in an auto accident. When
the lawyer learned that the woman had been hospitalized, he visited
her and offered to represent her. After another visit with her par-
ents, he had her sign a contingent fee agreement. He also contacted
her passenger, who had also been injured in the accident, and con-
vinced her to agree orally to a similar arrangement. Even though
both driver and passenger later discharged him, he succeeded in
getting a share of the driver's insurance recovery in settlement of his
claim against her for breach of contract. The Court held that the
disciplinary action against Ohralik was a proper exercise of state
power because it served to protect the important state interests of
protecting consumers, regulating commercial transactions, and
maintaining standards among members of the licensed profes-
sions.24 While the Court said that in-person solicitation served much
the same function as advertising, it noted that there were also signif-
cant differences:

Unlike a public advertisement, which simply provides information
and leaves the recipient free to act upon it or not, in-person solicita-
tion may exert pressure and often demands an immediate response,
without providing an opportunity for comparison or reflection. The
aim and effect of in-person solicitation may be to provide a one-sided
presentation and to encourage speedy and perhaps uninformed deci-
sionmaking; there is no opportunity for intervention or counter-
education by agencies of the Bar, supervisory authorities, or persons
close to the solicited individual. The admonition that "the fitting
remedy for evil counsels is good ones" is of little value when the

circumstances provide no opportunity for any remedy at all. In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the "availability, nature and prices" of legal services, it actually may disserve the individual and societal interest, identified in Bates, in facilitating "informed and reliable decisionmaking."

Concluding that the state has a compelling interest in preventing solicitation that "involves fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct," the Court said that in-person solicitation is "inherently conducive to overreaching and other forms of misconduct," that there is a greater potential for overreaching where "a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed lay person," and that the "uninvited lawyer may distress the solicited individual simply because of [the] obstrusiveness [of his overtures] and the invasion of the individual's privacy, even when no other harm materializes." Further, the Court noted that in-person solicitation, unlike advertising, "is not visible or otherwise open to public scrutiny," and would therefore be immune to effective regulation by either the state or the bar association. Since Ohr-alik's conduct in soliciting employment for pecuniary gain was likely to result in the kind of harm that the state was seeking to prevent, the Court held that the disciplinary rules were not unconstitutionally applied to him.

In Primus, the appellant was a practicing lawyer who was also an officer and cooperating lawyer of the American Civil Liberties Union. She had advised a group of women of their legal rights resulting from their having been sterilized as a condition of receiving public medical assistance. Later, she informed one woman by letter that ACLU assistance was available. The Court held that the disciplinary rule prohibiting solicitation was applied to appellant in violation of the first and fourteenth amendments, because appellant's conduct of sending the letter was a form of constitutionally protected political expression and association: "[h]er actions were undertaken to express personal political belief and to advance the civil-liberties objectives of the ACLU, rather than to derive finan-

25. Id. at 1919.
26. Id. at 1922.
27. Id. at 1923.
28. Id.
29. Id. at 1923-24.
30. Id. at 1924.
cial gain.” Stressing that appellant's conduct was not "in-person solicitation for pecuniary gain," the Court noted that none of the potential consequences justifying imposition of the disciplinary rules, such as undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred in this case. Furthermore, the Court suggested that the letter had informational value:

The letter imparted additional information material to making an informed decision about whether to authorize litigation and permitted Williams an opportunity, which she exercised, for arriving at a deliberate decision. The letter was not facially misleading; indeed, it offered "to explain what is involved so you can understand what is going on . . . ." Moreover, the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct.

In short, both Ohralik and Primus held "that the States may vindicate legitimate regulatory interests through proscription, in certain circumstances, of in-person solicitation by lawyers who seek to communicate purely commercial offers of legal assistance to lay persons." Those legitimate regulatory interests are the prevention of undue influence, overreaching, misrepresentation, and invasion of privacy by lawyers.

*Kentucky Bar Association v. Stuart*

Relying on Ohralik, Primus and Donoghoe, the Supreme Court of Kentucky held that Stuart & Thompson's letter was an advertisement rather than an in-person solicitation. The Court reasoned that since the letter contained "no words generally associated with solicitation," did not present "the danger of exertion of pressure," and did not encourage the recipient "to make a possibly uninformed decision whether to seek an attorney's assistance," none of the evils generally associated with in-person solicitation were present. Furthermore, as advertising, the letter was "constitutionally protected, unless the Association [could] justify prohibition of such speech by an interest which [would] outweigh individual and societal interests in the commercial speech." This the bar association

32. Id. at 1906.
33. Id.
34. *In re Primus*, 98 S. Ct. at 1908.
35. Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933, 934 (Ky. 1978).
36. Id.
37. Id.
38. Id.
failed to do, and the court dismissed the complaint. The only real difference between the advertisement in *Bates* and Stuart & Thompson's letter, as stated by Kentucky Supreme Court, was that the former was published in a newspaper while the latter was mailed directly to potential clients. The court dispelled the bar association's argument that private mailings possessed "greater potential for overreaching and deceptive statements" and would render "enforcement of ethical standards of attorney advertising . . . difficult, if not impossible," two evils presumably not caused by published advertisements. The court said,

> In all advertising there is the potential for over-reaching and deceptive statements. The fact that an advertisement is in the form of a letter does not increase the likelihood of evils occurring . . . . The letters in this case do not suffer from either of these evils and the written form provides a record of what was stated as protection against abusive conduct. As to the second possible evil, the prosecution of this very case demonstrates that enforcement of ethical standards of attorney advertising will not be impossible or overly difficult because it is allowed to take the form of a letter.

Further, the court suggested promulgation of a rule that would require attorneys to send copies of similar advertisements to the bar association when they are mailed to any member of the public. However, the court limited the scope of permissible advertising by letter in accordance with its reading of *Bates* by its emphasis on the fact that the information imparted by the letter—namely, fees charged for routine services, qualifications of those who would perform the services, and the time periods in which services would be rendered—were all "statements . . . susceptible of precise measurement and verification." The *Bates* decision also required that all attorney advertising be truthful and not misleading. The *Bates* Court effectively limited attorney advertising to "routine" services because it seemingly considered advertisements of "unique" legal services to be inherently misleading:

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40. *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d at 934.
41. *Id.*
42. *Id.*
43. *Id.*
We are not persuaded that restrained professional advertising by lawyers inevitably will be misleading. Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type. The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like. Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising misleading so long as the attorney does the necessary work at the advertised price.

A NEW RULE?

The United States Supreme Court said in *Bates* that while advertising by attorneys may not be suppressed, it could be subjected to reasonable regulation. The Court suggested that permissible regulation would include prohibition of false, deceptive or misleading advertising, “reasonable restrictions on the time, place and manner of advertising,” suppression of illegal transactions, and restraints dealing with the special problems of broadcast advertising. In *Primus*, the Court added that states may proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence. A state may also forbid in-person solicitation for pecuniary gain under circumstances likely to result in these evils. And a State may insist that lawyers not solicit on behalf of lay organizations that exert control over the actual conduct of any ensuing litigation.

The Supreme Court of Kentucky, however, has suggested that attorneys be required to mail copies of advertising letters to the bar association, presumably for approval. But several things should be considered before the bar association and members of the bar are burdened with unnecessary paperwork and expense.

A rule of this nature assumes that the public lacks sufficient sophistication or understanding of legal matters to appreciate the limitations of legal advertising. This may be true to a certain degree, but it does not sufficiently justify such a burdensome rule. The public is already barraged with “junk mail” from other businesses and professions, which is not subject to regulation by members of

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46. *Id.* at 383.
47. *Id.* at 384.
those businesses and professions. And in this age of consumer activism, the offended recipients of attorney advertisement letters might notify local bar associations, other attorneys, or consumer groups, thus supplying some degree of regulation.

Second, the legal profession must certainly have greater confidence in the integrity of its members than to require that attorneys' advertisement letters be scrutinized by bar associations. The United States Supreme Court found "the connection between advertising and the erosion of true professionalism to be severely strained," and stated its view that most lawyers are honest and would not abuse their right to advertise:

It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.

In any event, requiring attorneys to mail copies of advertisement letters would likely be an ineffective measure because attorneys who would mail offensive letters would probably ignore the rule anyway. Thus, the rule would not have solved the enforcement problem, and the courts and the bar association will be back where they started. Additionally, it is quite possible that the economic consequences of dealing unfairly with the public would effectively deter unethical conduct just as in any other business or profession. Although enforcement of the "unwritten code" of ethics in Kentucky was ineffective to prevent unethical conduct, enforcement of rules prohibiting improper solicitations and misleading advertisements will probably be adequate if accomplished in the same manner that has been employed since the adoption of a written code of ethics for Kentucky lawyers, namely through disciplinary proceedings instituted as a result of complaints from the public or other attorneys. The court in Stuart conceded as much by noting that since the letter

50. Id. at 368.
51. Id. at 379.
involved there did reach the bar association, regulation of advertising would not be overly difficult.\textsuperscript{54}

Finally, the \textit{Stuart} court itself suggested that since letters exert no pressure on the recipients, members of the public were not likely to be seriously harmed.\textsuperscript{55} This would be especially true if the public were adequately educated by local bar associations. An alternative to imposing an affirmative duty on attorneys to send copies of advertisement letters to the bar association would be for the bar to educate the public “to assure that the public is sufficiently informed to enable it to place advertising in the proper perspective.”\textsuperscript{56} Indeed, such an undertaking may have the added advantage of encouraging public respect for the legal profession, since it would result in more open and honest communication with the public.

**How Have Other States Answered the Question?**

The Pennsylvania Superior Court in \textit{Adler, Barish, Daniels, Levin, \& Creskoff v. Epstein},\textsuperscript{57} decided before \textit{Primus} and \textit{Ohralik} but after \textit{Bates}, dealt with the question whether a law firm’s letters constituted advertising or solicitation. Appellant Epstein and other salaried associates of the appellee law firm, after terminating their employment with the partnership, informed some 400 of the firm’s clients that they were forming a new firm and that the clients could be represented in the future by appellants. The trial court granted the firm’s request for an injunction against its former employees on the basis that their conduct constituted a tortious interference with business relations which was not privileged because their communications amounted to solicitation in violation of Canon 2 of the Code of Professional Responsibility.\textsuperscript{58}

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54. Kentucky Bar Ass’n v. Stuart, 568 S.W.2d at 934.
55. \textit{Id.}
58. \textit{Id.} at 1230. The trial court based its decision on \textit{Restatement of Torts} §§ 766, 767 (1939). Section 766 provides as follows:

> Except as provided in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to
> (a) perform a contract with another, or
> (b) enter into or continue a business relation with another
> is liable to the other for the harm caused thereby.

Section 767 provides as follows:

In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors:

(a) the nature of the actor’s conduct,
(b) the nature of the expectancy with which his conduct interferes,
(c) the relations between the parties,
Noting that this was not a disciplinary action, the appellate court held that since the Code of Professional Responsibility seeks "to eliminate the active recruitment of clients and stirring up of litigation by or on behalf of attorneys" appellants' conduct was not solicitation. The court commented as follows:

The common thread in cases involving the issue of solicitation is fomenting litigation or other legal action where none was contemplated by the client. The instant case is readily distinguishable. Appellants contacted only clients who had already sought legal services. They did not attempt to create lawsuits or controversy or to encourage an additional amount of legal work on behalf of those clients whom they contacted.  

Concluding also that appellants' conduct was not solicitation because it was not false, misleading or coercive, the court found that the interference, although "technically not advertising," was privileged and therefore permissible. The injunction was dissolved and the complaint dismissed.

Although the appellants clearly sought "to advance their own financial well-being," the court indicated that the letters served to advance the interests of the firm's clients as well:

Many of the clients have dealt personally both with partners in Adler, Barish and the associate to whom the case was assigned. In some instances the associate may have developed the client's trust and faith in his professional competence despite the fact that the partner may have procured the client's business. Having one's file transferred to a new associate... will undoubtedly engender additional cost and time to the client. That may be contrary to the client's best interest... Transfer may also necessitate delays in scheduling court appointments.

The concurring opinion filed by Judge Spaeth in Epstein proposed that the decision should have rested not on the Code of Professional Responsibility nor upon the law of business relations, but upon appellants' first amendment rights as defined in Bates. He felt that there was no justification for prohibiting appellants' commer-
cial speech because they proposed "'mundane commercial transactions'" in which their interest was "'largely economic,'"\(^{64}\) and said that "'[t]he fact that [the letters] were addressed to specific individuals rather than to the public generally in no way affects [the] conclusion"\(^{65}\) that they were protected commercial speech.

Subsequent to the Supreme Court's decision in *Primus* and *Ohralik*, the Pennsylvania Supreme Court reversed the decision of the superior court, holding that the associates' conduct was an unprivileged tortious interference with the business relations of their former employer.\(^66\) According to the court, the conduct was unprivileged because it violated DR 2-103(A) of the Code of Professional Responsibility in as much as the associates "recommended their own employment even though the firm's clients did not seek advice regarding employment of a lawyer."\(^67\)

The court said that the associates' "'active campaign to procure business,'" which included contacts by phone, by letter and in person,\(^68\) "'encourage[d] speedy, simple action by the client'"\(^69\) as evidenced by the enclosure of a form by which the clients could discharge their present counsel and employ the new firm with each letter announcing the formation of the new firm. Furthermore, the concern of the associates for their "'line of credit and the success of their new law firm gave them an immediate personally created financial interest in the clients' decisions.'"\(^70\) The net result was that the "'associates' contacts posed too great a risk that the clients would not have the opportunity to make a careful, informed decision.'"\(^71\) The court concluded that in this case, as in *Ohralik*, the Constitution permits regulation of such conduct by an attorney.

**Kentucky Supreme Court Rule 3.135 and the ABA Code of Professional Responsibility**

On June 1, 1978, The Supreme Court of Kentucky adopted Rule 3.135 in accordance with *Bates*. The new rule provides as follows:

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64. *Id.* at 1233-34 (Spaeth, J., concurring) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)).
65. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 382 A.2d at 1235.
67. *Id.*
68. *Id.* It should be noted that telephone calls and in person contacts were not mentioned in the opinion of the Superior Court.
69. *Id.*
An individual attorney or law firm may advertise its services as authorized by this Rule 3.135, and not otherwise. Such advertisement shall be confined to the name or names of the attorneys, address, telephone number, office hours, a statement of the type of services rendered, and a schedule of customary fees. It may be printed in a regularly published newspaper, magazine, directory, or similar publication or may be read by an unidentified person on radio or television.

A lawyer who advertises a fee for routine services and accepts the employment must perform such services for the amount stated, and a statement to that effect shall be included in every advertisement.72

The rule confines advertising by attorneys to newspapers, magazines, directories, and broadcast advertisements. But Stuart has obviously expanded the scope of the rule to include advertisement by letter. As to the content of advertisements, however, Stuart appears to be consistent with the rule in that Stuart expressly, and the rule implicitly, limit attorneys to statements “susceptible of precise measure or verification.”73 Additionally, the rule’s requirement that the stated service be performed for the stated price conforms with the Supreme Court’s finding in Bates that failure to do so would render advertisement misleading.74

In addition, since Supreme Court Rule 3.130 adopts the Code of Professional Responsibility of the American Bar Association “as a sound statement of the standards of professional conduct,”75 it is important to recognize that the Amendments to Canon 276 of the Code adopted August 10, 1977, are not entirely consistent with Stuart. The new Disciplinary Rule 2-101 provides that lawyers may advertise in print media or over radio broadcast provided the advertisement does not contain “false, fraudulent, misleading, deceptive, self-laudatory or unfair statements or claims.”77 It describes twenty-five items which may be included in an advertisement.78

72. KY. R. SUP. CT. 3.135.
74. Id. at 372-73.
75. KY. R. SUP. CT. 3.135.
77. ABA CANONS OF PROFESSIONAL ETHICS No. 2, DR 2-101(A).
78. The amended version of DR 2-101(A)-(B) is as follows:

Publicity

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.
(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A) and is presented in a dignified manner:

1. Name, including name of law firm and names of professional associates; addresses and telephone numbers;
2. One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;
3. Date and place of birth;
4. Date and place of admission to the bar of state and federal courts;
5. Schools attended, with dates of graduation, degrees, and other scholastic distinctions;
6. Public or quasi-public offices;
7. Military service;
8. Legal authorships;
9. Legal teaching positions;
10. Memberships, offices, and committee assignments, in bar associations;
11. Membership and offices in legal fraternities and legal societies;
12. Technical and professional licenses;
13. Memberships in scientific, technical and professional associations and societies;
14. Foreign language ability;
15. Names and addresses of bank references;
16. With their written consent, names of clients regularly represented;
17. Prepaid or group legal services programs in which the lawyer participates;
18. Whether credit cards or other credit arrangements are accepted;
19. Office and telephone answering service hours;
20. Fee for an initial consultation;
21. Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
22. Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
23. Range of fees for services, provided that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
24. Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
25. Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.
amended rule does not specifically permit advertisement by letter, but it does not prohibit it either.\textsuperscript{79} It condemns only "in-person contact with a non-client . . . for the purpose of being retained to represent him for compensation," and in-person advice "if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another."\textsuperscript{80}

Disciplinary Rule 2-101(C), however, may provide the answer to the Stuart court's suggestion that a new rule be promulgated regarding letter advertisements. It provides as follows:

Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination in any other forum may apply to the agency having jurisdiction under state law . . . . The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers.\textsuperscript{81}

This rule, then, provides the amendments with flexibility, as well as with a means for attorneys to seek approval without requiring that a copy of every advertisement letter be sent to the bar association and therefore may supply a viable alternative to the court's suggestion.

CONCLUSION

If the holding in Stuart is limited to its facts, it is apparent that there are very few applications of Stuart in other situations in that the letter was, in effect, impersonal solicitation, and may be better described as selective advertising. Stuart represents one of that "large number of situations" which fall between the opposite poles of attorney solicitation presented in Ohralik and Primus, and in light of those decisions and Bates it is difficult to imagine that the Supreme Court of Kentucky could have come to any other conclusion in Stuart. It was a case of "'benign' solicitation" in every sense, despite the fact that the Kentucky court characterized it as advertising. The question of how far an attorney may go in seeking clients,

\textsuperscript{79} It is significant that the House of Delegates of the ABA did not adopt a proposed alternative version which would have amended DR 2-103(A) to provide that "[a] lawyer shall not seek by direct mail or other form of personal contact . . . . employment as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice . . . ." House, supra note 76, at 1236. The American Bar Association Task Force on Lawyer Advertising, which drafted the two Proposals, stated in its report that "[n]either proposal would allow 'one-to-one solicitation.'" Id. at 1234.

\textsuperscript{80} ABA CANONS OF PROFESSIONAL ETHICS No. 2, EC 2-3 (emphasis added).

\textsuperscript{81} Id.; DR 2-101(C).
however, is still unresolved.

Justice Marshall indicated in *Ohralik* that the courts and the bar association must be guided not only by *Primus* and *Ohralik*, but by *Bates* as well, in determining the permissible scope of attorney solicitation and/or advertising. He was of the opinion that the state's legitimate interest in regulating both solicitation and advertising are limited to prevention of evils such as fraud, overreaching, deception and misrepresentation, while the majority opinion seems to imply that solicitation is malum in se and that rules proscribing any form of solicitation are justified by these potential evils. He noted that the "impact of non-solicitation rules . . . is discriminatory with respect to the suppliers as well as the consumers of legal services" in that the "less privileged classes of society" suffer from lack of knowledge about legal services just as small firms and solo practitioners suffer in terms of economic gain from the inability to provide the public with that knowledge. He continued,

Where honest, unpressured "commercial" solicitation is involved—a situation not presented in either *Primus* or *Ohralik*—I believe it is open to doubt whether the State's interests are sufficiently compelling to warrant the restriction on the free flow of information which results from a sweeping nonsolicitation rule and against which the First Amendment ordinarily protects. While the State's interest in regulating in-person solicitation may, for reasons explained in *Ohralik*, . . . be somewhat greater than its interest in regulating print advertisements, these concededly legitimate interests might well be served by more specific and less restrictive rules than a total ban on pecuniary solicitation. For example, the Justice Department has suggested that the disciplinary rules be reworded "so as to permit all solicitation and advertising except the kinds that are false, misleading, undignified or champertous."

Thus, while the perimeters of the issue of attorney solicitation have been laid down by the United States Supreme Court, *Stuart* and cases like it will determine what is permissible and what is not within those borders.

M. Gayle Hoffman

83. *Id.; see also Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 81 Yale L.J. 1181 (1972).
84. *Ohralik* v. Ohio State Bar Ass'n, 98 S. Ct. at 1929 (emphasis by the Court).
ATTORNEYS—MALPRACTICE—DRIVING LAWYERS FROM THE CITADEL: ATTORNEY'S LIABILITY TO THIRD PARTIES FOR MALPRACTICE AFTER Hill v. Willmott, 561 S.W.2d 331 (Ky. App. 1978).

Dr. Byron W. M. Hill was sued for malpractice in 1975 by Kenneth and Phyllis Russellburg, who alleged that Dr. Hill incorrectly diagnosed Mrs. Russellburg as having a venereal disease. The couple retained M. Curran Clem to represent them in the suit. Because Clem often relied on Dr. Hill as an expert witness in workmen's compensation claims, Clem did not want his name to appear on the complaint.1 A colleague of Clem's, Robert Willmott, agreed to be named as the attorney of record, with the understanding that Clem would do all of the actual work on the case.2

Although Clem told the Russellburgs that the suit was being filed in the name of another lawyer, the Russellburgs did not expressly authorize Willmott to file suit on their behalf.3 After prevailing on a motion for summary judgment in the medical malpractice action, Hill retaliated by filing a malpractice suit against Willmott, alleging "negligence in the instituting of the suit."4 The Henderson Circuit Court granted summary judgment for Willmott, and Hill appealed. The Court of Appeals of Kentucky concluded that a former litigant who was neither a client nor the intended beneficiary of an opposing counsel in a prior suit, could not sustain a professional negligence action against that attorney.5 Judgment for Willmott was affirmed.

Dr. Hill claimed that Willmott owed him the duty to act professionally in accord with the Kentucky Rules of the Supreme Court,6 which embody the principles enunciated in the American Bar Asso-

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2. Id.
5. Id. at 335.
6. Ky. R. Sup. Cr. 3.130:
   The court recognizes and accepts the principles embodied in the American Bar Association's code of professional responsibility as a sound statement of the standard of professional conduct required of members of the bar, and the board may cause to be tried all charges brought under this code as well as charges of other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.
   The court in Willmott repeatedly refers to the rules which incorporate the ABA Code of Professional Responsibility and govern the practice of law as the "Rules of Appellate Procedure." Effective October 14, 1977, the rules were designated the "Rules of the Supreme Court." This note will refer to those rules by the more recent designation.
ciation’s Code of Professional Responsibility. The specific duty alleged is set forth in Canon 9, “A Lawyer Should Avoid Even the Appearance of Professional Impropriety,” which calls upon the attorney to “promote public confidence in our system and in the legal profession.” The court of appeals quickly dispensed with Hill’s contention that a violation of the Code gives rise to a private cause of action:

The sole remedial method for a violation of the Code is the imposition of disciplinary measures after a hearing by the Board of Governors of the State Bar Association for any “. . . charges brought under this code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.”

In language with broad implications for the law governing legal malpractice in Kentucky, the court stated that a lawyer’s liability for professional negligence goes beyond his contractual duty to his client, and may extend to intended beneficiaries:

Assuming the attorney owes a duty independent of that set forth in the Rules and the Code and a violation occurs, we must then determine to whom the duty is owed. The California appellate court recently confronted this problem . . . and reached a workable solution. Therein an attorney employed by a collection agency . . . was held liable to the individual creditor despite the absence of privity of contract when the collection proceeding was dismissed for lack of diligent prosecution due to the attorney’s negligence. In so holding, the court stated that “An attorney may be liable for damage caused by his negligence to a person intended to be benefited by his performance, irrespective of any lack of privity . . .” (Emphasis added). We believe this to be a proper statement of the law of this Commonwealth.

This is a break with tradition. Kentucky and the majority of states historically have adhered to a stringent privity requirement in all negligent malpractice cases against an attorney, and have barred third party actions which did not involve fraud or collusion.

7. ABA Code of Professional Responsibility No. 9 EC 9-1.
10. The single Kentucky case is which the privity issue was considered in Rose v. Davis, 288 Ky. 674, 157 S.W.2d 284 (1941). Rose had paid alimony to his former “wife” as required by the judgment in their divorce action. The judgment was reversed on the ground that the marriage was void because Rose’s “wife” had been legally married to another man at the time of her “marriage” to Rose. Rose sued the woman’s attorney to recover the alimony payments, alleging that the attorney had obtained the judgment by fraud. The court sustained a demurrer to Rose’s petition. It determined that the attorney had not acted unprofessionally, negli-
In this country, attorneys' liability to third parties was first considered on the appellate level by the Supreme Court of the United States in *Savings Bank v. Ward*. The bank sought to recover from an attorney who had negligently searched and certified title to real estate which the bank had accepted as security for a loan. Drawing heavily upon British precedent, the majority held,

"The general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained."

Except for cases involving fraud, collusion, or an act imminently dangerous to human life, privity was essential to establishing negligence against one whose faulty goods injure another. The Court relied heavily upon the much criticized *Winterbottom v. Wright*, and echoed Lord Abinger's fears that relaxing the privity requirement would lead to "absurd and outrageous consequences, to which I can see no limit," and that, "[t]he only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."

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11. 100 U.S. 195 (1879).
12. Id. at 200.
13. Id. at 203-04.
14. 10 M. & W. 109, 152 Eng. Rep. 402 (1842). Dean Prosser pointed out that Lord Abinger's fears of "absurd consequences" were but dicta later "taken to mean that there could be no action even in tort, and that this was true of any misperformance of a contract," the error of which view "has been exposed long since; but from it there developed a general rule . . . that there was no liability of a contracting party to one with whom he was not in 'privity.'" W. Prosser, *Torts* § 93, at 622 (4th ed. 1971).
16. Id. at 115, 152 Eng. Rep. at 405 (Baron Alderson's opinion).
Chief Justice Waite, dissenting in Savings Bank, stated that an attorney certifying a title which he "knows or ought to know is to be used by the client in some business transaction with another" should be held "liable to such other person relying on his certificate," for the resulting loss. Waite's dissent was directed at a most resistant bastion of the citadel of privity, that which protected lawyers. Despite wholesale abandonment of the privity doctrine in most aspects of negligence liability, it has persisted as a shield for most lawyers.

Most of the litigation on this issue has been in California. Sixteen years after Savings Bank, the Supreme Court of California decided Buckley v. Gray, in which a beneficiary of a will sued the drafting attorney to recover $85,000 the plaintiff had lost because the attorney had caused him to act as a subscribing witness, which rendered the bequest to plaintiff void. Relying upon Savings Bank and its English precursors, the court sustained defendant's demurrer on the ground that the testatrix had been the attorney's sole client in the matter. Any right to sue for negligence in drafting the will expired at her death. The plaintiff also contended that he was a third-party beneficiary under the contract to draw the will. Reasoning that to accept plaintiff's argument would be to "confound the terms of the will with those of the contract," the court held that the primary beneficiary of the will was the testatrix and that the plaintiff was merely a remote beneficiary with no right to recover.

At the beginning of the twentieth century, attorneys were well insulated from liability to third parties: the strict privity requirement set forth in Savings Bank was a shield against actions in tort, while Buckley v. Gray effectively rebuffed contract actions by negligently excluded legatees as mere damnum absque injuria.

However, non-attorney cases began to change the law. In Glanzer

18. "The assault upon the citadel of privity is proceeding in these days apace." Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931) (Cardozo, C.J.) (third-party action against accountants).
21. Id. at 345-46, 42 P. at 901.
22. Id. at 347, 42 P. at 902.
23. Of this most fertile ground for third-party actions against lawyers, the court stated, "Although the ultimate consequential injury to plaintiff would appear to have been great, it was, so far as defendant is concerned, damnum absque injuria, against which the courts are powerless to relieve." Id. at 902.
v. Shepard,\(^{24}\) public weighers erroneously certified the weight of 905 sacks of beans. The purchaser sued the weighers to recover his over-payment. Despite absence of privity, Justice Cardozo for the New York Court of Appeals held that the plaintiff could recover. The requisite duty was found with little difficulty: "The plaintiffs' use of the certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction."\(^{25}\) The determinative consideration was that the weighers had actual knowledge of the consequences which any mistake would have upon a known third party.\(^{26}\) The court distinguished Savings Bank on the ground that the attorney's certification of title had not been prepared with actual knowledge of the precise use the bank or another third party might make of it.\(^{27}\) The closeness of this distinction is shown by Chief Justice Waite's precisely opposite conclusion that the title searching attorney "knows or ought to know" that his work will be relied upon by a third person in some future transaction.\(^{28}\)

But the importance of Glanzer v. Shepard in the development of attorney liability to third parties is not in such niceties. The protection of privity for manufacturers of goods had recently fallen in MacPherson v. Buick Motor Co.,\(^{29}\) and sellers of services, including attorneys, were warned in Glanzer that lack of privity was not an impregnable barrier against liability for them either. "One who follows a common calling may come under a duty to another whom he serves although a third may give the order or make payment."\(^{30}\) Subsequently, liability for attorneys appeared to shrink in the Cardozo opinion in Ultramares Corp. v. Touche,\(^{31}\) a situation analogous to third party actions which attorneys might face. The defendant/accountants, Touche, Niven & Co., had attested to the validity of a Fred Stern & Co. balance sheet. Contrary to the reports of Touche the company was on the verge of bankruptcy. When Stern failed, Touche was sued by Ultramares, which had loaned Stern

\(^{24}\) 233 N.Y. 236, 135 N.E. 275 (1922).

\(^{25}\) Id. at 238-39, 135 N.E. at 275 (emphasis added).

\(^{26}\) Id. at 239, 135 N.E. at 276.

\(^{27}\) Id. The court quoted Savings Bank v. Ward, 100 U.S. 195, 199 (1879) in which the Supreme Court found that the defendant-attorney, who searched and certified title to a piece of real estate, did so "without any knowledge" of "what use was to be made of the same certificates or to whom they were to be presented."

\(^{28}\) Savings Bank v. Ward, 100 U.S. at 207.

\(^{29}\) 217 N.Y. 382, 111 N.E. 1050 (1916).

\(^{30}\) 233 N.Y. at 239, 135 N.E. at 276.

\(^{31}\) 255 N.Y. 170, 174 N.E. 441 (1931).
money on the strength of Touche's audit statements.

The court recognized that Touche knew the certified balance sheets would be supplied to "banks, creditors, stockholders, purchasers or sellers . . . as the basis of financial dealings," and was negligent in its performance, but nevertheless found the relationship between Touche and the plaintiff too tenuous and the potential for unforeseeable damages too great to support negligence liability. 32

The court held that Touche's service was rendered primarily for the benefit of Stern, for the use and development of Stern's business, and only "incidentally or collaterally" for the use of third parties who might view the balance sheets. 33

A rule was beginning to emerge which defined professional liability for injuries to intangible interest where privity is lacking. Where the benefit to the plaintiff was remote or collateral to the contract, or if the magnitude of the injury to the particular plaintiff was not foreseeable, liability is not likely to be imposed. Biakanja v. Irving, 34 another non-attorney case, crystallized the rule in a six-part formula. In Biakanja a will drafted by a notary public and executed without any subscribing witnesses was deemed invalid. The sole beneficiary, the testator's sister, sued the notary for the difference between the amount she took by statutory distribution and the amount bequeathed her in the invalid will. She allowed that no privity with the notary existed. In upholding the sister's claim, the California Supreme Court stated, "Whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors . . . ." 35

The factors were enumerated as follows: "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." 36 The formula is actually a concise list of the tests, in order of importance, which courts have used since Buckley v. Gray to determine the existence of a liability-creating duty. Biakanja set the

32. Id. at 173-74, 174 N.E. at 442.
33. Id. at 183, 174 N.E. at 446.
34. 49 Cal. 2d 647, 320 P.2d 16 (1958).
35. Id. at 650, 320 P.2d at 19.
36. Id. See also Fickett v. Superior Ct. of Pima County, 27 Ariz. App. 793, 558 P.2d 988 (1976) (adopting the same balancing formula).
stage for *Lucas v. Hamm*, which is considered the bellwether of legal developments in attorney third party liability actions. The defendant, a lawyer, drafted a will violative of the Rule Against Perpetuities and principles forbidding restraints on alienation. When the residuary trust was attacked on these grounds, the defendant advised a settlement whereby the plaintiffs received $75,000 less than they would have received under a properly drafted will. The court unanimously held that lack of privity was, of itself, no bar to recovery. The legatees were found to be third-party beneficiaries of the testator's contract with defendant to draft the will, and were permitted to maintain the action on those grounds. In one stroke both barriers of *Buckley v. Gray*, the privity requirement and lack of standing due to remoteness of third party beneficiaries, were torn down. Cases supporting the old premises were expressly overruled.

Traditionally, whether the attorney malpractice action is brought in contract or tort by a third party, the requirement that the potential plaintiff and the amount of loss be clearly foreseeable has effectively limited the actions to two main types of cases: actions for negligently drafted wills and actions for negligently searched titles. However, liability is by no means limited to those areas, as *Donald v. Garry* illustrates. Lee A. Garry, the attorney for a collection agency, was sued successfully by a customer of the agency, despite lack of privity, for negligently allowing a collectable claim to be dismissed for lack of diligent prosecution.

The Kentucky Court of Appeals cited the case as presenting "a proper statement of the law of this Commonwealth," regarding attorneys' liability to third parties. However, the intriguing language of *Donald v. Garry*, that an attorney may be liable to persons intended to be benefitted by his work, regardless of privity, is technically mere dicta. It does not amount to express disapproval of *Rose v. Davis*, which set forth the general rule that an attorney is not

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39. Wade, *The Attorney's Liability for Negligence*, in PROFESSIONAL NEGLIGENCE 217, 237-38 (Roady & Anderson eds. 1960), reprinted in 12 Vand. L. REV. 755, 775-76 (1959). Dean Wade noted that whether a malpractice action is in contract or tort has little bearing on most cases, except when the statutes of limitation differ and one has run.
43. 288 Ky. 674, 157 S.W.2d 284 (1941).
ordinarily liable to third persons for his acts committed in rep‐
resenting a client unless those acts are fraudulent or otherwise tort‐
ious.

But assuming the assault upon the citadel continues, what effect
will Hill v. Willmott have upon the citizens of the Commonwealth
generally, and Kentucky lawyers in particular? First, the plaintiff’s
burden of proving both error and actual damages serves as a barrier
against the success of wholly frivolous actions. Second, third party
negligence liability is tempered by a standard of reasonableness.
Up to a certain point, for lawyers at least, ignorance of the law is
an excuse. Third, the requirement of foreseeability under either a
balancing formula, as in Biakanja v. Irving, or under a third party
beneficiary theory, goes to both the injured party and the extent of
damages. If either factor is unknowable or beyond the experience of
the contracting attorney, liability will seldom be imposed. In
practical effect, these prerequisites limit the scope of potential lia‐
bility to the type of civil cases discussed above, with the probable
inclusion of escrow and third party beneficiary cases, in which both
plaintiff and foreseeable injury are known. Third-party liability for
criminal practice has not been established.

Statutes of limitation also protect lawyers. For example, it is
likely that many otherwise valid cases of negligently drawn wills
would be barred by Kentucky’s negligence and contract statutes
of limitation. It is not unusual for a will to be drawn many years
before the testator’s death, and for any flaws not to be noticed until
the will is probated.

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44. Averill, supra note 38, at 381-82.
45. Restatement (Second) of Torts § 299A (1965). One is expected to exercise the stan‐
dard of skill and knowledge which is “commonly possessed by members of that profession or
trade in good standing. It is not the most highly skilled, nor is it that of the average member
of the profession or trade, since those who have less than median or average skill may still be
competent and qualified.” Id.
46. Dean Wade related the exclamation of one barrister who said, “God forbid that it
should be imagined that an attorney, or a counsel, or even a judge is bound to know all the
in Wade, supra note 39, at 755.
47. 49 Cal. 2d 647, 320 P.2d 16 (1958).
ing an accused has but one intended beneficiary—his client).
52. See e.g., Lucas v. Hamm, 56 Cal.2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (will drafted
violating Rule Against Perpetuities—liability to third parties recognized); Heyer v. Flaig, 70
Cal.2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969) (will failed to exclude taking by post‐
testamentary spouse—attorney held liable to children of prior marriage); Licata v. Spector,
Despite the number of hurdles between a genuinely wronged third party and the negligent attorney's pocket, the message of Hill v. Wilmott will have the ring of bad news to many attorneys. Its effect on the cost of legal malpractice insurance, if any, is difficult to ascertain, but if, as some commentators put it, a "liability revolution" is affecting the professions generally, it does little for the image and stature of the bar for attorneys alone to seek refuge behind the doctrine of privity. Although it is an increasing burden, malpractice insurance is available to attorneys. The third party victim of legal malpractice has no such broad protection available.

Lord Abinger of the Winterbottom v. Wright court likely did not envision attorneys cowering behind the remains of the privity doctrine while reducing the citadel to rubble for those around them. Rather, to borrow his phrase, it would indeed be one of the privity doctrine's most "absurd consequences."

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26 Conn. Supp. 387, 225 A.2d 28, (C.P. 1966) (will denied probate for insufficient witnesses—attorney liable to third party beneficiaries); Woodfork v. Sanders, 248 So. 2d 419, writ denied, 259 La. 759, 252 So. 2d 455 (1971) (intended beneficiary allowed to witness will could claim against attorney when will rejected, despite absence of privity). In light of the hazards posed by will drafting formalities, it should be noted that Kentucky's requirements for a valid will were recently changed to specify that both witnesses sign in the presence of each other. Ky. Rev. Stat. § 394.040 (Supp. 1978).

One commentator has expressed the fear that "as the late sixties and early seventies have evinced a tremendous rise in both the volume and the magnitude of medical malpractice claims, the legal profession will meet its anathema in the eighties." LeHoulier, Legal Malpractice: The Risks and Insurance Protection, 42 Ins. C.J. 106, 111 (1975). Others have concluded that "[t]he present trend of expansion of liability concepts and inflation of liability judgments is likely to continue for much longer than most defendants would like." Denenberg, Ehre & Huling, Lawyer's Professional Liability Insurance: The Peril, The Protection and the Price, 570 Ins. L.J. 389, 400 (1970).

Commentators have noted a lack of statistics or studies of the effect of third party liability on malpractice rates. Citing the 1961 case of Lucas v. Hamm, one wrote: "The court specifically mentioned the possibility that a burden on the legal profession might result from extending standing too far, yet no data has been collected on the number of malpractice actions by people not themselves clients, actually brought under the new rule." Improving Information on Legal Malpractice, 82 Yale L.J. 590, at 606, quoted in D. Stern, An Attorney's Guide to Malpractice Liability, 431-32 (1977).

55. Denenberg, Ehre & Huling, supra note 53 at 400.
BOOK REVIEW


Reviewed by Bernard P. Kiernan*

This collection of essays, presented originally as lectures at the University of Chicago, is, as the author indicates in the introduction, "neither a text nor a treatise on either Watergate or the Constitution." It is, rather, a series of discussions designed for the general public of certain constitutional, legal, and political questions raised by the Watergate affair. These are not new questions, and Professor Kurland does not suggest that Watergate created unprecedented constitutional problems but rather that it brought to an acute, crisis stage certain fundamental problems inherent in our constitutional system, problems of long standing, and which have not disappeared with the waning of the Watergate scandal. One strength of these discussions is the ability of the author to place them on such firm historical footing.

Professor Kurland discusses essentially six crucial issues: the Congressional power of inquiry; executive privilege; powers of appointment and removal from public office; impeachment; prosecution of the president; and presidential pardons. Some issues receive greater attention than others, reflecting the larger concerns of the author about the nature of our system, the changes it has experienced in the past, and continues to experience today. The central problem he addresses is the gradual erosion of traditional safeguards against arbitrary and excessive power. "The constitutional limitations on power have been eaten away slowly but surely." Nor does he limit himself to a lawyer's narrow view of the Constitution, but relates it to the larger reality of our political system.

Professor Kurland begins by recognizing that the Constitution has changed and is constantly changing, not necessarily as a result of the formal amendment process. "Changed societal conditions . . . have provided one . . . extraordinarily important form of amendment of the Constitution." This recognition reflects his awareness that the Constitution does not exist in a vacuum, but is

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2. Id. at 4.
3. Id. at 9.
a working document related to the everyday affairs of a complex and constantly changing society. "It is not to say that the Constitution's original language no longer has anything to say about the interstate commerce power, or the war power, or the foreign affairs power. What it has to say is necessarily different, however, from what it said when it was written and there were not yet steamships or mass-produced goods or revolvers . . . and atomic explosives." As a result, the discussion of the constitutional questions raised by Watergate is extremely rich, perceptive, and solidly rooted in historical fact as well as legal analysis.

In each case, the author attempts to determine the original meaning of the Constitution and the intent of its framers, recognizing that such a task is extremely difficult because the framers were not in agreement, and the Constitution was itself a compromise of different views. He then traces the way in which each of the issues has been interpreted historically, by both lawyers and politicians. The greatest value of Professor Kurland's analysis is that he does not attempt to prescribe one true constitutional definition which imposes a single standard, but rather, he seeks to define and circumscribe precisely the nature of these constitutional problems in political as well as legal terms. He never loses sight of the fact that the Constitution is a political document designed to serve political interests and political ideologies—not a piece of holy writ designed for continual exegesis by lawyers.

A good example of his method is his discussion of the Congressional power of inquiry, "the role of Congress as grand inquisitor." That role is not defined in the Constitution. It may be inherent in the function of Congress as a lawmaking body. In any case, Congress has, in fact, defined for itself an inquisitorial role, and, by custom, has established the constitutionality of such a role. As Professor Kurland observes, "change in the Constitution . . . is effected through . . . long standing custom." That is, a certain continuing practice becomes, by virtue of its existence, part of the way in which our constitutional system works, even though the practice may have no specific authorization in the Constitution. Custom is the way in which the Constitution is put into practice, and the assumption is that such practice becomes established custom precisely because it is not in conflict with the explicit meaning of the Constitution.

4. Id.
5. Id. at 17.
6. Id. at 9.
Professor Kurland does not limit himself to history, however; nor does he suggest that legal analysis must necessarily bow to the realities of changing historical circumstances. His most impressive discussion concerns the tangled question of executive privilege and the related problem of the liability of the President to criminal prosecution, as separate from the impeachment process. He concludes that the President of the United States "must be immune from criminal prosecution," (although obviously not from impeachment), a conclusion which he reaches not on narrowly technical or legal grounds, but "derives from the structure of our Constitution." Criminal prosecution of the president, as president, contradicts the functions assigned to him by the Constitution.

Although the author tells us at the outset that he does "not propose to dwell on the events of Watergate," his concerns go beyond purely constitutional questions. More accurately, he defines constitutional questions in the broadest possible political and legal terms, and his concern is not for the Constitution as a divinely inspired document which must be kept strictly and literally to some presumed original meaning, but with the total nature of our political system, with the concept of what he calls the rule of law, and with the threats to this system which have developed over the years. Watergate is merely the latest, albeit the most acute, symptom. In this context, Professor Kurland asks what lessons can be learned from Watergate. He refuses to limit these lessons narrowly to the person of Richard Nixon or the specific criminal acts of the Watergate principals. The lesson which he would most like us to learn is how to retard the process which has created the so-called "imperial presidency," that is, the concentration of power in the presidency and in the executive branch. Professor Kurland traces the erosion of constitutional limitations on that power, the system of checks and balances, which he describes with great acumen, and which he differentiates from the separation of powers doctrine, a rhetorical and somewhat unreal notion.

The imperial presidency obviously did not originate with the Nixon administration, so that "removal of Nixon did not eliminate the root causes that contributed to the imperial presidency." It is refreshing that Professor Kurland wants to get at these root causes and, unlike such Nixon die-hards as Victor Lasky to whom Professor

7. Id. at 135.
8. Id.
9. Id. at 1.
10. Id. at 166.
Kurland refers, does not draw the bizarre and chilling conclusion that since "it didn't start with Watergate," Nixon's crimes are not really crimes, and should best be forgotten and ignored.\textsuperscript{11}

For Professor Kurland, the threat symbolized by Watergate is the threat of excessive concentration of power, and he is concerned that too much focus is placed on a rather simple-minded notion of corruption as "making pecuniary gain from public office . . . . We have not yet learned from experience that love of power is the grosser evil."\textsuperscript{12} And so, most of our reforms, and most of the lessons we have learned from Watergate concentrate on preventing public officials from stealing our money rather than preventing them from stealing our freedom. For Professor Kurland, the greatest threat posed by Nixon was not his criminality or his corruption, but his immorality, his gross abuse of power.

But despite his erudition, his perceptiveness, and his willingness to place constitutional questions in a wider political and social context, Professor Kurland ultimately fails to confront more basic factors in modern America which have produced the imperial presidency, or what he calls, even more accurately and relevantly, the "plebiscitary presidency." That term relates what has happened to the American political system clearly to a broader phenomenon common to all modern nations: the development of a strong, central political authority which embodies the national will. The creation of such a plebiscitary executive cannot be attributed, however, to a kind of moral laxity, an unwillingness on the part of people to defend their freedoms, for the plebiscitary presidency, whether we like it or not, fills a need. As much as one sympathizes with Professor Kurland's abhorrence of concentrated power and the pressure towards totalitarian centralism, such pressures are inherent in the very nature of modern nations. The plebiscitary presidency represents the need for a strong national authority to perform necessary national business. The plebiscitary presidency reflects the search for efficiency, for a strong, \textit{effective} authority to override narrow, selfish, special interests and forge a national policy, not because the president is, magically, less corrupt or less beholden to special interest or because of some irrational belief that government can do better what should be left to private interests, but because the presidency is the only office which confronts the \textit{national} dimensions of

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\footnote{11. Those interested in a more extensive exposition of the rather novel theories of this Nixon apologist are referred to V. Lasky, \textit{It Didn't Start With Watergate} (1977).}
\footnote{12. Id. at 180.}
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our system. All these selfish, special interests are interrelated in a larger whole and are, ultimately interdependent and the presidential office is the only one capable of performing the task of national coordination without which the system would collapse.

Faced with evidence of the incompetence of the CIA, Professor Kurland comments: "I find some comfort in a corrupt, hapless, inefficient intelligence service, more than I would in an effective, efficient one."\(^{13}\) One applauds the sentiment, particularly as one remembers that efficiency can be criminal as well as benign, that an effective political authority can be effective for ends we abhor as well as for ends that we seek. Unfortunately, the business of the nation does need to be done and people do demand effective, efficient authority, not because they have become derelict, or lax, or wish to "escape from freedom," but because things desperately need to be done if we are not to live in a state of perpetual crisis, if the individual is to find relief from the accumulation of disasters, from inflation to unemployment, from decaying cities to pollution, from collapsing highways to nuclear warfare, which daily visit him.

Professor Kurland quotes approvingly Arthur Schlesinger's blistering indictment of Congress as "fragmented, parochial, selfish, cowardly, without dignity, discipline or purpose,"\(^{14}\) and the indictment is deserved. But it is an indictment of the American nation rather than of the Congress which merely represents that nation, of the special interests which command American life, rather than the Congress which merely reflects them. The old saw, "What's good for General Motors is good for the country," expresses accurately this parochial selfishness, this inability on the part of American special interests to identify a general welfare which truly attaches to all Americans. American corporations identify the national interest solely with their own profits, without any sense of responsibility for the general welfare of the total system, of the nation. And corporate special interests, although the most obvious and most powerful of these selfish, fragmented purposes, are but one example of a theme which runs through the whole fabric of modern America, a theme enshrined in the folklore of competitive capitalism and the general glorification of selfishness as synonymous with freedom. It is, in fact, this willingness to identify freedom with private selfishness and to equate individual freedom with the ideals of the hustler which create the fragmented crisis-prone, divided society which

\(^{13}\) Id. at 192.

\(^{14}\) Id. at 203.
power hungry politicians so easily exploit.

The Constitution was framed, presumably, to create, among other things, an institutional framework to check man's unlimited appetite for power. It was based on the principle that the people could not rely on the integrity and good will of their leaders, that the rascality of such leaders would have to be checked by creating institutional obstacles to the concentration of power into too few hands. We continue to function on the assumption that threats to our freedom come simply from the inherent unscrupulousness of political leaders and that we can protect ourselves simply by maintaining the institutional checks and balances against concentrated power. We fail to realize that this concentration of power derives also from the demands of modern national societies. It is useless to tell people that they should safeguard the institutional obstacles to the creation of too much efficient power when these same people yearn desperately for the effective exercise of that same power in the relief of their problems. Although people do not want a government which oppresses them, they also want a government that delivers the goods.

Professor Kurland has some sense of that dimension of the problem, but his focus remains too narrowly on the traditional defense of individual freedom unrelated to the larger needs of society, to the enormous need for social coordination and cooperation, for instance. Professor Kurland is very critical of the way in which the Supreme Court has consistently favored a strong national establishment and the concentration of executive authority in the presidency. This tendency, however, may be no mere aberration, some unexplainable prejudice on the part of Supreme Court justices for centralized authority, but the reflection of a growing pressure for the definition of a national policy.

In short, the limitations of Professor Kurland's analysis is the limitation of our traditional definition of individual freedom. Modern society cannot avoid crisis and chaos without an enormous amount of coordination and organization. Our choice is between a human, voluntary, democratic cooperation coming from below, and an arbitrary, bureaucratic, dictatorial cooperation imposed from above. One reason we are imposed with the second is that our selfish concept of individual freedom prevents us from recognizing the need to try to implement the first.