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RISING EXPECTATIONS IN LAW PRACTICE AND LEGAL EDUCATION

by
Roger C. Cramton*

I. LAW PRACTICE

What is it that lawyers do? And how should lawyers be prepared for what they do? These questions are difficult ones because of the breadth and variety of lawyering. If a lawyer is defined as one whose work relates to the law, the definition includes subject matter areas as diverse as admiralty and workmen’s compensation and, within each subject matter area, functions as disparate as counseling a client, negotiating with opposing interests, drafting a legal instrument, and lobbying on behalf of proposed legislation.

The United States is unique among nations in both the number of lawyers and the breadth of their endeavors. Nearly one-half million lawyers facilitate the planning of social and economic activity and the resolution of the disputes and conflicts generated by a volatile and dynamic society—a society with a large hunger for legality both in the statement of basic premises and in the details of everyday life.

This paper is concerned with the relationship between the practice of law and the professional education that precedes it. As we contemplate an uncertain future from the vantage point of the seemingly fixed positions of today, remembrance of other arrangements may add a note of humility to today’s certitudes. Only a few generations ago the bulk of practitioners prepared for professional careers by reading law in the office of an experienced attorney. Only since World War II has the number of lawyers with a law school education first outnumbered and then totally overwhelmed those who entered via the apprenticeship route that is now almost entirely closed.¹

Recent studies tell us that about 80 percent of law graduates are engaged in law-related careers as lawyers, judges, legislators, and the like.² The remainder are engaged primarily in activities in

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¹ See Stevens, Two Cheers for 1870: The American Law School, in LAW IN AMERICAN HISTORY 405 (1971).
which some use is made of legal training: for example, real estate, insurance, self-employed business, or employment with a corporation, government, or other organization. Law schools differ to some degree in the proportion of their graduates who are admitted to the bar and earn their living in law-related careers, but the unsurprising general rule is that law school is preparation for the practice of law rather than for other endeavors.

College graduates who go to law school with the aim of keeping their options open ("I'll decide later whether to become a lawyer or enter the foreign service") are initially a minority; the experience of law school reduces this minority to the 15-20 percent who pursue careers other than in law.

The recent Baird study of 1,600 graduates from six law schools (chosen in order to be fairly representative of legal education as a whole) provides a useful breakdown of the professional employment of law-trained people. Of the approximately 80 percent in lawyer positions, about two-thirds were in private practice, about 17 percent were salaried lawyers with governmental branches (including the judiciary), and the remainder were salaried lawyers with corporations or law schools. A summary tabulation of the data from the Baird study follows:

3. The six law schools were Boston College, George Washington, Michigan, New York University, San Francisco, and Texas. Although the schools were chosen to be "representative" and "typical" of the law school world generally, it is apparent that they are not. Five of the six schools were included in the top forty of the Carter Report's 1977 ranking of law schools (see 19 UCLA EDUCATOR 41,44 (Spring 1977)), and only one is drawn from the remaining 128 ABA-approved schools. In addition, most of the schools selected are large and located in major metropolitan areas.

4. See Baird, supra note 2, at 269.
Table 1.

Professional Employment of a Sample of Law Graduates

**Lawyer Occupations**

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private practice of Law</td>
<td>54.0%</td>
</tr>
<tr>
<td>Solo practitioner</td>
<td>9.1%</td>
</tr>
<tr>
<td>In law firms</td>
<td>44.9%</td>
</tr>
<tr>
<td>Salaried employee of government</td>
<td>13.8%</td>
</tr>
<tr>
<td>Judicial branch</td>
<td>1.7%</td>
</tr>
<tr>
<td>Executive/legislative</td>
<td>12.1%</td>
</tr>
<tr>
<td>Corporate legal staff</td>
<td>9.0%</td>
</tr>
<tr>
<td>Law teachers</td>
<td>2.7%</td>
</tr>
</tbody>
</table>

The most significant statistic is that relating to solo practitioners, who once dominated the profession. As law practice has become more specialized and complex, rising overhead costs have put solo practitioners at a disadvantage. Moreover, the areas of practice in which solo practitioners have most common (personal injury law, family law, and criminal defense) have grown more slowly than the profession as a whole or have been displaced by new structures such as public defender organizations. Although the Baird sample appears to underestimate the number of solo practitioners, today they constitute less than one-fourth of all law graduates and the proportion is decreasing.  

The Baird sample was composed of lawyers who have been out

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5. In 1948, 171,110 lawyers were listed in Martindale-Hubbell's *Law Directory*, 92.4% of whom were in private practice and employed and 61.2% of whom were individual practitioners. In 1970, 324,085 lawyers were listed, but the number of solo practitioners remained about the same. In 1970, 85.1% of all listed lawyers were in private practice or employed by private concerns; 36.6% of listed lawyers were individual practitioners. *American Bar Foundation, The 1971 Lawyers Statistical Report* 10-11 (1972). Since those in non-lawyer occupations are not listed in Martindale-Hubbell, the proportion of law graduates in solo practice in 1970 probably was about 25-30%.
of law school five, fifteen and twenty-five years. The proportion of solo practitioners in the oldest group was about 17 percent of those in lawyer occupations, while the proportion among the youngest group was only about one-half as large. Although some of the latter group may enter solo practice at a later date, the long-term trend is clearly toward the practice of law in organized groups. This fact has considerable significance for legal education.

A number of studies show that a half-dozen general areas of practice attract the services of a large number of lawyers. In the Baird study, for example, more than one-third of the law graduates in the sample reported working in the following six areas: trial and litigation, corporate law, real estate law, commercial law, general practice, and administrative law. The primary areas of practice (as distinguished from areas in which some work is done) ranked as follows:

1. Trial and litigation 31.3%
2. General practice 22.9%
3. Corporate law 20.9%
4. Real estate law 20.9%
5. Personal injury law 19.0%
6. Administrative law 16.1%
7. Commercial law 15.3%
8. Trusts and estates law 14.9%
9. Criminal law 14.6%
10. Family law 14.0%
11. Tax 12.8%
12. Constitutional law 7.9%

A dozen or so other areas claimed the primary attention of smaller numbers of lawyers, with admiralty law (1.4%) and public interest law (2.1%) being the two smallest categories.

There are very few surprises in what has been related thus far. Law schools prepare their graduates for a wide variety of law-related careers that call for an extraordinary range of knowledge, abilities, and competencies.

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6. See Baird, supra note 2, at 288.
7. Id. at 270-72.
8. Since a number of the respondents checked more than one area as "primary area of work," the percentages add up to more than 100 percent.
II. LAWYER COMPETENCE AS AN ASPECT OF ASSURING ADEQUATE PERFORMANCE BY THE JUSTICE SYSTEM

A. Some Basic Distinctions

"Lawyer competence" has been a catchword in recent years, carrying associations and emotional freight that have sometimes interfered with discussion of important issues. Whatever one may think of the specific statements and recommendations of Chief Justice Burger, he has raised questions that deserve serious inquiry and response.9

Why should we be concerned with lawyer competence? Reliable information about the general level of competence of lawyers is a necessary predicate for decisions about many issues concerning the availability of legal services, legal education, and lawyer discipline. Better understanding of what lawyer competency is and better information about the competency of present lawyers is an essential component of any discussion about the role of lawyers in our system of justice. This understanding is also essential in order that clients and the general public may participate in these decisions and make more confident judgments about when to seek a lawyer and how to choose one.

1. The distinction between competence and performance

"Competence" may be defined as the capacity to perform a task in a manner that meets a particular standard. Standards may take a variety of forms, ranging from the minimum standard ("adequate but no better") that barely meets the requirements of canon 6 of the Code of Professional Responsibility to aspirational goals that are stated in the form of ideals for which we strive but do not expect to meet. At every intermediate point, standards may be set at points denominated as "reasonable," "average," "high" or other levels of performance.

The capacity of an individual to perform a legal task ("lawyer competence") must be distinguished from the performance that occurs in any particular instance. Assume that a lawyer has the capacity to perform a particular function in a satisfactory manner. His clients may nevertheless receive inadequate service because of inattention, laziness, the pressure of other work, or mistake. Competence does not result in adequate service unless it is disciplined

and controlled by attitudes, work habits, and values that ensure a routinely good product. Entry tests to a profession measure only competence, if that; they cannot assure thoroughness in preparation, internalized standards of good performance, ethical conduct, or the absence of error.

The gap between competence and performance is revealed in elaborate studies of physicians. In one such study involving detailed observation of the manner in which a group of general practitioners in North Carolina handled their regular clients, the highly rated doctors, a minority, "knew exactly what they were doing and did it thoroughly and systematically. Even more important, . . . they seemed to enjoy the intellectual challenge of medicine. . . . Others [who performed much less well] knew better, but didn't seem to care enough."10

Some of the major reasons for lawyer failure are well known. Inattention to a client's problem is the most common.11 Inadequate preparation is another major culprit.12 Limiting effort to the amount of the fee is yet another.13 Carelessness in handling details — simple goof-up and error — is a fourth.14 All of these have more to do with the character of the lawyer — to matters relating to ethics, attitudes, work habits, and pride in one's work — than they do to capacity to perform a task adequately. The lawyer who is sacrificing a client's interest due to one of these reasons may be performing work for other clients at a highly satisfactory level.

There is another reason for distinguishing between competence and performance. Although ethics and competence merge — canon 6 of the Code of Professional Responsibility states that "a lawyer should represent a client competently" — each of the two sets of issues is difficult enough to handle without fuzzing them together. As Douglas Rosenthal has said,

Whatever difficulties we may have in agreeing about what a compe-

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tent (i.e., skilled, effective) lawyer is as nothing compared with disputes about what ethical behavior is. . . . [I]n considering competence, we can avoid grasping some porcupines such as the duty of a defense lawyer to bring forth evidence damaging to his client, or the duty of a lawyer who believes his or her client to be seriously in the wrong, or the duty of the lawyer who can help the client only by injuring an innocent third party.15

A concern for a better understanding of lawyer performance must simultaneously define and measure criteria and standards to govern both lawyer competence and lawyer ethics.

2. Micro versus macro analysis of lawyer competence

Most of the discussion of lawyer competence has concerned one level of analysis — the competence of the individual lawyer. While the bulk of this paper shares the same emphasis, other levels of analysis need to be recognized.16

The services of lawyers are performed in an institutional context. Most lawyers today work in organizations that deliver such services, whether they be private law firms, government law offices, or the like. Even the individual practitioner operates in an institutional context that has a profound influence on behavior. In this sense, lawyer competence is “situational.”

If work is performed under circumstances that do not reinforce the pride of the worker, competence will diminish. A lawyer who must perform too many tasks will not perform them well. In part then, competence is a product of professional economics. If his fee is sufficient to compensate the lawyer for careful work, higher standards of performance will result. It is unrealistic to expect competence from a lawyer who must perform on a treadmill to eke out a living. . . .17

Since organizations cannot be expected to perform well if their individual components do not do so, the competence of the individual lawyer is an important matter. But it should not obscure the fact that more than individual lawyer behavior is normally involved. A law firm, a public defender office, or a corporate legal staff is an organizational entity that provides hierarchical supervision of the individual lawyer, established policies and procedures, and a prevailing ethos. The work of the office is shaped by these factors, and they have a powerful effect on the work habits and

attitudes of the individual practitioner. Rick Carlson, after study of analogous problems of assuring quality service in the health care field, concludes that

"error" in a system relying heavily on human labor is not so much a matter of individual mistake as it is a compound of many systemic failures. . . . [A]ssurance of the quality of legal services is also more likely to succeed if its major focus is on systemic failure rather than upon individual competence.18

Shifting from the individual to the organization does not exhaust the levels of "macro" analysis. Organizations that deliver legal services operate in relation to the institutions of justice, and they in turn are shaped by lawyer outlook and legal organization as well as by community attitudes and other factors. Leon Mayhew argues, I think correctly, that legal institutions are structured to reflect the biases of lawyers concerning the need for and use of lawyers.

Each institution of representation possesses a peculiar set of biases; it is more likely to stimulate and provide for the representation of some claims than others. The biases are not random but structured. They reflect the social organization of the various institutions of representation of the legal system and of the larger society.19

The most competent lawyers performing at their very best cannot assure equality in representation, just outcomes, or the provision of social justice. Even to the extent that one is concerned not with broader visions of justice but with the observance of legal rules, increasing the supply of competent lawyers is neither the only, nor necessarily the best, approach. Marc Galanter argues that simple and accessible tribunals, aggressive governmental champions for these unlikely to be represented, and better organizational structure on the part of the frequently victimized groups may do as much as lawyers in achieving legality.20

The just society must look beyond lawyer competence, especially the competence of individual lawyers, and ask questions about the purposes of the justice system and the meaning of justice.21 A society in which everyone insists on his rights and receives a full mea-

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18. Carlson, supra note 14, at 301.
sure of competent lawyering is not heaven but hell. Less formal procedures involving self-help and face-to-face confrontation of contending parties, without the benefit of lawyers, competent or otherwise, may lead to more satisfactory dispute resolution and a more just society. Our efforts to improve the quality of lawyering should not blind us to broader issues of justice that are much more fundamental.

B. Evaluating the Performance of Individual Lawyers

Any review of this subject must begin with the concession that our understanding of how to evaluate lawyer competence is at a primitive level. There are only a few studies that attempt to evaluate the performance of lawyers, and most of what has been written is intuitive, impressionistic, and anecdotal. While a great deal of experience inside lawyer organizations, especially law firms, has accumulated, it has not resulted in published criteria or generally accepted standards. Law firms follow a cautious approach by exercising great care in the initial selection of new lawyers and then hedging their bets by reserving permanent commitments until the lawyer's development can be assessed over five to seven years of continuous scrutiny.

The approach of law firms suggests both the difficulty of judgment, given the enormous variety in what lawyers do, and the importance of professional character to superior performance. Personal characteristics such as enthusiasm, energy, motivation, and integrity lead the best lawyers to be thoroughly prepared and to put extra effort into consideration of alternative strategies and approaches. The most important ingredient of the good lawyer is probably that sense of craftsmanship — pride in one's work — that sustains and is nourished by internalized standards of good lawyering. One reason that law firms make an overall judgment of a lawyer on the basis of a number of years' work experience is that they recognize that intangible aspects of heart and spirit are as vital to lawyer performance as technical competency.

With this caveat in mind, what needs to be done to define and to establish valid measures for lawyer competency? The initial step is to analyze lawyer behavior in typical situations and to break it

down into separate components. For each task or component it may be possible to identify the information, abilities, and attitudes that are required for adequate performance. The next step is to identify ways of channeling behavior, by initial training or operating procedures or after-the-fact review, so that desirable outcomes are achieved.\textsuperscript{24}

The United States Air Force devoted years of effort and staggering amounts of money to an analysis of pilot competency, a fairly complex task involving physical movements and measurable outcomes. Whether the same progress is possible in a less disciplined field involving a larger judgmental factor, much more complicated problem-solving, and much less measurable products (how good is a settlement, a lease, or an oral argument?) remains undetermined.\textsuperscript{25} Nor is it evident from where the funds for such an elaborate undertaking would come, even if a degree of optimism about likely results is possible.

At the extremes, there may be a wide range of agreement about whether a lawyer's performance in a particular instance meets minimum standards of competence. There is much greater difficulty, however, in reaching agreement in more intermediate situations. The Federal Judicial Center study of the performance of trial lawyers in federal district courts included an experimental study of the consistency with which eighty-nine federal district judges rated four video-taped lawyer performances: an argument on a motion, an opening statement and cross-examination in a criminal case, a cross-examination in a civil case, and a closing argument.\textsuperscript{26} Although individual judges expressed a great deal of confidence in their evaluation of the four performances, their collective assessment of each was highly variable and inconsistent. Three of the video-taped performances were rated by the eighty-nine judges in six of the available seven categories, ranging from "about as good a job as could have been done" through "adequate

\begin{footnotesize}
\begin{enumerate}
\item The importance of intangibles such as judgment and character in evaluating lawyer performance give rise to legitimate skepticism whether somewhat mechanistic efforts to "rate" and "code" dissected bits of lawyer activity will be productive. Perhaps the nature of the classic professions defies the kind of proficiency testing which has been utilized (none too effectively) elsewhere in the occupational structure. I urge only that systematic study may produce useful insights into elements of lawyer performance and its evaluation, not a suspension of critical judgment in the face of such efforts.
\item Carlson, supra note 14.
\end{enumerate}
\end{footnotesize}
but no better” to “very poor,” while the fourth was represented in all seven categories.

The authors of the study, in somewhat of an understatement, concluded that “district judges were not highly consistent with one another in assigning ratings on the basis of the seven-point scale used in the research.” Two propositions emerge from the study. First, there is no unanimity among experienced trial judges concerning such standards as “adequate” trial performance — some judges rate more severely than others. Second, there is a great deal of disagreement concerning the relative merits of individual performances. Development of criteria for assessing lawyer performances and of consistency in their application needs to proceed much further before remedial proposals concerning legal education or admission to the bar can be advanced with any degree of confidence that they are causally related to improved lawyer performance.

Deficiencies in lawyer performance are not likely to be distributed evenly across the lawyer population. Identification of lawyer characteristics that are commonly associated with inadequate performances is a necessary step, since it may lead to remedial measures targeted at those lawyers who constitute the problem. Measures applicable to all lawyers, especially at the educational stage, increase entry costs to the profession and increase the cost of legal services to consumers, even though most of those affected are not part of the problem.

There is scattered evidence concerning some of the lawyer characteristics that are associated with inadequate lawyer performance. First, employment status is related to quality. In general, solo practitioners are much more likely to perform inadequately because of the economics of much of the legal work they perform, the situational context in which it occurs, the differential selection process that results in their overrepresentation in the “lower” strata of the bar, and related factors. The recent Federal Judicial Center study tells us that solo practitioners are much more likely to be inadequate trial performers than lawyers in firms of ten or more

27. Id. at 29.
29. See J. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO (1962).
lawyers.30

In addition to the size of the lawyer's office, the nature of representation has important effects on the incidence of inadequate trial performances. Assigned counsel in criminal cases are inadequate performers much more frequently than lawyers in public defender offices.31 This suggests that problems of competence in the field in which it is most worrisome, that of the defense of criminal charges, may be attacked effectively by more selectivity in judicial appointment of assigned counsel or by substitution of a good public defender system. Legal education should not be blamed for failures in the selection or organization of criminal defense lawyers.

Improvement in the supervision provided in civil legal aid offices may also yield similar dividends. The Federal Judicial Center study indicates that the proportion of inadequate performances in civil legal aid offices was higher than that for the average of all lawyers studied.32 The number of legal aid lawyers in the study was so small, however, that the validity of the result is suspect; but it does reinforce data from other sources suggesting that the conditions under which legal aid practice is performed adversely affect the quality of the service provided to clients.33 Lower caseloads, better supervision of young attorneys, and enhanced opportunities for long-term career development in legal services are promising ways to address this problem. Specialized training programs for legal services attorneys, such as the new institute being established by Gary Bellow and others under the auspices of the Greater Boston Legal Services program and the Harvard Law School, may also be beneficial.

Simplistic assertions that "it stands to reason" that additional educational and experience requirements will improve the average lawyer's performance are not supported by the few instances of detailed study of the performance of professionals. A landmark study of general practice physicians in North Carolina, previously described, found

that there was no relationship between a physician's level of performance and the medical school attended, the physician's age, or

31. Id. at 31-33.
32. Id.
33. See Bellow, Turning Solutions into Problems: The Legal Aid Experience, 34 NLADA BRIEFCASE 106 (1977); Cramton, Legal Education and Legal Services for the Poor — Some Reflections, 12 Creighton L. Rev. 487 (1979).
With the exception of school attended, it is likely that similar results will emerge when lawyer performances are given an exacting and consistent examination. As with physicians, the more vital factors are such intangibles as intellectual curiosity and continuing pursuit of self-learning, factors that may be reflected by class standing or journal subscriptions, but not by years of experience, courses taken, or similar matters.

The intellectual aspect of lawyer competence suggests that given the substantial differences in the average quality of students at different levels of law school, lawyer performance may be associated with the law school attended. A preliminary indication that this is the case is found in the Federal Judicial Center study, which tells us that no inadequate performances were found among the forty graduates of nine elite schools who were included in the 257 lawyers from whom biographical information was obtained. The data should be reexamined to see whether the same correlation exists on the other side—whether a higher proportion of inadequate performances is found in trial lawyers who attended poorly rated schools. If so, it will be easier, more effective, and without negative side effects to improve particular schools (or their student bodies).
than to reform legal education as a whole.\textsuperscript{39}

The effort to define and measure lawyer competence is as necessary as it is difficult. What we must avoid in this elusive quest is any effort to reduce professional behavior solely to endless lists or aspects of desirable or undesirable behavior in the performance of ever more discrete professional tasks. As Paul Carrington has warned, that approach will result in an unhappy emphasis on formalism and routine that takes too static a view of a dynamic process, ignores the intangibles that cannot be quantified, and diverts attention from more fundamental questions of the role of lawyers in a democratic society.\textsuperscript{40}

C. A Framework of Remedial Techniques

Let us make the bold assumption that at some point in the future we will be able to define lawyer competence in the performance of common legal tasks and that reliable measures or tests of lawyer competence will have been created and validated. What remedial techniques are available for bringing this new knowledge to bear in a way that will result in improved service for clients?

Douglas Rosenthal and Rich Carlson have drawn a useful distinction between "direct" and "indirect" approaches to lawyer competency.\textsuperscript{41} A direct approach involves an evaluation of lawyer behavior, assessing it in accordance with either intuitive standards (as in most peer review) or more specific criteria or performance. An example of the latter is Rosenthal's effort to evaluate the performance of plaintiffs' attorneys in personal injury cases by comparing the actual result to the value placed on the case by a panel of experienced negligence experts. Emphasis on outcomes will not be possible in the many legal situations in which the results of a lawyer's efforts do not take such a clearcut win-lose, dollar form or the cases are so multifaceted as to make any reliance on outcomes

\textsuperscript{39} The practicality of remedial programs focusing on marginal schools will depend upon the proportion of inadequate performers graduating from certain schools. Even if the graduates of certain law schools are disproportionately represented among inadequate performers, denial of accreditation would not be justified unless the proportion of inadequate performers was extremely high, since this action would deny society the benefit of the services of the bulk of the school's (highly competent?) graduates. A tightening of accreditation standards that would primarily affect marginal schools would be justifiable if (1) the bulk of inadequate performers graduate from identifiable schools and (2) the additional requirements are likely to improve legal education everywhere without significant negative consequences on the cost of legal education or the openness of the profession.

\textsuperscript{40} Carrington, supra note 13, at 422-24.

Professional discipline and malpractice liability are direct approaches to lawyer competence, since they evaluate a lawyer's behavior against a minimum standard of performance. They have many advantages: It is easier to identify clearly unacceptable conduct than to define and enforce average or reasonable standards; there is an economy of effort in directing remedial measures to those who need them rather than at the profession at large; and undesirable side effects, such as larger costs for consumers of legal service, are not entailed.

Given the advantages of direct approaches to lawyer competency, it is remarkable that so much attention has been directed to legal education and so little to improving the effectiveness of lawyer discipline and enhancing the credibility of legal liability as a deterrent to incompetence. It is common knowledge that grievance proceedings against attorneys are infrequent in number and are invariably based on flagrant omissions of proper practice causing serious injury to a client. If trial lawyer incompetence is as great as some judges claim, their failure to initiate grievance proceedings or to hold that a criminal defendant has been denied the right of counsel is inexplicable.

Similarly, the double standard in professional liability cases is difficult to explain or to justify. While physicians are being held to much stricter standards of behavior in the medical malpractice field, judges assess lawyer performance by much more relaxed standards, usually imposing liability only for a flagrant omission on the part of the lawyer, such as a failure to file a claim before the

43. The Maddi study of trial judge perceptions of lawyer competence illustrates the gap between judicial perceptions of the nature of the problem and recommended solutions. Even though "inadequate preparation" is viewed as by far the most important factor affecting the competence of trial lawyers, requirements of continuing legal education and improved legal education were the most popular remedial measures. Even though the trial judges believed that about 12% of attorneys were incompetent to the degree that their clients had been prejudiced, only 18% of the judges had ever initiated disciplinary proceedings because of attorney incompetence and, of these, only one-third (6% of the total judges) had done so on more than one occasion. Maddi, supra note 12, at 123-30. If there is so much incompetence, why is there so little direct response and so much support for indirect remedies?
44. See Ass'n of the Bar of the City of New York, The Disposition of Cases of Professional Incompetence in the Grievance System, 32 Record of the Ass'n of the Bar of the City of N.Y. 130 (1977).
45. Frankel, supra note 21, at 619-20.
statute of limitations has run. The failure of the bench and bar to take lawyer incompetence seriously in its day-by-day occurrence suggests either that the problem is not as serious as asserted or that the focus on entry and educational requirements is intended more to restrict competition than to purify the profession.

Since no attempt is made to evaluate a lawyer's performance directly, remedial proposals in the form of educational requirements, entry requirements, or continuing education are indirect in form. Indirect measures rest on an assumption that those who have met certain educational or other requirements will be more competent on the average than those who have not. This approach assumes that general upgrading of the quality of lawyers will result in a decrease of incompetent lawyering.

The increased demand for legal education on the part of college undergraduates has gone a long way to insure that those entering the legal profession have satisfactory intellectual qualifications. Similarly, the constant improvement in legal education in the last generation, especially at the non-elite schools, has probably resulted in a substantial increase in the average competence of new lawyers. I believe these to be plausible assumptions even though evidence concerning changes in the average competence of the bar over time is scanty. (The Maddi study of trial lawyer competence includes a finding, based on a survey of the views of a sample of state and federal trial judges, that trial lawyer performance is improving rather than deteriorating.)

47. Marks & Cathcart, supra note 11.
48. Rick Carlson states that "input measures [such as entry controls] should be understood for just what they are—barriers designed to preserve the lawyers' monopoly. One of the inevitable effects of input control is to homogenize supply and grant the suppliers something approaching monopoly power." Carlson, supra note 14, at 308.
49. In stressing analytical competence, I do not assert that present-day students are "better" or "worse" than their predecessors. The law schools are at the mercy of trends in the society that influence the number of applicants for law school and the qualities these applicants bring to law school. Although I believe that the selectivity which law schools have enjoyed in the last decade has improved the analytical capacities of the law student population, other trends have a negative effect. The television age is producing students who have read and written much less, who have often been judged by less rigorous intellectual and literary standards, and who are encouraged in oral quickness more than in patient judgment.
50. "As for the general trend in the quality of trial advocacy over time, only slightly more than 19 percent of the judges [rating individual trial performances] had perceived noticeable deterioration, as compared with the almost 32% who had noticed improvement." Maddi, supra note 12, at 144. The 387 federal district judges in the Federal Judicial Center split neatly into three roughly even groups when asked whether the proportion of inadequate
While large scale changes in the qualifications of those entering law school may be expected to have important effects, it is doubtful that more limited changes in law school curricula will have identifiable effects. Imposition of new educational or experience requirements for those admitted to the bar (or one of its segments) is unlikely, for example, to eliminate the small proportion of inadequate performances observed in the trial courts. Since incumbent lawyers who are responsible for current deficiencies will continue to practice, any improvement will take effect only slowly over a generation or so. More important, the association of inadequate performance with poor preparation, limited supervision, or the economics of law practice is very strong, and it is unlikely that these attitudes or basic conditions will be altered by course requirements or additional testing.\footnote{Maddi, \textit{supra} note 12; A. Partridge \& G. Bermant, \textit{supra} note 26.} Exposure to a particular course in law school appears to have little or no relation to effectiveness as a trial advocate. It is a startling irony that the Devitt Committee's recommendation of required trial experiences for would-be trial lawyers in the federal courts rests on a study which shows a negative correlation between the level of trial lawyer performance and exposure to a trial advocacy course in law school.\footnote{A. Partridge \& G. Bermant, \textit{supra} note 26, at 43.} This curious finding is probably a surrogate for two more important variables: trial advocacy courses were of limited quality and effectiveness prior to the development by the National Institute of Trial Advocacy of an effective pedagogical approach; and the earlier courses of more limited value were more commonly taken in the poorer law schools from which inadequate trial court performers are largely drawn.

If entry measures are to be utilized, their form and content require much greater attention than is now provided. Tests that reward memorization of rules can be improved by adding emphasis on reasoning ability and expression, which are qualities associated with successful practice. A further dimension is added by problem-solving tests which place the examinee in a situation simulating a real-life problem and allow for successive stages of problem-solv-

\begin{itemize}
  \item trial performances was greater or smaller today than it was in 1965: the largest group (35.1\%) thought the proportion was the same; 32.0\% thought it was greater; and the remainder (32.9\%) thought it was smaller, had no opinion, or did not respond to the particular question. Letter from Anthony Partridge, Federal Judicial Center to Roger C. Cramton (March 23, 1979).
\end{itemize}
ing: factual inquiry, legal analysis, formulation of tentative strategies, response by adversaries or legal officials, and reassessment in light of experience or further information. The use of interactive computer testing programs offers this potential. Early attention should be given to the development of such tests, which offer far greater potential for inquiry into the judgmental aspects of competence than an essay examination or a multiple-choice test.

Other current proposals for improvement of lawyer competency involve requirements of specialized training for particular areas of practice, mandatory continuing legal education, and programs for certification of specialists in various areas of law. At present there is ample opportunity for law schools, bar groups, and other organizations to mount specialized programs of full-time and part-time study for law graduates. If those programs are more cost-effective than available alternatives in advancing the skills of the lawyers who are exposed to them, market forces will support their vigorous development and expansion. There are encouraging signs that this may be the case with many programs. The current state of the art, however, does not justify the substitution of coercion for choice in the decision to enroll in these programs.

George Bernard Shaw quipped that "[a]ll professions are conspiracies against the laity." One need not accept this as a universal law to recognize its kernel of truth. Paul Carrington and others have warned us against excessive professionalism that restricts entry into the market for services, stands in the way of social mobility, and raises the price of service without proportionate benefits of improved service to the public. Carrington also counsels that excessive emphasis on professional credentials may result in hierarchical layers in the profession and the dominance of hierarchically structured work organizations; and that these developments in turn may raise anxieties about status and reduce the independence, autonomy, and personal pride in work that have been among the most rewarding features of professional life.

55. See Frankel, supra note 21, at 627-32.
56. P. Carrington, supra note 13, at 402-03.
57. There is irony in the fact that the rewards of professional life may be undermined both by the guild mentality that pushes toward stratification and credentialism and by the anti-professional aspects of the growing movement to franchise legal services for the middle class. If the latter movement demonstrates an ability to provide satisfactory service at rea-
A concern to avoid the excesses of credentialism leads me to conclude that lawyer discipline is the most direct and effective way to encourage better performance by lawyers. To the extent that lawyer competence can be identified and measured, a direct attack on it by means of discipline proceedings and legal liability to clients is likely to be most productive of desirable change. The establishment of peer review committees by the courts to deal with instances of inadequate performance also is worth trying, since this approach can offer encouragement, advice, and assistance as well as the clumsy sanction of discipline. The modification of liability rules so that lawyers are held to higher standards of performance, including errors of commission as well as those of omission, is also desirable. Imposition of new educational requirements does not appear to be warranted on the basis of present information.

III. LAW SCHOOLS AS PREPARATION FOR PRACTICE

The theoretical orientation of the university law school leads to recurrent proposals for more practical training for the profession. This issue, which has spawned an enormous literature, cannot be canvassed here. My objective is the more limited one of assessing what recent studies have to say about legal education as preparation for the practice of law.

On a number of occasions, Chief Justice Burger has called attention to deficiencies of lawyer competence, especially in the trial bar, and has attributed these deficiencies to inadequate law school preparation for practice. Speaking to the American Bar Association in August 1978, the Chief Justice concluded that

the quality of advocacy in our trial courts falls short of what it should be to protect the interests of the consumers of justice. . . . [O]ur present mode of legal education is ripe for reexamination and restructuring in this respect. . . . [Although] the upper echelon of law school graduates are far better qualified than they were in the past for appellate work, . . . we have not matched this in terms of preparing lawyers for trial work. . . . [I]f the concepts of ‘recall’ ap-

sonable cost, the implications for the structure and character for the legal profession are much greater than is likely from credentialing controversies.


pllicable to motor vehicles under current governmental standards were applied to law school graduates, the 'recall' rate would be very high indeed on those who go into the courts, without substantial added training.60

In making these vigorous assertions, the Chief Justice suggested that a recently published study by Leonard Baird demonstrated that law graduates "believed their law schools had not prepared them for work in court." Relying on an analysis of the Baird study by Joel Seligman, the Chief Justice summarized its findings:

More than 60 percent of the 1,600 [law graduates studied] responded that their education had not prepared them to investigate and deal with facts.

Forty-four percent of the 1,600 lawyers stated that the law schools had not been helpful in training them to draft legal documents.

Sixty-nine percent said that they had not learned how to counsel with clients.

Seventy-seven percent said that the law schools had not prepared them to deal with the problems of negotiating settlements of cases.61

Does the Baird study provide the basis for a sweeping assertion that legal education fails to prepare its graduates for the practice of law? The study, financed by the Law School Admission Council and sponsored by a number of other organizations, sought to obtain reliable information about the types of knowledge and abilities that many law graduates use in their work and the relationship of these knowledges and abilities to their legal education. A sample of 1,600 graduates from six law schools, chosen from classes five, fifteen and twenty-five years out of law school, responded to a detailed questionnaire inquiring about their occupations, the skills they used in their work, and their perception of the value of their legal training in their everyday work.62

Twenty-five percent or more of the graduates, given the choice of placing eight knowledge items and twelve ability items in four categories, ranging from "no importance in my work" to "a key element in my work," listed fourteen elements as a key element, a category that was defined as meaning that the element was "essential for adequate performance."63 The fourteen items, with the per-

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61. Id.
63. Id. at 270-77.
percentage viewing each as a key element, are tabulated in Table 2.

Table 2.

Elements Essential to Adequate Performance

<table>
<thead>
<tr>
<th>Percentage of respondents viewing element as essential to adequate performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Ability to analyze and synthesize law and facts</td>
</tr>
<tr>
<td>2. Knowledge of statutory law</td>
</tr>
<tr>
<td>3. Ability to write</td>
</tr>
<tr>
<td>4. Ability to be effective in oral communication</td>
</tr>
<tr>
<td>5. Ability to do research</td>
</tr>
<tr>
<td>6. Ability to draft legal documents</td>
</tr>
<tr>
<td>7. Ability to counsel clients</td>
</tr>
<tr>
<td>8. Ability to negotiate</td>
</tr>
<tr>
<td>9. Knowledge of procedural rules of courts</td>
</tr>
<tr>
<td>10. Ability to investigate facts</td>
</tr>
<tr>
<td>11. Ability to interview clients</td>
</tr>
<tr>
<td>12. Ability to organize work flow</td>
</tr>
<tr>
<td>13. Knowledge of agency regulations</td>
</tr>
<tr>
<td>14. Knowledge of common law</td>
</tr>
</tbody>
</table>

The six other knowledge and ability items were found to be a key element by smaller portions of those responding.

It is not surprising that a group of law graduates engaged in a wide variety of legal and other activities (approximately 20 percent were not engaged as lawyers, but in a variety of activities ranging from gold mining to the foreign service) would report that general abilities were more important in their work than discrete bodies of knowledge. Only one knowledge item ("knowledge of statutory law") made the top five elements and only one other ("knowledge of procedural rules of courts") was included in the top ten. It is not surprising that "knowledge of municipal ordinances" and "knowledge of community resources" ranked lowest among the twenty elements included.

Four of the abilities that were viewed as key elements by more than 25 percent of the respondents were general skills that were not confined to law or lawyers: ability to write, ability to be effective in oral communication, ability to negotiate, and ability to interview clients. Ability to communicate orally and in writing is an

64. Id. at 273, Table 3.
important aspect of good citizenship as well as an essential component of a wide range of occupations. Negotiating and interviewing skills are required in a number of occupations and professions. In short, there is nothing particularly legal in character about these fundamental skills, although law schools along with parents, elementary schools, and most other societal institutions have a responsibility in fostering the development of these complex arts. One suspects that “ability to reason clearly” and “ability to read quickly and carefully” would also have been included in the top-rated group if these items had been included in the questionnaire.

More important for our purposes are the views of law graduates concerning the degree to which their legal education was related to the acquisition of these key elements. Respondents were provided four possible responses: “essential,” “helpful,” “not helpful,” and “played no role in the skill.” The difference between the latter two categories is not clear to me, so I have grouped the responses in pairs: those viewing law school as essential or helpful in relationship to the particular element and those viewing it as not helpful or irrelevant. Table 3 rank orders the twenty items by the extent to which law school contributed to the acquisition of the skill.
### Table 3.

**Relationship of Law School Training to the Acquisition of a Skill**

Percentage of Respondents Viewing Law School as:

<table>
<thead>
<tr>
<th>Ability or Knowledge Item</th>
<th>Essential or Helpful</th>
<th>Not Helpful or Played No Role</th>
<th>Rank Order of Importance of Key Elements in Respondents’ Work</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Knowledge of common law</td>
<td>98.7%</td>
<td>1.3%</td>
<td>14</td>
</tr>
<tr>
<td>2. Ability to analyze and synthesize law and facts</td>
<td>96.8</td>
<td>3.2</td>
<td>1</td>
</tr>
<tr>
<td>3. Knowledge of constitutional law</td>
<td>95.8</td>
<td>4.2</td>
<td>2</td>
</tr>
<tr>
<td>4. Ability to do research</td>
<td>95.5</td>
<td>4.5</td>
<td>3</td>
</tr>
<tr>
<td>5. Knowledge of statutory law</td>
<td>76.7</td>
<td>23.3</td>
<td>4</td>
</tr>
<tr>
<td>6. Knowledge of procedural rules of courts</td>
<td>72.3</td>
<td>27.7</td>
<td>5</td>
</tr>
<tr>
<td>7. Ability to write</td>
<td>70.4</td>
<td>29.6</td>
<td>6</td>
</tr>
<tr>
<td>8. Knowledge of ethics of the profession</td>
<td>65.5</td>
<td>36.5</td>
<td>7</td>
</tr>
<tr>
<td>9. Ability to be effective in oral communication</td>
<td>59.3</td>
<td>40.7</td>
<td>8</td>
</tr>
<tr>
<td>10. Ability to draft legal documents</td>
<td>56.0</td>
<td>44.0</td>
<td>9</td>
</tr>
<tr>
<td>11. Knowledge of agency regulations</td>
<td>45.7</td>
<td>54.6</td>
<td>10</td>
</tr>
<tr>
<td>12. Ability to investigate facts</td>
<td>42.1</td>
<td>57.9</td>
<td>11</td>
</tr>
<tr>
<td>13. Knowledge of municipal ordinances</td>
<td>33.4</td>
<td>66.6</td>
<td>12</td>
</tr>
<tr>
<td>14. Ability to counsel clients</td>
<td>31.4</td>
<td>68.6</td>
<td>13</td>
</tr>
<tr>
<td>15. Ability to negotiate</td>
<td>22.7</td>
<td>77.3</td>
<td>14</td>
</tr>
<tr>
<td>16. Ability to interview witnesses</td>
<td>22.5</td>
<td>77.5</td>
<td>15</td>
</tr>
<tr>
<td>17. Ability to organize work flow</td>
<td>20.4</td>
<td>79.6</td>
<td>16</td>
</tr>
<tr>
<td>18. Ability to interview clients</td>
<td>20.3</td>
<td>79.7</td>
<td>17</td>
</tr>
<tr>
<td>19. Knowledge of community resources</td>
<td>15.6</td>
<td>84.4</td>
<td>18</td>
</tr>
<tr>
<td>20. Ability to direct work of others</td>
<td>14.1</td>
<td>85.9</td>
<td>19</td>
</tr>
</tbody>
</table>

What is the significance of these data? On the whole, they conform with *a priori* notions about what law school does well and what it does not attempt to do. With respect to the three elements that are thought to be essential to adequate performance by the
largest groups of law graduates, the relative success of legal education is striking. Virtually all agree that law school was essential or helpful in acquiring the ability to analyze and synthesize law and facts, and an extremely large majority say the same with knowledge of statutory law and ability to write. Of the fourteen items thought key by more than 25 percent of the respondents (see the right-hand column of Table 3), law school was essential or helpful for a majority of the respondents with respect to eight of the items. Only with respect to four of the fourteen items did the proportion who viewed law school as essential or helpful go below one-third of the respondents: ability to counsel clients, ability to negotiate, ability to organize work flow, and ability to interview clients. Since it seems doubtful that a university law school is the best place to train young lawyers in the handling of a flow of work, the basic shortcoming involves the interpersonal skills of interviewing and counseling and the equally general skill of negotiation.

The study also confirmed that the area of greatest deficiency in law school is not in skills related to litigation but those involved in interviewing, counseling, and planning, functions that are more important to more lawyers than courtroom litigation. One of the dangers of the current emphasis on the competence of trial lawyers is that it may further skew legal education toward the adversary, litigative, and confrontational. Law students are given too little exposure to working cooperatively with others, to reaching acceptable solutions without an adversary confrontation, and to devising and drafting private and public regimes of law to guide parties through an uncertain future. Legal education is frequently criticized as being too absorbed in appellate judicial opinions; the broader and more valid criticism is that it is too absorbed in adversary litigation as distinct from the planning and counseling functions that bulk larger in the work of most law graduates. 66

The Baird study tells us that most law graduates believe that their legal education did help them acquire many of the skills they need in carrying on their daily work, and that it was less helpful with respect to several others, but it does not tell us what can or should be done in law school. Nor does it demonstrate that legal education fails to produce competent lawyers, which is a question

We continue to be troubled by the myth of the unitary lawyer — the all-competent generalist — long after the intricacy of the law and the growing specialization of the bar has rendered it dangerous to think of any law graduate, however competent, performing all of the functions performed by lawyers. No lawyer, no matter how experienced or able, is competent to do everything, especially if constraints of time and resources are applicable (as they always are).

The most important aspect of the truly competent lawyer is that of knowing the extent and limits of his own competence: what he can handle alone and what requires the assistance of others. While critics talk loosely of the neophyte lawyer performing the equivalent of brain surgery on the day after admission to the bar, law graduates are aware of their limited competence and respect those limitations. There is substantial evidence in support of this statement. One of the basic arguments for a larger infusion of skills training through law school simulations and clinics is to counter the fear, anxiety, and reality shock that many young lawyers experience when they face their first client, even under the most carefully supervised conditions. These young lawyers know all too well the limitations of their competence! Consumers of legal services, even individual clients, are also aware of the limitations of inexperience and youth; except in situations in which they have no alternatives (e.g., indigents served by a legal aid or public defender office), they are not so rash as to invite new entrants to perform the equivalent of brain surgery on them.

What should be taught in law school? The Baird study suggests that several items thought to be important to many lawyers are not emphasized in law school. Whether they should be emphasized in law schools turns on teachability, priorities and tradeoffs, the comparative advantage of other modes of learning, and available resources. Not all law schools can or should make the same choices, for each has a somewhat different mission and situation.

The question of teachability is still an open one with certain of the skills in question, although there is growing evidence that lawyer skills can be taught effectively in the law school setting. Until

68. Carlson, supra note 14, at 314-16.
the development of the NITA approach to the teaching of trial advocacy, utilizing a structured series of exercises, simulations, and demonstrations, there was considerable doubt whether litigative skills could be effectively taught in law school. Today that answer is no longer in doubt.

Although the development of pedagogy is at an earlier stage, similar progress may be possible in other skill areas, such as interviewing, counseling, negotiation, and fact investigation. A lengthy period of curriculum development and teacher training, though, will have to occur in these areas before it is established that enhanced skill can be conveyed through readily available materials in the hands of ordinary teachers.

The law school experience does not encompass three full years but a mere 96 weeks of a student’s life. Much has to done in that period, and resources are limited. Choices must be made so that the important tasks are accomplished. The question of priorities and tradeoffs asks whether the law schools can undertake a new function without impairment if what they now do well. It would be a shame to graduate students who established marvelous interpersonal rapport with their clients but were unable to analyze their legal problems or to formulate strategies for their resolution.

Although the question is a serious one, I believe there is sufficient slack in the law curriculum to permit the assumption of additional tasks without threatening the success story of law school analytical training. In an important sense, infusion of more real-life problem solving, using both simulations and live clients, will enhance the excitement of law school, provide a desirable progression from simpler to more complex judgmental tasks, and improve analytical capacity by demonstrating the interrelatedness of law and fact, reason and emotion, and theory and practice. These artificial dichotomies sever the reality of things in unproductive ways.

Thus my personal choice is for wide ranging experimentation with

the teaching of lawyer skills and with scholarly inquiry on lawyer functions, including the development of new generalizations as well as new courses.

At some point in the teaching of practical skills, especially if they are defined too narrowly in terms of limited horizons ("how to find your way to the court room"), the comparative advantage of other modes of learning will become apparent. Law schools cannot give infinite emphasis to everything and the question is what can be best done in the home, the school, the church, other life experiences, and, especially, the early years of professional employment. Law teachers differ with practitioners less in deemphasizing practical skills than in emphasizing the convenience and power of the low-cost training provided in the employment setting.

Norman Redlich has argued that leaving important aspects of professional training to initial employment is a dereliction of duty since only large corporate law offices are set up to provide effective apprenticeship experiences to recent law graduates. I am unpersuaded that this is the case; at the least, important matters of degree are involved. We need to know more about the training provided in all organizations that deliver legal services, including the small firm, the legal services office, the prosecutor offices, and the public defender offices. If some of these organizations do not provide supervision, advice, and assistance to the recent graduate, why don't they? What can be done to change the situation?

There remain those who enter solo practice immediately upon admission to the bar. I have argued earlier that this branch of the legal profession has been shrinking rapidly and that this trend is likely to continue. Hence a reduced number of inexperienced solo practitioners will be dependent on the mechanisms that long were the sole protection of the public — the willingness of experienced lawyers and judges to serve as mentors, to provide advice, and to protect the clients of the young from their inexperience. Is the bar so lacking in the sense of what it means to be a professional that it does not and will not act in these situations?

Effective teaching of lawyer skills, whether done by exercise, simulation, or with live clients, is a labor-intensive endeavor. It requires a student-faculty ratio of 8 to 1 or 10 to 1 rather than the

75. See Redlich, Lawyer Education and Certification: Flawed Premises and Uncertain Results, in EDUCATION AND LICENSING OF LAWYERS (1976).
ratio of 25 to 1 more characteristic of American law schools. While some of the instruction during the three academic years can occur in small groups even with the higher ratio, the vast bulk must be in classes of 50, 75, 100, or more, in which drafting exercises and individualized instruction generally are not feasible. Thus the question of resources to undertake new tasks comes to the fore.

Over a period of years law schools can reallocate resources from one part of the curriculum to another; they have done so in the past and will continue to do so in order to make room for new developments. Possible increases of productivity may emerge from greater use of teaching assistants and computer-assisted instruction at relatively low cost. And law schools will generate new resources from the same sources that have provided funds in the past: alumni contributions, foundation gifts, and public support.

The demands being placed on law schools, however, seem likely to outrun the ability of these approaches to meet the resource problem. And increases from the most likely source of funds, student tuition, will have adverse effects on the openness of the legal profession to all, including the poor and the disadvantaged.\(^7\) If the legal profession desires law schools to provide more and better education, it has an obligation to assist in providing the resources that will be required.

**Conclusion**

The practice of law is enormously variegated and complex, and the educational experience that precedes it, while emphasizing some common denominator aspects of lawyerly analysis and work, must also be variegated and complex.

In order to prescribe cures for lawyer incompetence, we must first define it and create valid techniques of measurement. We must also take it seriously when it happens. Direct approaches to instances of inadequate lawyering, such as peer review, discipline, and legal liability, are likely to be more effective than indirect approaches, such as the imposition of further educational or entry requirements. Certification of specialists, without precluding others from practice in the same areas, may also encourage specialized training programs and higher standards of specialized competence.

Law schools are doing more and doing it better than in the past,

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\(^7\) Carrington, *supra* note 13, at 413-20.
but rising expectations continue to outrun their ability to deliver. The heightened expectations for legal education are both a challenge and a problem: a stimulus for needed experimentation and a threat of external regulation.

The positive aspects of the current situation need encouragement and support, including the provision of new resources for legal education. Improved legal education can emerge from the current ferment of curricular innovation and experiment if it is not stifled by inadequate resources and external constraint.
COMMENTS

THE KENTUCKY TREND TOWARD THE FEDERAL RULES OF EVIDENCE: IN WHICH AREAS WILL KENTUCKY LAW BE CHANGED?

The law of evidence in Kentucky is currently in a state of flux. The Supreme Court of Kentucky has demonstrated its favor toward adoption of the Federal Rules of Evidence, yet it and the court of appeals have handed down recent decisions underscoring the Kentucky position on points in which the Commonwealth differs from the federal position.

This comment examines the trend that has developed in Kentucky toward adoption of the Federal Rules of Evidence, the remaining areas in which Kentucky law would be notably changed by such adoption and the major controversies which must be resolved in the Commonwealth by either adoption, rejection, or modification of Federal Rule 609. Only those areas in which significant changes would take place are examined herein, and no attempt has been made to discuss the areas in which Kentucky law supplements, but does not substantially conflict with, federal evidence law.

I. The Kentucky Trend toward Adoption of Federal Rules of Evidence

Since the Federal Rules of Evidence were adopted in 1975, they have exerted a growing influence on Kentucky law. During 1977 and 1978, a flood of evidentiary questions was presented to the Kentucky Supreme Court, many of which resulted in approval or adoption of federal rules.¹ Litigants before both the supreme court and the court of appeals frequently present federal evidence rules as authoritative,² presumably appealing to the courts' inclination to adopt them, and some trial courts seem to make evidentiary decisions with an eye to the federal provisions.³

The first Kentucky case adopting a Federal Rule of Evidence was actually decided four months before the federal rules became

¹. See text accompanying notes 4-10 infra.
². See, e.g., Commonwealth v. Duvall, 548 S.W.2d 832 (Ky. 1977) (per curiam).
effective, and it referred to the Uniform Rules of Evidence even though the federal rules had been promulgated. In *Heilman v. Snyder* the court of appeals (now the supreme court) decided that "publication by experts should be admitted in evidence to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical, or pamphlet is a reliable authority on the subject." It expressly overruled all cases to the contrary; and although the language varies slightly from that of Federal Rule 803(18), the effect is substantially the same.

The Kentucky Supreme Court began its true venture into Federal Rules of Evidence territory in a second case dealing with expert testimony in 1976. In *Buckler v. Commonwealth* the court overruled all cases following the rule that a medical expert could not state an opinion based on information supplied by a third party, noting that both the trend and the federal rule were contrary to this view. Although not adopting the rule per se, the court quoted Federal Rule 703 and expressed its decision in similar language. Again, all contrary cases were overruled, thus representing a turning point in evidence law.

On April 15, 1977, the Kentucky Court of Appeals decided two cases in which it compared Kentucky evidence law to the federal rules, expressing favor toward the latter. In *Jones v. Heady* the court answered affirmatively the question whether an employee's alleged admission against the interest of his employer could be admitted into evidence where it concerned matters within the scope of his employment and where the statement was made contemporaneously with the event it described. Because it met the require-

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4. 520 S.W.2d 321 (Ky. 1975). The date of this decision was March 7, 1975. Public law 93-595, 88 Stat. 1926, consisting of the Federal Rules of Evidence had been approved January 2, 1975 and took effect 180 days later on July 1, 1975.
5. 520 S.W.2d at 323.
6. Id.
7. 541 S.W.2d 935 (Ky. 1976).
8. FED. R. EVID. 703 reads as follows: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing.
If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
9. 541 S.W.2d at 940.
10. Id.
ments of prior Kentucky law, the employee's statement was ad-
missible independent of any changes toward the federal rule. 
However, the fact that the court noted "a substantial trend favor-
ing admission of statements of employees related to a matter 
within the scope of employment" would seem to indicate its read-
iness to follow the more lenient Federal Rule 801 when the occa-
sion should arise.

In Motorists Mutual Insurance Company v. Hunt, also de-
cided April 15, 1977, the issue was whether a statement could be 
admitted under the declarations against interest exception to the 
hearsay rule where the declarant was unavailable rather than de-
ceased, as had been the case in all prior Kentucky law. The court 
determined it could be admitted, noting that its decision was con-
sistent with Federal Rule of Evidence 804(a)(5) and (b)(3). Al-
though the court of appeals avoided adopting the rule per se, the 
next Kentucky decision in which the federal rules were discussed 
offers support for the proposition that Federal Rule 804, in its en-
tirety, may become part of Kentucky evidence law.

12. The applicable rule in Kentucky is that "[t]he admissions of an agent are not compe-
tent evidence against his principal unless they relate to and are made in connection with 
some act done in the course of his agency so as to form part of the res gestae." Niles v. 
Steiden Stores, Inc., 301 Ky. 80, 83, 190 S.W.2d 876, 878 (1945) cited in R. LAWSON, KEN-
TUCKY EVIDENCE LAW HANDBOOK § 8.15 at 136 (1976).
13. 553 S.W.2d at 290.
14. Fed. R. Evid. 801(d)(2)(D) provides that "[a] statement is not hearsay if . . . [it] is 
offered against a party and is . . . a statement by his agent or servant concerning a matter 
within the scope of his agency or employment made during the existence of the relationship."
16. See, e.g., Evans v. Payne, 258 S.W.2d 919 (Ky. 1953); see also R. LAWSON, supra note 
12, at § 8.40.
17. Fed. R. Evid. 804 provides as follows: 
(a) Definition of unavailability. "Unavailability as a witness" includes situations in 
which the declarant —
(1) is exempted by ruling of the court on the ground of privilege from testify-
ing concerning the subject matter of his statement; or
(2) persists in refusing to testify concerning the subject matter of his state-
ment despite an order of the court to do so; or
(3) testifies to a lack of memory of the subject matter of his statement; or
(4) is unable to be present or to testify at the hearing because of death or 
then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of his statement has been 
unable to procure his attendance (or in the case of a hearsay exception under 
subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other 
reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of
In Maynard v. Commonwealth, decided seven months after Hunt and Jones v. Heady, the court of appeals acknowledged that although Kentucky courts had not adopted the federal rules in toto, they had adopted some of them. It then added, "[w]e see no reason why this court should not adopt Federal Rule 804 which adds but another group of exceptions to an already eroded hearsay rule." The supreme court did not respond to this suggestion but did expressly adopt Federal Rules 804(a) and 804(b)(3) in a decision rendered shortly after Maynard.

By 1978 the trend had thus become well established. After Maynard, the Kentucky Supreme Court followed suit with three more decisions favoring federal evidence law. In Lowery v. Commonwealth it was held that a prior consistent statement could be used to rehabilitate the testimony of a prosecution witness where defense cross-examination had discredited him by showing he had been drinking prior to taking the stand. Although his opinion for

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memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by the declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history . . .

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . .

19. Id. at 633.
20. See text accompanying note 23 infra.
21. 566 S.W.2d 750 (Ky. 1978).
the court was brief, Justice Lukowsky quoted the parallel federal rule and noted that it would compel the same result.22

Two months later, in July, 1978, in *Crawley v. Commonwealth*23 the supreme court expressly adopted Federal Rules 804(b)(3) and 804(a),24 providing a broader basis on which to apply the declarations against interest exception to the hearsay rule. As previously noted, the court of appeals had implied approval of the same rules in *Motorists Mutual Insurance Co. v. Hunt.*25 Prior to *Crawley*, Kentucky law had been clear that declarations against penal interest did not qualify under the declarations against interest rule.26 Acknowledging this, the court in *Crawley* went on to point out that a similar rule in Mississippi had been struck down by the United States Supreme Court as a violation of due process,27 and it thus took the precautionary measure of adopting the federal rule and overruling all Kentucky cases to the contrary.28

The next and most recent occasion on which the Kentucky Supreme Court has discussed the Federal Rules of Evidence was three weeks after its *Crawley* decision. In *Whorton v. Commonwealth,*29 Justice Lukowsky, in his now famous concurring opinion, expressed his view and perhaps the rationale behind the trend as follows:

I would end the conflict [between the federal and state systems] and equalize the position of the parties now by:

(2) Adopting the Federal Rules of Evidence in toto, at least for use in criminal cases.

This approach would insure that if the Supreme Court of the United States should reverse a Kentucky case on procedural grounds it would have to dine on a procedure, which it prepared and we could take comfort in the lament of the homemaker that the dullest food is that which you cook yourself.30

Justice Lukowsky, among others, has expressed the opinion that the present inclination of the court is toward review of the federal

22. *Id.*
23. 568 S.W.2d 927 (Ky. 1978).
24. *Id.* at 931; see note 17 *supra*.
25. See text accompanying notes 15-17 *supra*.
27. 568 S.W.2d at 930, (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)).
28. 568 S.W.2d at 931.
29. 570 S.W.2d 627 (Ky. 1978).
30. *Id.* at 635.
rules, albeit on an ad hoc basis rather than swallowing them whole. It has even been questioned whether the rule of *Cotton v. Commonwealth*, the single most significant conflict between Kentucky and federal evidence law, will remain standing in light of the apparent trend and the imminent departure of Justice Reed (who authored the *Cotton* opinion for a unanimous court) for the federal court of appeals. On this note, it is relevant to consider those areas in which Kentucky law is still at variance with the Federal Rules of Evidence and how adoption of the latter would effect substantial changes in Kentucky law.

**II. Areas in which Adoption of the Federal Rules Would Significantly Change Kentucky Evidence Law**

At present the most striking difference between federal and Kentucky evidence law is in the area of impeachment by prior felony convictions. This conflict alone merits considerable discussion, however, there are a number of other potential changes less significant but worthy of comment. Those discussed in this comment include admissibility of evidence of habit or routine practice, statements or admissions made during compromise or offers to compromise, character evidence offered by means of opinion, impeachment by prior bad acts, and the required foundation for evidence of prior inconsistent statements.

With respect to admissibility of evidence of habit or routine practice (also referred to as custom and usage), Kentucky is among the minority in ruling that such evidence as to a particular person is inadmissable. Only five other states make the distinction, as does Kentucky, that although evidence of general custom in a business or trade is admissable, evidence of an individual’s habit or tendency to act in a particular manner is not. Federal Rule 406, on the other hand, represents the majority view that any evidence

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32. 454 S.W.2d 698 (Ky. 1970).
33. See text accompanying notes 56-90 infra.
34. See R. Lawson, *supra* note 12, at § 2.25(A), (C). (Professor Lawson’s citation of the applicable case law is presently up to date with respect to the Kentucky position on evidence of habit and custom.)
of habit of an individual or organization may be admitted to prove conformity therewith on a particular occasion. Of course, Federal Rule 404(a) must be read in conjunction with Rule 406 on this point, since the former precludes use of evidence of character to prove a person acted in conformity therewith. This provision is consistent with Kentucky law.

Federal Rule 408, which pertains to compromise and offers to compromise, is a second subject on which Kentucky case law is directly contrary to the federal provisions. Kentucky, like the Federal Rule, follows the general rule that evidence of a compromise or settlement offer is inadmissible; however, Kentucky law does not exclude evidence of admissions made during compromise or settlement negotiations, as does Federal Rule 408. The federal rule's exclusion of such conduct or statements is contrary to what had been a widespread rule, but the addition of this provision was proposed by the United States Supreme Court in an effort to promote nonjudicial settlement of disputes. Thus, while it does not follow the federal rule, Kentucky is nevertheless in the majority as to this point.

Traditionally, rules governing admissibility of character evidence, a third significant point of difference between Kentucky

36. Fed. R. Evid. 406 provides as follows:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

37. Fed. R. Evid. 404(a) provides as follows: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . ." (exceptions omitted).


39. Fed. R. Evid. 408 provides as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

40. Elam v. Woolery, 258 S.W.2d 452, 453 (Ky. 1953).


and federal rules, have distinguished that which is offered by way of opinion from that which is based on the reputation of the person for a particular trait. The latter form of character evidence has been favored and is the only type admissible in Kentucky. Thus under existing Kentucky law, a witness may be questioned about the reputation of an individual, but he may not express an opinion as to the individual's character. Federal Rule of Evidence 608(a) does not distinguish between reputation and opinion evidence of character, although it does limit use of such evidence for impeachment purposes to "character for truthfulness or untruthfulness," a limitation also imposed in Kentucky.

Kentucky law also differs on a second point pertaining to character evidence, namely impeachment by evidence of prior bad acts or "specific instances of conduct." Under Federal Rule 608(b) a witness may be impeached by evidence of prior bad acts where such

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45. Borders v. Commonwealth, 252 Ky. 577, 67 S.W.2d 960 (1934); see also R. Lawson supra note 12, at § 4.15.
46. Fed. R. Evid. 608 provides as follows:
   (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
   (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.
47. Ky. R. Civ. P. 43.07 provides as follows:
   A witness may be impeached by any party, without regard to which party produced him, by contradictory evidence, by showing that he had made statements different from his present testimony, or by evidence that his general reputation for untruthfulness renders him unworthy of belief, but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of a felony.

This rule is made applicable to criminal cases by Ky. R. Crim. P. 13.04 and Shirley v. Commonwealth, 378 S.W.2d 816 (Ky. 1964).
48. See Fed. R. Evid. 608(b); notes 45, 46 supra.
conduct concerns his character for truthfulness or untruthfulness; whereas in Kentucky, "particular wrongful acts" are not the proper subject of impeachment of witnesses either by direct or cross examination. Although the federal rule represents the majority view, there is substantial support for the Kentucky approach to this type of impeachment.

A final area in which Kentucky law would be notably changed by adoption of the Federal Rules of Evidence is that of prior inconsistent statements—specifically, the requirements for laying a foundation for such evidence. Originally laid down in 1820, the rule which led to Kentucky’s current position was stated as follows: “If it be intended to bring the credit of a witness into question by proof of anything he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or no [sic] he has said or declared that which is intended to be proved.” The Kentucky rule set out in Civil Rule 43.08 represents the present majority view. Federal Rule 613(a), on the other hand, abolishes the requirement that a witness be shown the contents of the writing or statement prior to his impeachment. The obvious benefit of the federal rule is the opportunity for confrontation in order to show the intent of the witness to evade the effect of his previous statement. Much of this effect is mitigated by the requirement that a witness be shown the contents of the prior statement before he is

49. See note 46 supra.
50. See C. McCormick, supra note 44, ¶ 42.
52. Ky. R. Civ. P. 43.08 provides:

Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it. The court may allow such evidence to be introduced when it is impossible to comply with this rule because of the absence at the trial or hearing of the witness, sought to be contradicted, and when the court finds that the impeaching party has acted in good faith.

This rule is made applicable to criminal cases by Ky. R. Crim. P. 13.04 and Calmes v. Commonwealth, 304 Ky. 71, 199 S.W.2d 993 (1947).
54. Fed. R. Evid. 613(a) provides that “in examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.”
confronted. Since Rule 613(b) retains the safeguard that extrinsic evidence of a prior inconsistent statement may not be admitted "unless the witness is afforded an opportunity to explain or deny the same," it thus retains the confrontation value of the evidence without revoking the witness' opportunity to explain or deny his prior statement.

Each of these conflicts between federal and Kentucky evidence law represents a change that is likely to occur in the Commonwealth in light of Kentucky's present sentiment favoring the Federal Rules of Evidence. There remains one area, however, in which conflicts with the federal rule are so deeply ingrained in Kentucky law, and in which current decisions continue to reject the federal rule, that the ultimate result in Kentucky cannot reasonably be predicted. That area is impeachment by evidence of prior convictions, and the most significant aspects of the rule on which Kentucky law and the federal rule differ are the scope of the rule, the degree of remoteness permitted for admissible evidence, and the procedure by which admissibility is determined.

The present Kentucky rule as to impeachment by evidence of prior convictions was laid out in the landmark case of Cotton v. Commonwealth. In a unanimous opinion authored by Justice Reed, the court held that evidence of a prior conviction is admissible only if the following conditions are met:

1. the prior conviction must be a felony;
2. the offense must involve dishonesty, stealing or false swearing;
3. the probative value of the evidence must outweigh its prejudicial effect;
4. the age of the conviction must be taken into consideration in determining its probative value (however it is of no consequence in and of itself); and
5. a limited-purpose admonition must be given to the jury.

In addition, the court required that prior to the admission of any such evidence, a hearing must be held outside the presence of the jury to determine what, if any, evidence meets the above requirements. The Cotton rule was expanded in Bell v. Commonwealth which added the following points:

1. the defendant must decide whether or not he wants the iden-
tity of the felony disclosed;
(2) if he fails to request such disclosure, it is presumed that he prefers it not be identified; and
(3) this rule applies equally to defendants and other witnesses.

The federal position is set out in Federal Rule of Evidence 609 as follows:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment. (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.60

The most significant and controversial conflict between the present Kentucky and federal positions is in the scope of the rules, specifically, the kinds of prior convictions available for impeachment use. In Kentucky only those convictions which bear a direct relationship to credibility by having involved dishonesty or false statement may be used. Under the federal rule any felony convictions may be used, subject only to judicial discretion, and all offenses, whether felonies or misdemeanors, involving dishonesty or false statement are admissible for impeachment without regard to the trial court’s discretion.60 The scope of the general rule in subsection (a) is, of course, subject to the ten-year time limitation imposed in subsection (b).

Federal Rule 609(a) has a complex legislative history reflecting

59. FED. R. EVID. 609(a) & (b).
60. FED. R. EVID. 609(a). See H.R. REP. No. 1597, 93rd Cong., 2nd Sess. 9 (1974) (specifying that exclusion of crimen falsi is not within the discretion of the trial court).
the bitter controversy between what is now essentially the Ken-
tucky and federal positions, as well as more extreme positions
ranging from suggestions that all evidence of prior convictions be
excluded to approaches which would admit virtually all such evi-
dence. The Committee on the Judiciary had adopted the alterna-
tive permitting impeachment only by evidence of crimes involving
dishonesty or false statement; however, both the House and the
Senate preferred the version proposed by the United States Su-
preme Court, which is substantially like the present rule. The Ad-
visory Committee on the Rules of Evidence rejected the proposal
of the Committee on the Judiciary, “because most of the crimes
regarded as having a substantial impeaching effect would be ex-
cluded, resulting in virtually the same effect as if the alternative
allowing no prior convictions for impeachment purposes were
adopted.” The Advisory Committee also noted that because any
major crime “entail[s] substantial injury to and disregard of the
rights of other persons or the public,” the commission of any crime
involving “conduct in disregard of accepted patterns is translatable
into willingness to give false testimony.” Finally, it was argued
that if followed, the crimen falsi rule would be applied inconsist-
tently, with each jurisdiction having a different interpretation of
what constitutes dishonesty or false statement. This three prong
argument seems to be the rationale behind Federal Rule 609(a) in-
sofar as it differs from the Kentucky position.

Prior to its landmark Cotton decision, Kentucky’s position was
similar to Federal Rule 609 in that evidence of any felony convic-
tion could be used to impeach. This three prong argument seems
to be the rationale behind Federal Rule 609(a) insofar as it differs
from the Kentucky position.

61. 3 J. WEINSTEIN & M. BERGER, EVIDENCE, p. 609-2 to -55 (1978) [hereinafter cited as WEINSTEIN].
63. This position is derived from the common law rule that the conviction of any person of any “infamous crime” (treason, any felony, obstruction of justice or any misdemeanor involving dishonesty) rendered him incompetent as a witness. C. MCCORMICK, supra note 44, at § 43.
65. Id.
68. Id.
69. Id.
70. Cowan v. Commonwealth, 407 S.W.2d 695 (Ky. 1966); Ky. R. Civ. P. 43.07; Ky. R.
had, however, expressed dissatisfaction with the rule. In *Cowan v. Commonwealth,* 71 decided four years before *Cotton,* it stated:

Recognizing that no admonition can really assuage the prejudice that is done to a defendant on the merits of his case by disclosure of past felonies in the name of impugning his credibility, we are gravely troubled by the great latitude with which this courtroom device has come to be used in criminal trials. It is unnecessary and it is unfair. 72

The court went on to hold that although the rule of admissibility would remain, the prosecution would be limited to asking the defendant only whether he had been convicted of a felony, and could prove the record of conviction only if he denied it. 73 The *Cowan* decision was modified in *Cotton,* 74 in which the court, noting the above language of *Cowan,* stated its rationale for the present Kentucky position:

We said in *Cowan* and still declare that the device of admitting past felony convictions that are not actually related to the issue of credibility is unnecessary and is unfair.

... . . .

Under our modification of the *Cowan* rule . . . the true nature of the impeachment of the credibility of witnesses, including criminal defendants, will be preserved and promoted. The prosecution will not be unduly restricted. Prejudice to the defendant will be minimized and the nature of the evidence itself will coincide with the limited-purpose admonition given to the jury. The jury will not be expected to engage in mystical mental gymnastics. 75

It should be noted that one case in particular may have a stronger influence on both the federal and Kentucky rules with respect to impeachment by prior convictions than any other factor. *Luck v. United States* 76 was the first decision stressing the importance of judicial discretion in weighing certain factors determinative of admissibility. 77 The *Luck* doctrine of judicial discretion spread rapidly and eventually led to insertion of a clause in the

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*CRIM. P. 13.04.*

71. 407 S.W.2d 695 (Ky. 1966).
72. Id. at 698.
73. Id.
74. 454 S.W.2d 698 (Ky. 1970).
75. Id. at 701-02.
76. 348 F.2d 763 (D.C. Cir. 1965).
present federal rule permitting the trial judge to weigh probative value against prejudicial effect.\textsuperscript{78} Although \textit{Luck} was not cited in Kentucky's \textit{Cowan} or \textit{Cotton} decisions, in view of the timing of it, the fact that it spread quickly, and the importance of judicial discretion under Kentucky's present rule, it is likely that the doctrine influenced the discretion of the \textit{Cotton} provisions.

As noted above, the future of Federal Rule of Evidence 609 in Kentucky is highly speculative. Besides the vast difference in viewpoints as to which convictions should be available for impeachment, the two positions differ as to remoteness and the means by which admissibility is determined. The federal rule provides that no conviction more than ten years old may be used "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."\textsuperscript{79} Kentucky's position is that while the trial court must weigh the remoteness of a conviction in determining its probative value, the evidence will not be excluded solely because an arbitrarily determined number of years have passed since the offense.\textsuperscript{80} As for the determination of admissibility, in Kentucky a so-called "Cotton hearing" is required, while the federal rule makes no provision for an \textit{in camera} determination of admissibility.\textsuperscript{81} Thus under the federal rule, the prosecution could conceivably raise the question of a prior conviction which is later determined inadmissible, considerably prejudicing the defendant's case even though the evidence was not "admitted."

The Kentucky Supreme Court has, with the exception of one case, avoided comment on the conflicts between Federal Rule 609 and the pertinent Kentucky rules. In \textit{Commonwealth v. Duvall},\textsuperscript{82} a per curiam opinion, the trial court excluded evidence of a prior conviction because of a pending petition for rehearing. The supreme court refused to adopt Federal Rule 609(e)\textsuperscript{83} which would

\textsuperscript{78} Advisory Committee's Note to Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 270 (1972).
\textsuperscript{79} See text accompanying note 59 supra.
\textsuperscript{80} Cotton v. Commonwealth, 454 S.W.2d 698 (Ky. 1970).
\textsuperscript{81} Id. at 702; Burnett v. Commonwealth, 523 S.W.2d 229 (Ky. 1975); See \textit{Fed. R. Evid.} 609.
\textsuperscript{82} 548 S.W.2d 832 (Ky. 1977).
\textsuperscript{83} \textit{Fed. R. Evid.} 609(e) provides that "[t]he pendency of an appeal therefrom does not render evidence of a conviction inadmissable. Evidence of the pendency of an appeal is admissable."

have permitted use of the conviction notwithstanding the pending appeal, and it soundly upheld the 1926 Kentucky rule.\footnote{84}

The supreme court has declined comment altogether on any of the differences between the Cotton rule and Federal Rule 609(a) and (b). Only the court of appeals has discussed those differences; and its opinions, although approaching the subject, tend to vary, thus offering little guidance. In May, 1977 the court of appeals decided in Hardin v. Commonwealth\footnote{85} that a fifteen-year-old conviction for possession of burglary tools was properly admitted by the trial court for purposes of impeaching the defendant's only witness. The court specified that "a set number of years cannot be arbitrarily made" and that the "length of time since the conviction . . . goes only to its effectiveness as an impeachment not its admissibility."\footnote{86}

In a reported opinion directly contradicting Hardin, the court of appeals a year later expressed strong support for the federal provisions establishing a remoteness limitation. In Stiles v. Commonwealth\footnote{87} it declared that

practical considerations of fairness and relevancy demand that some boundary be recognized. This Court has neither the power nor the inclination to promulgate a binding rule in this respect but there should be a point whereat the probative value of the prior conviction regarding the person's credibility diminishes to a level where it should no longer be admissible . . . . [W]e consider the time period [of ten years] to be about the maximum.\footnote{88}

Because the court of appeals has since not only affirmed its Hardin decision\footnote{89} (as to the application of the Cotton rule), but also applied the remoteness standard of Cotton in other cases,\footnote{90} it cannot be considered a consistent proponent of change to the Cotton rule. Irrespective of its position, until the Supreme Court has spoken as to abandonment or modification of the existing rules, Cotton must be considered secure in Kentucky evidence law.

\footnotesize

84. The rule excluding evidence of prior convictions from which an appeal is pending was set out in Foure v. Commonwealth, 214 Ky. 620, 283 S.W. 958 (1926).
87. 570 S.W.2d 645 (Ky. App. 1978).
88. Id. at 649.
Conclusion

Adoption of the Federal Rules of Evidence will occur on an ad hoc basis, if at all, in Kentucky. The current movement of the supreme court toward review and, more often than not, adoption of the rules is a positive influence in the direction of the law of Kentucky. In most cases, review and adoption of the federal rules will serve to promote uniformity, whether by overruling prior decisions91 or codifying formerly piecemeal case law on which the Commonwealth and the federal rules are in substantial agreement.

The Kentucky Supreme Court's inclination to approach the rules in this manner will continue to provide it with the opportunity to accept, modify, or reject each rule rather than taking or leaving them en masse without detailed consideration. Under these circumstances, and upon consideration of the rationale behind Federal Rule 609(a), it should be obvious that in order to retain the basic premise of impeachment as an attack upon the credibility of the subject as a witness, the principles of Cotton must be retained. To expand the scope of impeachment by prior convictions to that of the federal rule is tantamount to eliminating the presumption of innocence for persons with one or more prior felony convictions. With respect to restrictions on remoteness, although in principle the federal rule's exclusion of felony convictions more than ten years old is a fair rule aimed at minimizing undue prejudice to the defendant or other witness, it is far preferable to substitute for this limitation the power of the trial judge to weigh the age of any conviction together with all other factors presented to him in determining its value. The decreased discretionary power in the trial judge under Federal Rule 609 (as compared with the Cotton rule), combined with the ten-year limit in 609(b) would most likely result in virtually automatic admission of those convictions less than ten years old, thus defeating the purpose of providing for judicial discretion at all.

The Kentucky Supreme Court's review of the Federal Rules of Evidence should continue, but with care to preserve those basic principles of Kentucky law which strike a better balance between the rights of all parties.

APRIL A. KESTEL

91. See text accompanying notes 34-55 supra.
COMPLEX CIVIL LITIGATION AND THE RIGHT TO TRIAL BY JURY

Introduction

Should a timely demand for trial by jury be sustained in complex civil litigation, such as modern antitrust actions which involve esoteric financial and scientific matters difficult for the lay juror to understand? While the antitrust cases serve best to illustrate the concept of complex civil litigation, the question of whether the seventh amendment right to trial by jury extends to complicated actions frequently arises whenever a case possesses one or more of the following characteristics: numerous parties, protracted trial, testimony of many witnesses, thousands of evidentiary documents, or highly technical legal and factual issues.

Since the 1970 Supreme Court decision in *Ross v. Bernhard*, the lower courts have become embroiled in controversy over the applicability of the seventh amendment to complex litigation. Some courts, including the United States Court of Appeals for the Sixth

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1. See, e.g., Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F.Supp. 889 (E.D.Pa. 1979), a massive antitrust case in which over two million documents, many requiring translation from Japanese to English, were expected to be introduced into evidence. Hundreds of foreign witnesses were expected to testify, posing substantial language problems. The trial was expected to last a minimum of one year. Furthermore, the subject matter of the action involved exceedingly complicated engineering and accounting concepts. Nevertheless, the court held that the right to trial by jury guaranteed by the seventh amendment could not be denied on the basis of complexity. See also *ILC Peripherals Leasing Corp. v. IBM*, 458 F.Supp. 423 (N.D.Cal. 1978), which reached the opposite conclusion on the seventh amendment question. *ILC* was an antitrust action charging monopolization in the computer industry involving principles of advanced computer technology and sophisticated financial concepts. The trial lasted five months. The parties called 87 witnesses whose testimony filled more than 19,000 pages of transcript. More than 2,300 exhibits were admitted into evidence. After deliberating for 19 days, the jury reported itself deadlocked, and the court declared a mistrial. The court then determined that retrial to a jury was not guaranteed by the seventh amendment because the case was “beyond the practical abilities and limitations of a jury.”

2. See Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 Harv. L. Rev. 898, 899 (1979) [hereinafter cited *Jury Trial*] (factors such as length of trial, number of parties, difficulty of issues, and magnitude of evidence may leave jurors unable either to comprehend the facts in evidence or to reason from them to a verdict). But see *In re United States Fin. Sec. Lit.*., 609 F.2d 411, 431 (9th Cir. 1979) (“No one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen jurors bring to bear on a case . . . .”); Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Tex. L. Rev. 47, 53 (1977) (“Apart from the occasional situation in which a judge possesses unique training, . . . the assumption that a jury collectively has less ability to comprehend complex material than does a single judge is an unjustified conclusion.”).

NORTHERN KENTUCKY LAW REVIEW

Circuit, have interpreted the Ross decision to permit denial of a timely jury demand where the judge determines a case is too complicated for a jury to understand. Other courts, which have been more circumspect in their analysis of Ross, have either questioned or flatly rejected the notion of limiting jury trials to only noncomplex cases.

This comment will seek to show that the seventh amendment right to trial by jury is preserved in complex civil actions. Part one will set forth the traditional analytical framework employed by the Supreme Court in its treatment of seventh amendment questions. Part two will establish that under the traditional "historical test" the right to trial by jury is preserved in complex civil litigation. Part three will explore the continued vitality of the "historical test" after the merger of law and equity under the Federal Rules of Civil Procedure. Finally, part four will analyze the recent seventh amendment decisions of the Supreme Court which reaffirm the Court's adherence to the "historical test."

I. The Historical Test

The seventh amendment provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." In analyzing the scope of the seventh amendment, the distinction between suits at common law and suits at equity is of paramount importance because of the analytical framework employed by the Supreme Court in treating seventh amendment questions, often termed the "historical test." The historical test identifies the extent to which the right to a jury trial is "preserved" in civil actions by focusing on the practice of the English courts in 1791 when the seventh amendment was adopted. In 1791, the prevailing English practice provided a jury

6. U.S. CONST. AMEND. VII.
8. Id. at 641-42. See also Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Curtis v. Loether, 415 U.S. 189, 193 (1974); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1932) ("The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted.").
trial in common law actions, whereas suits in equity were normally tried to the court.\(^9\)

In determining the availability *vel non* of the right to trial by jury in post 1791 cases, the traditional approach has been to analogize the right of action to its historical counterpart at law or equity, unless Congress has specifically prescribed the method of trial.\(^10\) Thus, the historical test guarantees the availability of a jury trial of actions which are of a "traditionally legal" character.\(^11\) The historical test does not, however, imply that considerations of the complexity of a lawsuit may be taken into account in making the required analogy.

II. Complexity at Common Law

Some courts and commentators contend that the historical test recognized the inadequacy of juries in complex civil litigation by allowing the parties of an action to seek equity jurisdiction when a case presented complicated factual and legal issues.\(^12\) In essence, the critics of the right to trial by jury in complex civil litigation argue that the seventh amendment was intended to apply only to non-complex cases of reasonably short duration.

At the time of the ratification of the seventh amendment, the context in which considerations of complexity most frequently arose was the action for an accounting.\(^13\) In such cases, the jurisdiction of a court of equity was often sustained even though the matter was cognizable at law, because the complicated nature of the accounts between the parties constituted a sufficient ground for going into equity.\(^14\)

Those cases in which resort to equity was based on the complexity of the accounts fell within the concurrent jurisdiction of law and equity.\(^15\) Thus a plaintiff asserting a complicated legal claim had the choice of bringing such a suit at equity for a bench trial or

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at law for trial to a jury. If the plaintiff chose to bring such an action at law, neither the court nor the defendant could have the case transferred to equity, no matter how complex the accounts involved. Thus the right to trial by jury was preserved in a complex case if the plaintiff chose to avail himself of that right.

The existence of the concurrent jurisdiction of equity in matters of accounting rested on the exclusive power of the equity courts to compel discovery and provide specific remedies unavailable at law, not upon the inability of the jury to understand the matter being presented. Whether the action was maintained at law or in equity, a court-appointed master did the actual computations, not the court or the jury.

The sine qua non of equity jurisdiction has always been the absence of an adequate remedy at law. However, in United States v. Bitter Root Development Co., the Supreme Court specifically rejected the argument that equity jurisdiction could be invoked on the basis of complicated facts to deny a party's demand for a jury trial of its legal claims. In Bitter Root, equity jurisdiction was sought on the ground that the complicated nature of the alleged frauds and conspiracies rendered any remedy at law inadequate. The Court held that whatever difficulties the complexity of the case might pose for the plaintiff, such did not in the least tend to give a court of equity jurisdiction.

Thus, there is strong evidence that the complexity of a case never constituted a sufficient ground for denying a jury trial at common law. While it is true that the concurrent jurisdiction of

17. 2 J. Story, Story's Equity Jurisprudence § 581 at 2 (14th ed. 1918).
18. Id. §§ 578, 590.
21. 200 U.S. 451, 472-73 (1906); see Curriden v. Middleton, 232 U.S. 633, 636 (1914) ("mere complication of facts . . . and difficulty of proof are not a basis of equity jurisdiction").
22. 200 U.S. at 472-73.
23. More recently, a court concluded after thoroughly surveying early complex cases in the United States and England that "as a matter of actual historical practice, matters cognizable at law were tried to juries in the courts of common law, regardless of complexity." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F.Supp. 889, 918 (E.D.Pa. 1979). Moreover, there is evidence that the English recognized the difficulty of a large and complex matters
law and equity in many complex cases provided plaintiffs with a choice between a jury trial at law and a bench trial in equity, the existence of this choice in no way impaired a plaintiff's seventh amendment rights.

III. Complexity After The Federal Rules

With the merger of law and equity in 1938 under the Federal Rules of Civil Procedure, application of the historical test became increasingly difficult. Particularly troublesome were the liberal joinder provisions and the sometimes mandatory counter-claim provisions of the federal rules which often mandated combining legal and equitable causes in a single suit, thus making it difficult to decide whether the legal or equitable claim should be tried first. The Supreme Court resolved the problem in Beacon Theatres, Inc. v. Westover and Dairy Queen Inc. v. Wood in favor of trying the legal issues first, thereby preventing the possible infringement of seventh amendment rights by operation of the doctrine of collateral estoppel.

Beacon Theatres and Dairy Queen require a court, before depriving a party of the right to jury trial by prior adjudication of an equitable claim, to determine whether any device is available, including any of the procedural innovations of the federal rules, that will permit prior trial by jury. Contrary to the views of one commentator, the Court's reference to such procedural innovations signaled no infidelity to the historical test. Rather, the expansion of the right to trial by jury under Beacon Theatres and Dairy Queen is consistent with the historical test, which merely prohibits

for ordinary juries, and found a solution not in equity, but in the "special jury." See Thayer, The Jury and Its Development, 5 Harv. L. Rev. 295, 301 (1892).

29. 369 U.S. 469, 472-73 (1962). The Court restated the rule of Beacon Theatres and Dairy Queen several years later: "Where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims." Ross v. Bernhard, 396 U.S. 531, 537-38 (1970).
30. Wolfram, supra note 7, at 644.
31. Jury Trial, supra note 2, at 901 (arguing that Beacon Theatres and Dairy Queen adopted a "dynamic" approach to seventh amendment analysis).
32. Wolfram, supra note 7, at 643.
any contraction of the jury trial right to limits narrower than those “preserved” by the seventh amendment. 33

IV. Complexity and Ross v. Bernhard

It has been argued that the Supreme Court’s strict adherence to the historical test was abrogated in part by the 1970 decision of Ross v. Bernhard. 34 This contention is grounded in an erroneous interpretation of Ross, which characterizes the Court’s reference therein to “the practical abilities and limitations of juries” 35 as a test, presumably of constitutional dimension, for denying the right to trial by jury in complex civil litigation. 36

In Ross, the Supreme Court held that the merger of law and equity under the federal rules removed the procedural barriers to trial by jury of a legal claim in a shareholder’s derivative action, formerly cognizable only in equity. 37 To reach this result, the Court drew from Beacon Theatres and Dairy Queen the rule that “[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.” 38 The Court then added the following footnote:

As our cases indicate, the “legal” nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply. 39

This “nature of the issue” approach formally adopted by Ross had its genesis in Beacon Theatres and Dairy Queen. 40 Developed as a response to the jury trial problems created by the merger of law and equity, it represents an expression of the federal policy of

34. 396 U.S. 531 (1970); see cases cited note 4 supra.
35. Ross, 396 U.S. at 538 n.10 (dictum).
36. See Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F.Supp. at 926: “[T]he Ross footnote may not be read as requiring or permitting the consideration of the practical abilities and limitations of juries in determining whether the constitutional right to trial by jury extends to matters committed by Congress or the common law to federal district courts.”
37. 396 U.S. at 538.
39. Id. at 538 n.10 (dictum).
protecting the right to jury trial. Furthermore, the "nature of the issue" approach is consistent with the historical test which also requires a determination of the legal or equitable nature of the claims asserted in an action.

Nevertheless, some courts and commentators maintain that the Ross Court's tripartite schema for determining the legal nature of an issue signals either a retreat from or modification of the historical approach. While the first two prongs of the Ross "test" - the first requiring examination of the "pre-merger custom" with reference to the legal versus equitable question and the second requiring determination of the legal or equitable nature of the remedy sought - are consistent with the historical test, critics argue that the third prong is a limitation on the scope of the seventh amendment. Thus, it is contended, the "practical abilities and limitations of juries" may serve as a basis for denying a jury demand in a complicated civil action.

Although such an interpretation of the Ross footnote may seem plausible, neither Ross itself nor subsequent Supreme Court decisions support this view. The most cogent reason for rejecting the characterization of the Ross footnote as a constitutional test is the Supreme Court's failure to recognize it as such, despite many opportunities to do so. In Ross, the argument that the case was too complex for the jury was raised at every level. However, the Ross Court granted the petitioner's demand for trial by jury and made no mention of the complexity argument in its decision on the mer-

42. See note 4 supra; Jury Trial, supra note 2.
43. Id.
46. See Ross v. Bernhard, 275 F.Supp. 569, 570 (S.D.N.Y. 1967), rev'd on other grounds, 403 F.2d 909, 915 (2d Cir. 1968), rev'd on other grounds, 396 U.S. 531 (1970). The respondents in Ross contended in their brief opposing the petition for certiorari that the case was unsuitable for a jury because "a precise and obviously difficult measurement of claimed disadvantage" to the corporation would be required for "each of many thousands of transactions." Respondents' Brief in Opposition to Petition for Writ of Certiorari, at 6-7. The respondents argued that Dairy Queen described a general exception to the seventh amendment and that Ross fell within it. See id.; Brief for Respondents, at 17-19. The petitioners in Ross did not dispute the respondents' position that some cases were too complex for juries, but argued instead that Ross was not the "rare case" referred to in Dairy Queen. See Brief for Petitioners at 18; Reply Brief for Petitioners at 10-12.
its. The omission of any discussion of the jury's ability to deal with the complex issues presented in Ross strongly indicates that the Court did not deem it relevant to the seventh amendment question therein.

Similarly, in Curtis v. Loether, the Court omitted any discussion of the Ross "test" even though the complexity issue was treated extensively by the court of appeals. The Court held that "[t]he Seventh Amendment . . . requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." Utilizing the historical test, the Court found that trial by jury must be available because the civil rights action in Curtis was analogous to common law torts, and because the remedy sought - actual and punitive damages - was a traditionally legal remedy. Thus, Curtis represents at least a sub silento rejection of the Ross schema as a constitutional limitation of the seventh amendment.

Later in the same term, the Court decided Pernell v. Southall Realty solely on the basis of the historical test. In determining that the seventh amendment required a jury trial of actions under the District of Columbia's summary procedure for evictions, the Court concluded that the seventh amendment guarantees "trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty."

The Court has reaffirmed its adherence to the historical test in its most recent seventh amendment decisions. For example, in its 1979 decision of Parklane Hosiery Co. v. Shore, the Court held that the use of offensive collateral estoppel by a plaintiff, predicated on a prior suit brought by the Securities and Exchange Co-

47. See Ross v. Bernhard, 396 U.S. at 538, 542.
52. Id. at 195.
53. Id. at 196.
56. Id. at 374-75.
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mission, would not violate the seventh amendment. In reaching this decision the Court looked to the common law of 1791, and found that a litigant was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity.\(^{58}\) Thus, instead of using the \textit{Ross} criteria as a constitutional test for seventh amendment questions, the Court's decisions subsequent to \textit{Ross} have reaffirmed the continuing validity of the historical approach.\(^{59}\)

In light of the Court's continued adherence to the historical test for defining the scope of the seventh amendment, it is unlikely that the \textit{Ross} footnote was intended to announce a new rule of constitutional magnitude.\(^{60}\) For just such reasons, one commentator has written that "the footnote is so cursory, conclusory and devoid of cited authority or reasoned analysis that it is difficult to believe it could have been intended to reject such established historical practice or Supreme Court precedent."\(^{61}\) Because the \textit{Ross} Court's mention of the "practical abilities and limitations of juries" was without any citation to authority and did not relate to any specific point addressed in the opinion, there can be only speculation as to its source.\(^{62}\) This uncertainty has caused one court to

\(^{58}\) \textit{Id.} at 333.
\(^{59}\) \textit{In re United States Fin. Sec. Lit.}, 609 F.2d 411, 425-26 (9th Cir. 1979):
While the Supreme Court has never specifically repudiated the third factor in the \textit{Ross} footnote, it has never met with general acceptance by the courts. In the \textit{Ross} decision itself, the Court did not consider the practical abilities and limitations of juries. And, although the Supreme Court has considered the Seventh Amendment question in depth on at least five occasions since \textit{Ross}, the abilities of juries have never been considered.


\(^{60}\) "After employing an historical test for almost two hundred years, it is doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote." \textit{In re United States Fin. Sec. Lit.}, 609 F.2d at 425 (footnote omitted).


\(^{62}\) The only explanation for the dictum which finds support in any holding of the Supreme Court, relates the reference to the "practical abilities and limitations of juries" to the Court's decisions dealing with the well-established "public rights" and "statutory proceedings" exceptions to the seventh amendment. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F.Supp. at 929-30. \textit{See}, e.g., Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1972); Katchen v. Landy, 382 U.S. 323 (1966). The Zenith court noted that \textit{Katchen} and \textit{Atlas Roofing} focused on the functional justifications for denying the jury trial right in congressionally created administrative proceedings and specialized courts of equity. Zenith, 478 F.Supp. at 930. The \textit{Zenith} court considered it likely, inasmuch as Justice White authored the opinions in both of these cases as well as in \textit{Ross}, that the "practical abilities and limita-
conclude that regardless of its origin, the *Ross* dictum cannot be construed, on the basis of mere speculation, as a general test for the right to jury trial.⁶³

From a practical standpoint, a seventh amendment standard based on complexity would be extraordinarily difficult to apply.⁶⁴ Since there are no guidelines in *Ross* to say how complex a case must be before a jury demand may be struck, courts would be forced to utilize a case-by-case approach yielding inconsistent and erroneous decisions. Such an approach would be a major departure from the settled method of analysis used by the Court in its seventh amendment decisions, both before and after *Ross*.⁶⁵ In such decisions, the Court has either indicated or clearly assumed that the standards set forth apply to all seventh amendment cases.⁶⁶

Furthermore, the concept of rejecting a demand for jury trial on the basis of the size and complexity of the litigation necessarily implies that a court would look to the case as a whole in deciding whether the factual and legal issues are beyond the competency of the jury. But this approach flies in the face of *Ross* itself,⁶⁷ which emphasizes that "[t]he Seventh Amendment question depends upon the nature of the issue to be tried rather than the character of the overall action."⁶⁸ Thus, the characterization of the Court’s reference to "the practical abilities and limitations of juries" as a constitutional test for limiting the scope of the seventh amendment is fundamentally inconsistent with the "nature of the issue" approach.

**Conclusion**

While it is true that such factors as length of trial and complexity of issues may present special problems for the trier of fact, whether judge or jury, neither the Supreme Court nor Congress has indicated that such considerations may be invoked to deny the seventh amendment right to trial by jury in civil actions. The Supreme Court has strictly adhered to the fundamental tenet of the

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64. *In re* United States Fin. Sec. Lit., 609 F.2d at 432.
67. *See In re* United States Fin. Sec. Lit., 609 F.2d at 426.
historical test that the right to trial by jury may not be denied in a
civil action in which legal claims are asserted. Under the historical
test, the complicated nature of a case was never a sufficient ground
on which to deny the right to jury trial. The Court's reference to
the "practical abilities and limitations of juries" in a footnote to its
Ross decision was never intended to undermine the Court's adher-
ence to the historical test. This is shown by the Court's seventh
amendment decisions subsequent to Ross which have unanimously
reaffirmed the validity of the historical test and made no reference
to the Ross dictum.

Daniel P. Mecklenborg
NOTES


I. Introduction

An employer is prohibited from discharging, disciplining, or otherwise discriminating against an employee who reasonably refuses to perform normal job activities because of alleged safety and health hazards. There are several prerequisites, however, before this protection attaches:

(1) a reasonable man, under the circumstances then confronting the employee, would conclude that there exists a real danger of death or serious injury arising from a hazardous condition at the workplace;
(2) the employee is taking the action in good faith;
(3) the employee has no reasonable alternative;
(4) the employee, where possible, notifies his employer of the hazardous condition and is unable to obtain a correction of the condition; and
(5) the urgency of the situation makes normal enforcement channels inadequate.1

In Whirlpool Corp. v. Marshall,2 the employer challenged the

* This casenote was originally prepared as a comment on the Sixth Circuit’s decision in Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979). However, publication was unavoidably delayed, since the Supreme Court rendered its decision on February 26, 1980, 445 U.S. 1. This casenote has been modified to reflect that decision. As a result the issues are presented as a conflict between the Sixth Circuit’s decision in Whirlpool and Marshall v. Daniel Constr. Co., 563 F.2d 707 (6th Cir. 1977), cert. denied, 439 U.S. 880 (1978).
2. Whirlpool Corp. v. Marshall, 593 F.2d 715 (6th Cir. 1979), aff’d 445 U.S. 1 (1980), is a consolidated case reported below as Usery v. Whirlpool Corp., 416 F.Supp. 30 (N.D. Ohio 1976); Brennan v. Empire-Detroit Steel Div., Detroit Steel Corp., No. C-1-74-345 (S.D. Ohio); and Brennan v. Diamond Int’l Corp., 5 O.S.H.C. (BNA) 1049 (S.D. Ohio 1976), appeal dismissed, No. 76-2139 (6th Cir. April 1977) (on motion of the Secretary of Labor). In Whirlpool the court determined the regulation was invalid after holding an evidentiary hearing in which the court held the complaint was factually correct. In Detroit Steel the district court dismissed the complaint holding that it failed to state a claim upon which relief could be granted.
validity of the Secretary of Labor (hereinafter referred to as the Secretary) implying such a right exists based on the language of section 11(c)(1) of the Occupational Safety and Health Act of 1970\(^3\) (hereinafter referred to as the OSH Act or the Act). The Supreme Court's unanimous decision held that the interpretation was a valid exercise of the Secretary's broad rulemaking authority and was consistent with the Act and not inconsistent with the intent of Congress.\(^4\)

The question arose when Whirlpool, a household appliance manufacturer, disciplined two maintenance employees who refused to perform normal maintenance tasks on guard screens at its Marion, Ohio, plant. These screens consisted of 16-gauge steel mesh panels and were positioned directly beneath the overhead conveyors used to transport appliance components throughout the plant.\(^5\) In order to perform all of their duties, the maintenance employees found it necessary to step directly onto the screens. Over a period of time several accidents occurred where workers fell partially or completely through the mesh panels. On June 28, 1974, a worker fell completely through to the plant floor below resulting in his death.\(^6\)

Throughout this period the maintenance employees frequently complained to their foreman about the unsafe working conditions, but they were never completely satisfied that Whirlpool's response was sufficient.\(^7\) On July 9, 1974, two men complained directly to the plant's Safety Director and requested the telephone number of the local OSHA office. The following night these men were instructed to clean an area of screen which they had previously pointed out as containing hazardous areas. Both employees refused; they were issued written reprimands and sent home without pay.

The district court subsequently found that the job of cleaning guard screens did in fact present an imminent danger of death or

\(^4\) 445 U.S. 1, 21-22 (1980).
\(^5\) Since late 1973, Whirlpool had been gradually replacing the thirteen miles of guard screens in the plant with heavier mesh. 593 F.2d at 719.
\(^6\) The resultant general duty clause citation was contested for nearly five years before the Occupational Safety and Health Review Commission affirmed the citation. Secretary of Labor v. Whirlpool Corp., 7 O.S.H.C. (BNA) 1356 (May 11, 1979), [1979] 3 CCH Empl. Safety & Health Guide ¶ 23,552 (May 11, 1979). A petition to review that decision is pending in the United States Court of Appeals for the District of Columbia Circuit.
\(^7\) The response consisted of issuing a general order to start cleaning the screens without walking on them by standing on power raised mobile platforms and using hooks to recover the material. 446 U.S. at 6.
serious bodily harm. Nonetheless, it denied relief holding that the Secretary's regulation was inconsistent with the Act and therefore invalid.  

II. Background of 29 C.F.R. § 1977.12(b)(2) (1973)

Congress has declared that "the purpose and policy" of the OSH Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve human resources." To further this goal every employer engaged in a business affecting interstate commerce is required to furnish his employees a place of employment free from recognized hazards likely to cause death or serious physical harm and to comply with OSHA standards. In addition, active employee participation is fostered under Section 11(c)(1) which provides: "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted any proceeding under . . . this Act or has testified . . . in any proceeding or because of the exercise by such employee . . . of any right afforded by this Act." Employees are afforded a wide range of substantive and procedural rights under the OSH Act. They also are said to have separate but dependent responsibilities to comply with OSHA standards, but the courts have placed the responsibility for employee compliance squarely on the employer's shoulders.

The OSH Act distinguishes between "recognized hazards" and "imminent dangers" and provides special relief for employees faced with the latter. Imminent dangers are those "conditions or practices in any place of employment which are such that the danger exists which could reasonably be expected to cause death or

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serious physical harm immediately or before the imminence of such danger can be eliminated through [normal] enforcement procedures.\textsuperscript{16} When this occurs the employee may notify the Secretary who will determine if there are reasonable grounds to believe that such a danger exists. An inspection will then be made as soon as practicable. If the inspector determines that an imminent danger does in fact exist, he must inform the affected employees and employer and seek voluntary abatement. If that fails he will recommend that the Secretary bring suit. The Secretary may then seek injunctive relief or a temporary restraining order pending other enforcement proceedings.\textsuperscript{17}

Under the statute, an employee who is faced with an imminent danger on the job may stop work and telephone the local OSHA office. However, if he refuses to resume his work until an inspection is made, he may be discharged. To remedy this and numerous similar situations, the Secretary determined that if the general statutory purpose was to be meaningfully fulfilled then “[c]ertain other rights exist by necessary implication.”\textsuperscript{18} Among these is the worker’s right, “when . . . confronted with the choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace,” to refuse that assignment.\textsuperscript{19} The Secretary found that when this implied right was exercised the employee was protected from employer retaliation under section 11(c)(1)’s “any right afforded by this Act” provision.\textsuperscript{20}

III. The Conflict in Circuits

When the Sixth Circuit heard this case on appeal, there had already developed a conflict among the courts as to the validity of the Secretary’s interpretation. The courts which had considered the issue were about evenly split.\textsuperscript{21} The Sixth Circuit had no prob-

\textsuperscript{18} 29 C.F.R. § 1977.12(a) (1973); Brief for Secretary at 21.
lem in upholding the authority of the Secretary to issue this interpretation. However, due to the contrary holdings in the Fifth and Tenth Circuits, it took pains to address each of the opposing arguments.

The Sixth Circuit's initial premise was that so long as an administrative officer's exercise of delegated rulemaking power is reasonable,\(^22\) and properly promulgated,\(^23\) the resulting regulation is presumed valid.\(^24\) In addition, the court "need not find that [the administrative officer's] construction is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings."\(^25\) This need for a broad construction is most apparent in the imminent danger situation where statutory gaps may leave the employee totally exposed when he is most in need of its protection. The court stated that the Act would be stripped of its efficacy through employee intimidation unless its prohibition of employer retaliation is broadly construed.\(^26\) The Sixth Circuit found both the presence of the requisite elements and the absence of substantial countervailing considerations. It held that the interpretation by the Secretary is consistent with the purpose and statutory scheme of the Act and performs a vital function in rounding out the Act's enforcement provisions.\(^27\)

Without questioning the Sixth Circuit's basic premise, several courts held the regulation invalid by relying on the principle that an interpretation which is inconsistent with the legislative history of an act cannot stand.\(^28\) The most thoroughly considered of these opposing opinions is *Marshall v. Daniel Construction Co.*\(^29\) In that case the appellee employed Jimmy Simpson as an ironworker to connect structural steel in the construction of a tall building. This job required fitting into place heavy steel beams with the aid of a crane. One windy day while Simpson was working 150 feet above

\(^{22}\) See Langer Roofing & Sheet Metal, Inc. v. Secretary of Labor, 524 F.2d 1337, 1338-39 (7th Cir. 1975).


\(^{24}\) See, e.g., Lilly v. Grand Trunk Ry., 317 U.S. 481 (1943); Freeman Coal Mining Co. v. Interior Bd. of Mine Op. Appeals, 504 F.2d 741, 744 (7th Cir. 1974).

\(^{25}\) Udall v. Tallman, 380 U.S. 1, 16 (1965).

\(^{26}\) 593 F.2d at 722-23.

\(^{27}\) Id. at 723, 726.


\(^{29}\) 563 F.2d 707 (5th Cir. 1977), cert. denied, 439 U.S. 880 (1978) (2-1 decision).
ground, the wind grew so strong that it imperiled his life. He and
the rest of the crew came down from the structure. Simpson was
ordered to return to work; he refused and was fired.30 The Fifth
Circuit did not reach the merits of this case because it held that
two series of events which occurred during Congress’ considera-
tion of the OSH Act expressed a congressional intent inapposite to the
Secretary’s interpretation.31

The first series began when a bill sponsored by Congressman
Daniels of New Jersey dealing with safe and healthful working con-
ditions was reported to the House.32 It contained a subsection
which allowed employees to absent themselves with pay from a
risk of exposure to toxic or harmful substances unless the employer
provided adequate protective equipment and information as to
long-term effects of exposure. However, this refusal must have
been preceded by (1) the Secretary’s determination that such sub-
stances in concentrations found in the workplace were potentially
toxic, (2) notification to the affected employees and employer, and
(3) no compliance by the employer for six months.33 The bill was
quickly labeled as guaranteeing the right to “strike with pay.”34
This label proved so unpopular that later offers by Congressman
Daniels to amend this provision could not save the bill. Instead,
the House adopted an alternate bill offered by Congressman Stei-
ger of Wisconsin which contained no such provision.35

A different bill sponsored by Senator Williams of New Jersey
passed in the Senate.36 During the legislative proceedings he
remarked:

I should add despite some widespread contentions to the contrary,

30. Id. at 717 (Wisdom, J., dissenting).
34. 563 F.2d at 712. The Whirlpool court did not consider the numerous amendments proposed by Congressman Daniels, because they were never acted upon by Congress. Id. at 728, n.23.
that the committee bill does not contain a so-called strike-with-pay provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation [when the employee believes that a present condition or practice creates an imminent danger].

In the conference committee the House acceded to the approach of the Williams bill. From these events the Daniels Construction court concluded that Congress intended that the right to request special inspections be given employees in lieu of the right to absent themselves from the danger with pay.

The second principal series of events also began with Congressman Daniels' bill. It permitted the Secretary to issue a five day order, which could be extended by the district court, prohibiting the employment or presence of any individuals in locations where an imminent danger had been determined to exist. This was defeated by the House. Instead, it passed the substitute Steiger bill which only permitted the Secretary to petition the courts for injunctive relief. In the Senate, the Williams bill permitted an inspector to issue seventy-two hour administrative restraining orders if a high Labor Department official concurred. The conference committee followed the Steiger approach and recommended that the issuing of restraining orders be left entirely in the hands of the courts.

The Daniels Construction court determined that since Congress deliberately withheld from OSHA inspectors the power to deter-

37. 119 CONG. REC. 37326 (1970), reprinted in LEGISLATIVE HISTORY, supra note 32 at 416.
39. 563 F.2d at 713.
mine in fact that an imminent danger exists and to issue an administrative stop work order, the Secretary could not give the equivalent of the same power to employees. They reasoned that an employee walk off is subject to the same abuses and would accomplish the same result Congress wished to avoid.\textsuperscript{44}

The Sixth Circuit addressed these arguments by noting, as to the first point, that Congressman Daniels' bill dealt exclusively with the threat of toxic substances. Even with this restriction, an employee could not walk off the job with pay unless the Secretary had previously certified the substance as toxic and the employer had not taken the necessary steps within six months. Further, the court noted that the concern of Congress was specifically aimed at workers walking off the job \textit{with pay}.\textsuperscript{46} This is evidenced by the absence of any discussion of such a refusal without pay and by the constant labeling of the subsection as a "strike with pay" provision. The court decided that the issue presented by the Secretary's interpretation was never addressed by Congress and in any event that the Daniels bill was never viewed as the equivalent of this regulation which protects workers in all imminent danger situations.\textsuperscript{46}

The Sixth Circuit also felt that the defeat of the stop work provision was misinterpreted by the Fifth Circuit. What Congress feared was arbitrary governmental authority to force an employer to take certain actions or to close all or part of a plant;\textsuperscript{47} that the inspector could become a pawn in a labor dispute;\textsuperscript{48} that it may unconstitutionally deprive an employer of due process;\textsuperscript{49} and that the bills imposed only minimal curbs to protect against the arbitrary inspector.\textsuperscript{50} In contrast, the court said the Secretary's interpretation does not grant the employee the power to affirmatively order changes; the employee's fear must subsequently be found valid under a "reasonable man under the circumstances" test; and

\textsuperscript{44} 563 F.2d at 714-15.
\textsuperscript{46} Id. at 726-31.
\textsuperscript{47} Id. at 734 n.46, \textit{citing} 116 Cong. Rec. 37338, \textit{reprinted in} LEGISLATIVE HISTORY at 425 (Sen. Dominick).
\textsuperscript{48} Id. at 734-35, n.47 \textit{citing} H.R. REP. No. 1291, 91st Cong., 2d Sess. 56, \textit{reprinted in} LEGISLATIVE HISTORY at 886 (minority views).
\textsuperscript{49} Id. at 734 n.46 \textit{citing} 116 Cong. Rec. 37602 (1970), \textit{reprinted in} LEGISLATIVE HISTORY at 453 (Sen. Schweiker).
\textsuperscript{50} Id.
if no alternate work is available, the employee loses his pay. The *Whirlpool* court concluded that allowing employees to reasonably refuse to subject themselves to imminent dangers is not the same abuse Congress feared, because the Secretary has carefully restricted the exercise of this right.51

On the whole, the Sixth Circuit felt that had Congress originally considered the issue, there is ample evidence it would have affirmed the Secretary’s interpretation.82

IV. The Decision of the Supreme Court in *Whirlpool*

The classic test for construing administrative interpretations under an act is stated in *Skidmore v. Swift & Co.*53 There, the Supreme Court said:

> the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experienced and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgement in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.64

In *Whirlpool* the Supreme Court was persuaded. Its unanimous decision came down upholding the validity of the interpretations and affirmed the Sixth Circuit in all relevant aspects.

The court viewed the regulation as limited to those “few instances” which will “probably not often occur” when the Act’s express provisions for dealing with imminent dangers cannot be actuated in sufficient time to protect the employees.66 Despite the numerous legislative comments on the imminent danger provision, the Court felt that there was in fact “legislative silence” in this interpretation’s more limited setting. The interpretation does not vary the Act’s express provisions. It merely interprets the Act by filling the gap which occurs when even those expedited procedures are inadequate.66

51. *Id.* at 734.
52. *Id.* at 734-35.
54. 323 U.S. at 140.
55. 445 U.S. at 10.
56. *Id.* at 11.
Instead, the Court said that this regulation should be viewed in the context of the whole Act’s overriding purpose and remedial scheme. It is clearly in step with the OSH Act’s purpose to assure “safe and healthful working conditions and to preserve human resources.” It is also an appropriate aid to the employer’s “general duty” to furnish “a place of employment . . . free from recognized hazards that . . . are likely to cause death or serious physical harm.” In addition, the legislation’s basic purpose is remedial in orientation and prophylactic in nature. In this setting, the Court said “[i]t would seem anomalous to construe an Act so directed and constructed as prohibiting an employee, with no reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.”57 This conclusion is strengthened by the reality that OSHA inspectors cannot be present around the clock in every workplace to insure that employees enjoy all rights afforded them by the Act.

The Court also noted that the language in the OSH Act’s anti-discrimination clause is nearly identical to the parallel provision in the Federal Mine Safety and Health Amendments Act of 1977.58 In the latter, Congress specifically considered the possibility of employees refusing to perform dangerous tasks. The committee report stated:

[t]he Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints seeking inspection . . . or the participation in mine inspections . . ., but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violations of the Act or any standard promulgated thereunder.59

Normally, where statutory language has a counterpart in other legislation dealing with the same subject matter, courts should not

57. Id. at 12.
[n]o person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation . . . or because such miner . . . has instituted any proceeding . . . or is about to testify . . . or because of the exercise by such miner, on behalf of himself or others of any statutory right afforded by this Act.
WHIRLPOOL CORP. v. MARSHALL diverge from the counterpart’s customary interpretation. While it is true that the intent of Congress expressed in this committee report can hardly be considered a “customary interpretation,” it is nonetheless a significant factor in favor of the Secretary’s interpretation under the OSH Act. It would seem to follow that the Secretary’s interpretation of section 11(c)(1)’s anti-discrimination provisions conforms to the interpretation that Congress clearly wished the courts to give similar language in the more limited mine safety area.

In view of this interpretation’s consistency with the OSH Act’s purpose and remedial scheme, and similar trends in analogous safety legislation, the Supreme Court decided that the regulation must be upheld, unless there was some contrary indication in the Act’s legislative history. The Court found none.

When Congress rejected the “strike with pay” provision in the Daniels bill, it was in no way concerned with conditions posing real and immediate dangers of death or serious injury. The court found that Congress was instead troubled by the bill’s “requirement that employees be paid their regular salary after having properly invoked their right to refuse to work” under the provisions of that section. Therefore, the defeat of the Daniels bill does not require the rejection of the Secretary’s interpretation here.

The Court also found the defeat of the administrative shut down provisions unpersuasive. These demonstrated only Congress’ opposition to (1) federal officials having unfettered, unilateral authority which would drastically impair the operation of the employer’s business and (2) jeopardizing the government’s otherwise neutral role in labor-management relations. Under the regulation in issue, employees have no affirmative power to order employers to correct hazardous conditions or to clear the dangerous workplace of others. Instead, it merely permits employees to reasonably absent themselves from a workplace containing grave dangers. The Court concluded that this regulation does not remotely resemble the one that Congress rejected.

Finding no bar in the Act’s legislative history, the Court held that promulgation of this interpretative regulation was a valid exercise of the Secretary’s authority under the OSH Act. Therefore,

62. Id. at 21.
an employee may reasonably refuse to perform an assigned task because of a reasonable belief that no less drastic alternative is available.

V. The Remedies under 29 C.F.R. § 1977.12(b)(2) (1973)

Section 11(c)(1) merely prohibits employers from "discriminating" against employees exercising "any right afforded by this Act." The Supreme Court determined that "an employer 'discriminates' against an employee only when he treats that employee less favorably than he treats others similarly situated."\(^6^8\) In this case it found that the two maintenance employees were clearly discriminated against when Whirlpool placed written reprimands in their respective employment files.\(^6^4\) It follows that these must be withdrawn. Similarly, disciplinary actions such as discharging would constitute discrimination.

The Supreme Court expressly declined to determine whether the employees suffered discrimination when they were each docked six hours pay for the night they were sent home.\(^6^5\) Nonetheless, the Supreme Court appears to indicate, at least under this regulation, that the loss of pay may not constitute discrimination. While discussing the rejection of the "strike with pay" provision in the Daniels bill, the Court stated that "Congress very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay their employees their regular paychecks when they absented themselves from work for safety reasons."\(^6^8\) However, the Daniels bill only allowed employees to absent themselves from the danger. It did not say that those employees could walk off the job with full pay if alternate work was available and offered to them by their employer. In this respect the Secretary's interpretation is identical. The real differences arise when alternate work is not available. Under the Daniels bill the employee would receive full pay; under the Secretary's regulation, he would not. From this it can be seen that the obligation to continue pay was not unconditional under the Daniels bill and is even less so under this interpretation. This gives both counsel and the district court some maneuvering room.

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63. Id. at 19.
64. Id., n.31.
65. Id. The employees returned to work the next day without incident.
66. Id. at 18-19.
In addition, there is a third situation, i.e., when alternate work is available but is not offered by the employer. This is what occurred in Whirlpool. The regulation imposes no duty on the employer to offer such work, but the Supreme Court's decision leaves the door open to a finding by the district court that the corporation discriminated against these employees by not allowing them to perform readily available alternate work.

The express remedy for an employer's violation of section 11(c)(1) is stated to be "all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay." If an employee, for example, is discharged for reporting a safety violation to OSHA and requesting an inspection and as a result he loses six years back pay, the court appears to be fully empowered to award back pay for a complete remedy. If instead two employees refuse to subject themselves to an imminent danger, are sent home, and lost six hours back pay, the Supreme Court implied that an award of back pay is prohibited. Why the difference? The Supreme Court's strong characterization of the import of the rejection of the Daniels bill certainly implied such a result, but their decision does not mandate such a result. Still, a district court may find itself hard pressed to reject such a clear statement. While the issue is technically open, it appears that employees who exercise their right to refuse to perform assigned tasks in the face of imminent dangers may have to trade their pay as part of the bargain.

VI. The Effects of 29 C.F.R. § 1977.12(b)(2) (1973)

This interpretation will probably not affect most employees and employers. It will hopefully be only the rare employer who will order employees to work in the face of a bona fide imminent danger and then take no action to ameliorate the situation. In addition, the overall situation is mitigated by the existence of section 7 of the National Labor Relations Act which gives employees, who do not have arbitration or no-strike clauses in their union contracts, the right to withdraw from the danger in a "concerted activity" for the purpose of "mutual aid or protection." Even those employees

68. 29 U.S.C. § 157 (1947), which provides in part: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ..." (emphasis added). See NLRB v. Washington Aluminum Co., 370 U.S. 9, 16 (1962); Union Boiler Co. v. NLRB, 1980]
whose contracts contain such clauses may leave the job "in good faith because of abnormally dangerous conditions" if the danger is immediate under section 502 of the Labor Management Relations Act. But these statutes do not cover many workers and many situations. This is particularly true when only one or a small number of employees are involved. So it appears that this interpretation is primarily aimed at such employees, although the others are also covered and may have an option as to which remedy or means they choose to pursue.

The Supreme Court stated in its opinion that there is no conflict between the Secretary's interpretation and federal labor legislation. While this may be true in spirit, in fact there are many provisions in the OSH Act in general and in this interpretation in particular, which may alter existing labor-management relations. As stated, section 7 of the NLRA and section 502 of the LMRA already provide similar relief to many employees. The NLRB has developed a fairly comprehensive system of corresponding duties and responsibilities on the part of both labor and management. At least one commentator has argued that a preemption doctrine should be applied here in favor of the NLRB. However, Congress was aware of this conflict and under section 4(b)(3) of the Act directed the Secretary to recommend "legislation to avoid unnecessary duplication and to achieve coordination between this Act and other federal laws." The OSH Act also provides that it should not

530 F.2d 811 (6th Cir. 1975); NLRB v. Interboro Contractors, Inc., 338 F.2d 495 (2d Cir. 1967); NLRB v. Ben Pekin Corp., 452 F.2d 205 (7th Cir. 1971).

69. 29 U.S.C. § 143 (1947), which provides in part:

[n]othing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of labor by an individual employee an illegal act; . . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment . . . be deemed a strike under this Act (emphasis added).

This section protects employees who engage in work stoppages in the face of immediate dangers and such activity is not susceptible to Boy's Market injunctions. See Gateway Coal Co. v. UMW, 414 U.S. 368 (1974); Jones & Laughlin Steel Corp. v. UMW, 519 F.2d 1155 (3d Cir. 1975). See generally Atleson, Threats to Health and Safety: Employee Self-Help Under the NLRA, 59 Minn. L. Rev. 647 (1975).

70. The NLRA covers 44,000,000 employees and the OSH Act covers 64,000,000. See President's Report on Occupational Safety and Health for 1973, 57-60 (G.P.O., 1975).

In addition, the NLRB has chosen not to exercise jurisdiction over employers with few employees. See Siemens Mailing Service, 122 NLRB 81 (1958).


be interpreted as superceding prior legislation "under any law arising out of, or in the course of, employment." 73 One response to this mandate was the memorandum of understanding between OSHA and the NLRB on April 16, 1975. 74 It recognized these very conflicts and declared that many of the same activities may be protected under both acts. When this occurs, the memorandum said that enforcement actions should primarily be taken under the OSH Act, rather than the NLRA.

Because Congress realized that the OSH Act would conflict with the NLRA and the LMRA and nonetheless made no specific provisions for resolving these inevitable conflicts, other than requesting advice as to future legislation, it seems clear that Congress intended that any employee rights derived from passage of the OSH Act should be interpreted as being coextensive with similar provisions in prior statutes. The result is that employers can expect no relief under the OSH Act from the ever complicating mish-mash of federal legislation affecting labor-management relations.

The true breadth of this interpretation is unknown, because many questions as to its meaning and application remain unanswered. For example, what is a "real danger?" The Secretary's interpretation specifically states that it does not apply to "potential" dangers. The difficulty in establishing workable criteria for determining real dangers is illustrated by the facts in Whirlpool. It was stated in the corporation's brief for the court of appeals that the guard screens involved were identical to those universally utilized in the industry. 75 The maintenance department had ninety employees, most of whom performed identical cleaning tasks on hundreds of occasions. 76 In addition, the "series of accidents" leading up to an employee's death, as noted by the court, were actually isolated incidents in 1966, 1968, 1969, 1973 and possibly a few other minor occurrences. 77 Taking these statements at face value, it appears that any normally hazardous job, which by its nature will inevitably contribute to causing serious accidents, is susceptible to being branded an imminent danger if an employee has recently died performing that task. This situation is complicated by

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74. 5 OCC. SAFETY & HEALTH REP. (BNA) 125-26 (1975).
75. Brief for Whirlpool at 5, 39, 42.
76. Id.
77. Reply Brief for Whirlpool at 6-7.
the fact that a compliance officer made an inspection after the employee's death and merely issued a citation. No imminent danger was found to exist and no injunction was pursued. Yet, when two maintenance employees refused to perform the same task a few days later under essentially identical circumstances, OSHA claimed these men were faced with an imminent danger. Unless these facts represent the high water mark in construing "real" dangers then employers in inherently dangerous industries may become hard pressed to stop walkouts when any new element of danger is added to the situation. A more workable solution would be to pattern the criteria for real dangers after those established by the NLRB for "abnormally dangerous" work.78

Another question is, assuming the right to absent oneself from an imminent danger, how long does this right attach? The court in Usery v. Babcock & Wilcox Co. understood that the right "is applicable only if the employee has begun the procedure to notify the Secretary, and it remains applicable only until a compliance officer can come out to make a determination."79 This interpretation is probably too narrow, because when confronted with the issue, it is unlikely that the courts would find the right was initially present but became unavailable between the time an inspection is made and an injunction is issued. Such a narrow interpretation would have changed the result in Whirlpool because the employees had not previously requested an inspection by the Secretary. On the other hand, OSHA has said:

[i]n certain limited circumstances . . . where, for example, the employer refuses temporarily to abate or alter his directive that unsafe work proceed, there are no other tasks to be performed, the immediately dangerous condition continues, and expedited inspection and imminent danger proceedings . . . consume several days before an ex parte injunction issues . . . it may permit a cessation of work for that brief time.80

The use of the word "may" in this purified example is surprising because it would appear that the Secretary's interpretation is specifically aimed at protecting employees in just such situations and that protection would last until the danger abated or the injunction was issued. It is hard to believe that the Secretary would limit

80. Brief for Secretary at 39 (emphasis added).
his interpretation so as to leave the statutory gap unfilled while the employees he is trying to protect are still in jeopardy.

Perhaps the answer to these and other questions, such as what is a "reasonable alternative," lies in OSHA's unwritten policies. The Secretary clearly has the right to seek injunctive relief to protect employees faced with imminent dangers. However, since the passage of the Act, he has seldom exercised that right. While it is clear that many employers do act to correct the situation once OSHA has posted "imminent danger" notices and that situations such as those presented in Whirlpool may be very, very rare, there is still a concern that the Secretary has purposely chosen not to exercise this right. This would explain OSHA's actions in only issuing Whirlpool Corporation a citation after the death of one employee and then claiming a few days later that two employees in essentially the same situation were faced with an imminent danger. The ramifications of such a policy are that the other employees must continue to work in the face of a real danger of death or serious bodily harm even though OSHA is aware of their plight, has investigated the situation, and has a Congressional mandate to protect them. Merely issuing a citation is no real protection.

At least one commentator has speculated that the true purpose of the Secretary's interpretation of section 11(c)(1) is to allow the Secretary to abdicate his entire responsibility for seeking injunctive relief to protect employees. If indeed OSHA has a policy in such situations of primarily acting after the fact or merely issuing citations, then the only possible immediate relief will come from the actions of the employees themselves. When the employees do choose to act, then the Secretary's interpretation will offer them some protection from their employer's ill will or the loss of their jobs. However, they must be able to establish each of the requisite elements before their actions become protected. If such a policy exists, its net effect is to shift the entire risk and responsibility for protecting employees faced with imminent dangers from OSHA to the employees themselves. This is clearly not what Congress contemplated when it created OSHA. Under such circumstances, the interpretation would be used al-

81. Letter from Baruch A. Fellner, counsel for Regional Litigation, United States Department of Labor to author (Dec. 5, 1979). "I would approximate that there have been no more than two dozen injunctive proceedings since the Act's inception. This would compare with approximately 5000 contested OSHA cases annually. Id..
most exclusively as a means of reinstating employees with full benefits and, possibly, back pay.

VII. Conclusion

The decision in *Whirlpool* now firmly establishes an employee's right to refuse to perform assigned tasks he reasonably believes may subject him to the immediate danger of death or serious physical harm. This right is conditioned upon his reasonable conclusion that he has no alternative and that normal imminent danger proceedings would be insufficient. However, the employee must be able to prove the reasonableness of all his actions, in court if necessary, to fully secure this right.

On the other hand, employers probably will not be required to pay these employees for that time when they did not work. But they will not be permitted to discriminate against such employees by issuing written reprimands, firing, etc.

Beyond this, many questions remain unanswered except that labor-management relationships are becoming more and more complicated. While it is clear that an employee in a real imminent danger position is fully deserving of the federal government's protection, the true extent of this protection is undefined and unless carefully restricted has the potential to cause serious problems for management, particularly when the work involved is inherently dangerous.

John L. Day, Jr.

The parameters of constitutional protection afforded persons suspected of criminal activity are continually reexamined and redefined in the federal courts. In a series of decisions, the sixth circuit has examined whether federal agents may rely on a “profile” not only to detect couriers of illicit drugs at major airports, but also to establish grounds for an investigatory stop and, ultimately, probable cause for arrest. The decisions balance the individual’s right to be free from unwarranted governmental intrusion and law enforcement’s legitimate interest in apprehending offenders. What emerges are guidelines for the quantum of “evidence” required for intrusions, which vary in degree, and an inconsistent analysis of when a limited intrusion becomes an arrest.

Agent Thomas Anderson of the Drug Enforcement Administration (DEA) was on surveillance at the Detroit Metropolitan Airport on February 10, 1976.1 As part of DEA’s narcotics detection program, Anderson stationed himself so that he could observe passengers deplaning from an American Airlines flight from Los Angeles. He noticed a young black woman, the last passenger to deplane, who looked nervously about when she entered the terminal area. Anderson followed her to the baggage claim area. She did not claim any luggage but approached the Eastern Airlines ticket counter.2 Standing in line behind her, Anderson watched the woman hand a ticket to the ticket agent and request another ticket from Detroit to Pittsburgh. He observed that she already had a valid ticket from Los Angeles to Pittsburgh via Detroit. When she approached the Eastern Airlines boarding area Anderson stopped her, identified himself as a federal agent, and requested identification.3 She produced a driver’s license bearing the name Sylvia Mendenhall. She then displayed an American Airlines ticket issued in the name of Annette Ford. When questioned about the inconsistency, Mendenhall replied that she felt like using “Annette Ford.”4

1. Appendix, Memorandum and Order at 82, United States v. Mendenhall, 596 F.2d 706 (6th Cir. 1979). The parties stipulated that the testimony taken at the suppression hearing be treated as the trial testimony for all purposes, including appeal.
2. Id. at 83.
3. Id. at 84.
4. Id.
Anderson identified himself as a narcotics agent and asked her to accompany him to the DEA office at the airport. In the office, Anderson asked if she would consent to a search of her person and handbag. In the purse was a ticket issued to "F. Bush" for a flight to California three days previously. A "strip search" uncovered two bags filled with a brown substance which proved to be heroin.

Defendant Mendenhall waived her right to a jury trial, and the district court convicted her on a violation of the Drug Abuse Prevention and Control Act. Denying a motion to suppress evidence, the court found that the facts gleaned by the agent — flight from a source city, last passenger to deplane, nervous scanning of the terminal area, apparent lack of luggage although coming from a great distance, changing airlines even though carrying a valid ticket to the same destination — warranted an investigatory stop. The court further held that the defendant freely and voluntarily consented to the search and was not arrested until the strip search uncovered the evidence. The court added, however, that probable cause to arrest Mendenhall existed prior to the strip search. In addition to those factors mentioned above, the agent discovered that Mendenhall traveled to Detroit under an alias. In the DEA office, he learned that she flew to Los Angeles, a primary source city, three days prior to her arrival in Detroit under yet another alias. Her explanations only heightened the agent's suspicions. The court concluded that "[a]lthough each of these facts, in and of themselves, are relatively innocuous and innocent, when all of them are found to coincide, and all of them are known characteristics of airborne drug couriers, they furnish the officer observing them with probable cause."

The Sixth Circuit Court of Appeals in an unpublished panel decision reversed the trial court. On petition by the United States, the court granted a rehearing en banc. Reinstating its earlier decision reversed the trial court.

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5. Id. at 111. The parties stipulated that the substance was taken from the person of Mendenhall and that it contained heroin.

6. 21 U.S.C. § 841 (a) (1970) provides in part: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance."

7. Appendix at 85-87. (Investigatory stops are also termed "Terry" stops, referring to the Supreme Court's decision in Terry v. Ohio, 391 U.S. 1 (1968)).

8. Appendix at 88.

9. Id. at 89.

sion, the court held that "the so-called drug courier profile does not, in itself, represent a legal standard of probable cause in this Circuit."11

The Drug Courier Profile

DEA agents use the "drug courier profile," a loosely formulated list of characteristics, to identify couriers of illicit drugs. The "profile" emerged from a surveillance program conducted by agents at the Detroit Metropolitan Airport since October 1974.12 At that time, agents relied largely on tips from other law enforcement agencies to initiate investigations of suspected couriers. Gradually, through observation and information supplied by cooperating defendants and informants, agents isolated certain characteristics which were exhibited by persons employed to carry illegal drugs to local wholesalers and major retailers.13

"Profile" characteristics include the following: (1) the use of small denomination currency for ticket purchases; (2) travel to and from major import centers, especially for a short period of time; (3) absence of luggage; (4) nervousness; and (5) use of an alias.14 DEA, however, uses the "profile" rubric characterizing numerous other factors which generally are rooted in observation of persons traveling from source cities.15 A New York district court noted that "the profile has a chameleon-like quality; it seems to change itself to fit the facts of each case."16

DEA's use of the drug courier profile is the catalyst for a growing body of law interpreting important fourth amendment protections. A typical airport "search encounter" brings into issue the propriety of the investigatory stop, consent to search, the point of arrest, and the constitutional standards for probable cause.

In United States v. McCaleb,17 agents observed two men and a woman arrive at Detroit Airport on a non-stop flight from Los Angeles. The agents recalled seeing one of the men and the woman

11. United States v. Mendenhall, 596 F.2d at 707 (6th Cir. 1979). The court also held there was no consent to search.
12. Supplemental Brief for the United States at 4-5.
15. Supplemental Brief for Appellant in Mendenhall at 24-26 lists 25 profile "characteristics" mentioned in opinions.
17. 552 F.2d 717 (6th Cir. 1977).
board a flight to Los Angeles the evening before wearing the same clothes. The trio did not converse. McCaleb claimed one bag and, according to the agents, appeared nervous. The three were stopped and questioned. A comparison of identification and flight coupons carried by the detainees led agents to believe that they were traveling under aliases. DEA agents escorted the trio to the airport office and advised them of their Miranda rights.\textsuperscript{18} Appellant was asked for his consent to a search of his suitcase. Only after agents explained that he and his companions would be detained until a search warrant was secured did McCaleb unlock the suitcase. After the search uncovered a substance which proved to be heroin, the three were arrested.\textsuperscript{19}

In reversing his conviction, the court of appeals found that McCaleb's "consent" was the product of an unconstitutional stop and an arrest without probable cause: therefore, his "consent" was not freely and voluntarily given.\textsuperscript{20} Noting that the activities observed by DEA agents were consistent with innocent behavior, the court held that "while a set of facts may arise in which the existence of certain profile characteristics constitutes reasonable suspicion, the circumstances of this case do not provide 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed]' the intrusion of an investigatory stop."\textsuperscript{21} Furthermore, appellant's detention exceeded the limited scope of a Terry stop, for "[w]hen appellants were taken to the private office and were not free to leave, the arrest was clearly complete."\textsuperscript{22} The court refused the government's contention that the activities observed by the DEA agents gave them probable cause, stating "the 'drug courier profile,' by itself, provides no probable cause to arrest an individual."\textsuperscript{23} Thus the search of McCaleb's luggage could not stand as a warrantless search incident to a valid arrest.

In \textit{United States v. Lewis},\textsuperscript{24} the court expanded on the nexus between a probable cause foundation and the courier profile. "Probable cause is the sum total of layers of information and the

\textsuperscript{18} Id. at 719.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 720-21.
\textsuperscript{21} Id. at 720 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).
\textsuperscript{22} Id. (citing United States v. Jackson, 533 F.2d 314 (6th Cir. 1976)).
\textsuperscript{23} Id.
\textsuperscript{24} 556 F.2d 385 (6th Cir. 1977), cert. denied, 434 U.S. 1011 (1978).
synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers but the 'laminated total.'” \[^{25} \]

Reliance on the courier profile as a probable cause standard is improper, not only because “it is too amorphous to be integrated into a legal standard,” but also because it focuses on an individual layer of information instead of the sum total, thus “giving an undeserved significance to certain facts and distort[ing] the appraisal of the sum total of facts.” \[^{26} \]

The court, however, upheld Lewis’ arrest because of additional information known to the investigating agent. An airline employee alerted DEA that a man fitting the courier profile purchased round-trip tickets to Los Angeles. The agent learned that a William Van Lewis, who matched the traveler’s description, leased an apartment under surveillance by Detroit police for suspected narcotics trafficking. The agent also discovered Lewis had previously been arrested for possession of heroin and had been convicted of two non-drug related offenses.

Distinguishing McCaleb, where agents relied wholly on the airport investigation, the Lewis court stressed that DEA developed other information which suggested Lewis’ connection with illegal narcotics traffic: “[h]ence, what . . . agents did have in McCaleb, did not fit into a larger picture of narcotics traffic.” \[^{27} \]

While the profile itself is not evidence that probable cause exists, consideration of profile characteristics is not improper so long as the officer goes beyond “individual layers” to weigh the “laminated total” of probable cause. \[^{28} \]

Though McCaleb continues to gather judicial support in the sixth circuit, the unique circumstances of each airport investigation may produce arguably diverse results. Testimony in United States v. Smith, \[^{29} \]

for example, revealed that agents observed a woman who exhibited profile characteristics as well as “an abnormal and obvious bulge around [her] abdomen, which in [the agent’s] experience suggested that she was carrying illegal drugs.” \[^{30} \]

This additional factor, which the court did not treat within the ambit of

\[^{25} \] Id. at 389 (quoting Smith v. United States, 358 F.2d 833, 837 (D.C. Cir. 1966), cert. denied, 386 U.S. 1008 (1967)).

\[^{26} \] Id. at 389.

\[^{27} \] Id. at 391.

\[^{28} \] Id. at 389.

\[^{29} \] 574 F.2d 882 (6th Cir. 1978).

\[^{30} \] Id. at 883-84.
the profile, was sufficient to create a reasonable suspicion justifying
the intrusion of an investigatory stop.31

Significantly, the court found that Smith was not under arrest
until a consent search in the airport office produced contraband
drugs, which provided probable cause for arrest. The agent "asked
appellant to accompany him to the . . . office for further investiga-
tion and she went along voluntarily."32 Though informed that she
could refuse, "[a]ppellant consented to the search saying that she
had nothing to hide."33

The court disposed of Smith's contention that she was under ar-
rest when she was escorted to the airport office:34 "we said that if
the district court's findings were not clearly erroneous, then 'the
defendant's presence in the DEA office was as a volunteer and not
an arrestee.' "35 Distinguishing McCaleb, " 'where the defendants
were taken to the private office and were not free to leave,' "36 the
court concluded that Smith was not confronted with the element
of official coercion necessary to effect an arrest.

Mendenhall

Relying solely on McCaleb, the majority in Mendenhall declared
that "every single case differs from every other in material de-
gree"37 and foregoes an attempt "to formulate definitive rules."38
Yet the court avoids any discussion of events leading to the discov-
ery of the evidence. Critical of the majority's treatment of impor-
tant questions of law, Circuit Judge Weick in his dissenting opin-
ion states:

The en banc majority, relying solely on McCaleb, reverses the judg-
ments of the District Judges without specifically finding that . . .
[the] findings of fact on the issue of reasonable grounds to stop and
question, acquiescence in following the agents to the private room,

31. Id. at 884. The court treats the bulge as a "plus." Given the chameleon-like quality of
the profile itself, a suspicious bulge might readily be included. As such, Smith might be
characterized as falling within dictum in McCaleb, as a set of facts in which the existence of
certain profile characteristics creates a reasonable suspicion. United States v. Oates, 560
F.2d 45 (2nd Cir. 1979) and United States v. Roundtree, 596 F.2d 672 (5th Cir. 1979) illus-
trate that a "suspicious bulge" may warrant an investigatory stop. The facts in Roundtree
parallel those in Smith.
32. Id.
33. Id.
34. Id. at 886 n.15.
35. Id. (quoting United States v. Canales, 572 F.2d 1182 (6th Cir. 1978)).
36. Id. (emphasis in original).
37. United States v. Mendenhall, 596 F.2d at 707.
38. Id.
and probable cause to arrest and search or voluntary consent to search, were not supported by substantial evidence, and are clearly erroneous, and that their conclusions of law are incorrect. 89

The court’s failure to address the “point of arrest” is especially noteworthy. The district court found that the defendant accompanied the agent to the airport DEA office “voluntarily in a spirit of apparent cooperation with the . . . investigation.” 40 Confronted with facts closely paralleling those in Mendenhall, the court in Smith found that the appellant was not under arrest when escorted to the office. Determination of the point of arrest is critical, because law enforcement must at that time have a probable cause foundation for the detention. 41 The majority in Mendenhall merely reaffirmed that the courier profile is not a legal standard of probable cause. The inescapable inference, though, is that Mendenhall was under arrest prior to the search and discovery of heroin and before probable cause existed.

Analysis

Since the Supreme Court’s decision in Terry v. Ohio, 42 courts have recognized two distinct police responses, both of which involve a seizure under the fourth amendment. 43 These responses are an arrest which requires probable cause, and an investigatory stop, a less intrusive response which must be founded on a reasonable suspicion of criminal activity. 44

That each police-citizen encounter is unique is axiomatic. The standard of reasonable suspicion is, like probable cause, drawn broadly. Terry speaks of “specific and articulable facts, together with rational inferences from those facts.” 45 In United States v. Carrizoza-Gaxicla, 46 the ninth circuit required “reasonable grounds for singling out the person stopped as one who was in-

39. Id. at 709 (Weick, J. dissenting).
40. Appendix at 87-88 (quoting Sibron v. New York, 394 U.S. 40, 63 (1968)).
42. 392 U.S. 1 (1968).
43. The Fourth Amendment to the United States Constitution provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or things to be seized.
44. 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2(c) (1978).
46. 523 F.2d 239 (9th Cir. 1975).
volved or is about to be involved in criminal activity." 47 The deci-
sions which have considered the use of the courier profile maintain
that the facts known to investigating agents must create a "reason-
able suspicion" before the initial stop and request for identification
is constitutionally permissible. 48

The Supreme Court has stressed that the investigating officer is
entitled to assess known facts in light of his experience in the de-
tection of particular kinds of criminal activity. 49 The government
offered the district court in Mendenhall statistical "evidence" of
the successful use of the drug courier profile by DEA in its airport
narcotics detection program. 50 Though the court of appeals in its
published opinion did not address the legality of the Terry stop, it
might have concluded under the McCaleb rationale that the con-
fluence of profile factors exhibited by Mendenhall did not create a
reasonable suspicion. The court's analysis in Smith, however,
demonstrated that an additional element (suspicious bulge) "plus"
exhibition of profile characteristics warrants an investigatory
stop. 51 The constitutionality of the stop may be critical, for if
found unreasonable, "the subsequent seizure [of evidence] would
raise other grave constitutional questions." 52

Equally critical is the court's determination of when a suspect is
under arrest, or conversely, the permissible scope of a Terry stop.
In the courier profile cases, the crucial point in time is when the
suspect accompanies agents to the DEA airport office. The agent's
purpose is to obtain consent to a search in more private
surroundings. 53

47. Id. at 241.
48. Compare United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977) with United States
   v. Oates, 560 F.2d 45 (2nd Cir. 1977).
50. Supplemental Brief for United States at 6: "From February 1, 1975 to December 31,
   1976 there were 178 search encounters at the airport. Narcotics were found in 140 for a 79
   percent success rate. One hundred of these 178 were consent searches and narcotics were
   found in 71 percent. Seventy-eight of these searches were non-consent searches and narcot-
   ics were found in 88 percent." The validity of these statistical claims supporting the useful-
   ness of the courier profile is challenged by appellants, who point out that these statistics do
   not reflect how many successful search encounters were based on information other than
   exhibition of profile characteristics. Supplemental Brief at 29.
51. See note 31 supra.
52. United States v. Canales, 572 F.2d 1182, 1186 (6th Cir. 1978). The illegal stop places a
   heavy burden of proof on the government if it seeks to establish voluntariness of consent.
53. The dissenting opinion in Mendenhall briefly outlines the sequence of events in a
typical airport investigation.
McCaleb made clear that an agent who has merely observed characteristics fitting the courier profile, including information gleaned during the initial stop that the suspect is traveling under an alias, does not possess probable cause to arrest. Evidence seized during a search incident to an illegal arrest will be suppressed.\footnote{54} Even though a suspect apparently gives "consent" to search, consent may be invalidated because it is the product of an illegal arrest (and, too, an illegal stop) which does violence to the "free and voluntary" standard set forth in Schneckloth v. Bustamante.\footnote{55} The government will argue that the suspect who agrees to accompany the agent is not detained involuntarily, or that transportation of the suspect to a private office in the terminal building is a permissible extension of a Terry detention which falls short of an arrest.

Formal words of arrest are not a litmus test.\footnote{56} In Manning v. Jarnigan,\footnote{57} the court, noting uncertainty over the difference between a stop and an arrest, stated:

[w]hen the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discovers.\footnote{58}

Even this expanded analysis of the point of arrest ignores the reality that an investigatory stop necessarily encompasses an interruption of liberty of movement under a claim of authority.\footnote{59}

The courts have few problems with the "volunteer." In United States v. Canales,\footnote{60} agents, whose suspicions were aroused during prior surveillance, were waiting for appellant when he arrived at the Detroit Airport. After a valid stop and request for identification,\footnote{61} Canales expressed discomfort at continuing the conversation

55. 412 U.S. 218 (1973). Consent was so invalidated as the fruit of an illegal arrest in McCaleb, which was followed in Mendenhall.
57. 501 F.2d 408 (6th Cir. 1974).
58. Id. at 410 (quoting Henry v. United States, 361 U.S. 98, 103 (1959)).
59. 2 W. LAFAVE, supra note 44, at § 5.1 (a).
60. 572 F.2d 1182 (6th Cir. 1978).
61. Id. at 1187.
in front of his wife and stepson, and he asked if the discussion had to occur right there. After he was advised of the DEA office at the airport, Canales “very positively stated that he wanted to go to the office and get this matter straightened out once and for all.” The court held that appellant initiated the trip to the airport office and, therefore, was a “volunteer, not an arrestee.” McCaleb and Smith are readily distinguishable, for in neither case did appellants request more private surroundings.

Absent the active volunteer, the movement of one detained to another location without probable cause raises a difficult constitutional issue resolved in the case-by-case adjudication of novel fact situations. In United States v. Richards, the court held that a legitimate stop was not converted into an arrest even though agents made the stop at gunpoint, moved the suspects into the airport terminal from a private plane waiting to take off, and detained them for over an hour prior to making a formal arrest. The court determined that the exigencies of the situation — the plane with appellant aboard was ready for take off and he failed to comply with an order to shut down the engines and disembark — required a show of force which was necessary and reasonable under the circumstances. Movement of appellant was likewise upheld, because it was difficult for agents to question him on the runway and verify proffered explanations and ownership of the plane. The court noted that while not controlling, the absence of words of arrest as well as the officer’s action in holstering his gun when appellant disembarked evidence a limited detention for questioning and not an arrest.

In United States v. Oates, the court upheld movement of Oates and a companion from the boarding area to the airport security office as within the permissible scope of a Terry detention. There was nothing objectionable, said the court, in agents’ polite request that Oates accompany them to the nearby office, a place more convenient for interrogation and “more conducive to insuring

62. Id. at 1184 (agent’s testimony in the district court proceedings).
63. Id. at 1188.
64. See 3 W. LAFAVE, supra note 44 at § 9.2 (f). A complete discussion of the dimensions of a permissible stop is found in § 9.2(a)-(g).
65. 500 F.2d 1025 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975).
66. Id. at 1028-29.
67. Id. at 1029.
68. 560 F.2d 45 (2nd Cir. 1977).
the safety of other passengers in the departure area." The sixth circuit adopted similar reasoning in *Smith*. The dissent in *Mendenhall* stressed the propriety of movement to the DEA office, referring to "airport security regulations which are designed to prevent public confrontation and the injury which may result therefrom."70

**Conclusion**

It has been suggested that the court in *McCaleb* was influenced by a determination that the initial stop was invalid.71 If this be true, still the court concluded that the arrest was complete when McCaleb was escorted to the airport office.72 The court's reliance in *Mendenhall* on its decision in *McCaleb* to negate voluntary consent strongly suggests the inference that Mendenhall was under arrest prior to the search. The decisions in *McCaleb* and *Smith* on the propriety of the investigatory stop are distinguishable based on the quantum of evidence possessed by investigating agents.73 It is difficult to harmonize the holdings on the point of arrest. The cursory opinion in *Mendenhall* fails to clarify this substantial constitutional issue.

The Supreme Court will review the *Mendenhall* decision during the October 1979 term.74 The questions to be considered by the Court are: (1) whether narcotics agents violate the fourth amendment by approaching persons and requesting identification on the basis of facts which in their experience indicate that the person may be a narcotics courier, but that are also consistent with innocent behavior? (2) whether agents effect an arrest when requesting that suspected couriers move to an airport DEA office, which is unconstitutional unless supported by probable cause? (3) whether a suspect who is being illegally detained can validly consent to search?75

The Court's recent decision in *Dunaway v. New York*76 suggests that the Court is not eager to expand the scope of *Terry* and its progeny. The decision confirmed that formal words of arrest are

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69. *Id.* at 57.
70. 596 F.2d at 709 (Weick, J., dissenting).
71. 3 W. LAFAVE, *supra* note 44 at § 9.2 & n.88.
72. United States v. McCaleb, 552 F.2d at 720.
73. United States v. Smith, 574 F.2d at 884.
75. 48 U.S.L.W. 3185 (October 2, 1979).
not controlling. The Court rejected a proposed multi-factor balancing test of “reasonable police conduct under the circumstances” to cover all seizures which do not amount to technical arrests. “For all but those narrowly defined intrusions [brief investigatory stops], the requisite ‘balancing’ has been performed in centuries of precedent and is embodied in the principle that seizures are ‘reasonable’ only if supported by probable cause.”

In its review of Mendenhall, the Court may well decide that the confluence of profile factors exhibited by Mendenhall were sufficient to raise a reasonable suspicion and warranted a brief investigatory stop. It is less likely that the Court will find in the courier profile alone a standard of probable cause. The question then presented is whether movement of Mendenhall to the DEA airport office is permissible under Terry or if it is a seizure which amounts to an arrest. The Court will likely consider whether Mendenhall was in fact free to leave, or whether she would have been physically restrained if she had refused to accompany agents. If this analysis is employed, it is less likely that the transportation of one who was not an “active volunteer” will be considered anything other than an arrest.

The final question is whether voluntary consent to search is possible in the wake of an illegal arrest and detention. The Court’s analysis will focus on whether the causal connection between consent to search by Mendenhall and her arrest was broken sufficiently to purge the primary taint of the illegal arrest. If the detention was illegal, it is unlikely that her consent to search will be found voluntary under present standards. Important considerations here are the physical and temporal nexus between detention and consent. The decision in Dunaway reaffirmed the Court’s holding in Brown v. Illinois that Miranda warnings in and of

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77. Id. at 2257.
80. 422 U.S. 590 (1975).

* Editor’s Note: On May 27, 1980, the Supreme Court announced its decision in United States v. Mendenhall, 100 S. Ct. 1870 (1980). Five members of the Court joined in reversing the decision of the Sixth Circuit.

Announcing the judgment of the Court, Justice Stewart held that the evidence was sufficient to support the District Court’s findings: (1) that Mendenhall voluntarily accompanied agents to the DEA office, and (2) that she voluntarily consented to a “strip search.”

Only Justice Rehnquist joined in that portion of the opinion in which Justice Stewart held that no “seizure” took place. Noting that the issue was not raised before the courts below, Justice Stewart felt that the assumption that a “seizure” took place rested on a seri-
themselves do not necessarily cure a primary fourth amendment violation.

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ous misapprehension of constitutional law. A "seizure" occurs only if, in view of all the circumstances, a reasonable person would believe that he is not free to leave. The individual's freedom of movement must be restrained by physical force or a show of authority. Justice Stewart concluded that Mendenhall's freedom of movement was not restrained and that she was in fact free to walk away from agents while in the airport concourse.

In a concurring opinion, Justice Powell reasoned that it was unnecessary to hold that Mendenhall was not "seized" within the meaning of the Fourth Amendment. The facts known to agents in light of their experience were sufficient to give them reasonable grounds for an investigatory stop.

Justice White was joined by Justices Brennan, Marshall, and Stevens in dissent. Critical of Justice Stewart's treatment of the "seizure" issue, the dissent maintained that the proper course would be a remand to the District Court for an evidentiary hearing.

After reviewing the facts which led the agents to approach Mendenhall, the dissent found that the circumstances did not give rise to a reasonable suspicion and that the agents' "seizure" of Mendenhall was unjustified. Furthermore, the record did not support the conclusion that Mendenhall accompanied the agents to the DEA office voluntarily. She was in fact not free to leave. Since the "seizure" exceeded the bounds of an investigatory stop, probable cause must be present. Mendenhall was illegally detained at the time she was searched, and the evidence does not show that the "taint" created by her illegal detention was dissipated.

Statement of Facts

On the morning of September 10, 1976, Special Agent Lyons of the F.B.I., accompanied by Special Agents Fetterman and Graesse, identified himself to Allen M. Wachs. Wachs, an employee of five corporations (appellants herein), knew Lyons from previous investigations. On Lyons's representation that he wanted to discuss Wachs's business activities, Wachs escorted the three from the ground floor of one of the office buildings through the appellant's security system, to the company's fifth floor offices for further discussion.

On reaching the offices, Lyons served "forthwith" subpoenas duces tecum upon both Wachs and Thomas D. Bosse, who arrived shortly after the government agents and whom the trial court determined to be in charge of the office. In addition to the subpoenas duces tecum, a search warrant for the seizure of a "firearm" located in "[t]he top right hand drawer of a brown wooden desk used by Gennaro J. Orrico" was served upon Bosse, who immediately advised the agents that he would consult with Robert H. Jackson, legal counsel for the appellants and also for Bosse. In response to Bosse's call, Stephen Kalette, a young attorney with Jackson's law firm, arrived. Before Kalette's arrival, however, the government agents were joined by their counsel, Kenneth A. Bravo, Special Attorney for the Department of Justice, and two additional F.B.I. agents.

After substantial discussion among Wachs, Bosse, and Kalette,


2. Black's Law Dictionary 588 (5th ed. 1979) defines "forthwith" as follows:
   Immediately; without delay; directly; within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch... Within such time as to permit that which is to be done, to be done lawfully and according to the practice and ordinary course of things to be performed or accomplished. The first opportunity offered.


4. The search of the drawer produced an imitation handgun. Id. n.1.
Robert H. Jackson appeared and examined the subpoenas. On the basis of Jackson's advice⁶ and after the agents had been there for more than one hour, Bosse asked that Bravo and the F.B.I. agents remain in order to determine which documents were commanded to be produced by the subpoenas. Jackson departed, leaving Kalette to give further advice.

For the remainder of the afternoon - at least until the arrival of Orrico - Wachs, Bosse, and Kalette continued to cooperate with the demands of the agents. However, there is no evidence that Kalette gave any further advice at this time qualitatively different from that already given by Jackson; on the contrary, the appellants maintained that he performed mere clerical duties. In addition, the government agents never informed the custodians of the corporate records (Wachs, Bosse, and Orrico) of their right to refuse compliance until the validity of the subpoenas could be tested in court.⁶

Finally, Orrico arrived, and a third forthwith subpoena duces tecum was served upon him. Orrico indicated a desire to resist immediate compliance;⁷ in fact, Bravo testified that at one point Orrico declared, "[i]f you want me you're going to have to take me in handcuffs."⁸ Nevertheless, the record is clear that Bravo informed Orrico that non-compliance could result in his arrest, and also apprised Bosse of the possibility of adverse publicity. Finally, after attorney Jackson was contacted by telephone, Bosse persuaded Orrico to comply, and the documents were consequently transported to the grand jury.

Appellants commenced an action pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure⁹ in the United States District

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⁵. The dissenting opinion indicates that a fair reading of this portion of the record shows that Jackson advised Bosse that he could physically resist the subpoenas but that Jackson did not know what the consequences of non-compliance would be. In addition, neither Jackson nor Kalette informed Bosse at any time of his right to test the validity of the forthwith subpoena duces tecum in court before the documents were required to be produced. Id. at 777 (Weick, J., dissenting).

⁶. Id. at 771 n.1.

⁷. The majority opinion suggests that Orrico objected not so much to the production of the documents as to the subpoena's command for his personal appearance before the grand jury. Consumer Credit Ins. Agency, Inc. v. United States, 599 F.2d at 773.

⁸. Id.

⁹. Rule 41(e) states as follows:

**Motion for Return of Property**

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision
Court for the Northern District of Ohio seeking return of certain corporate books, correspondence, memoranda, books of account and like corporate documents which they alleged had been illegally seized. Judge Robert B. Krupansky, after receiving evidence on the issues of fact, ruled that the property had been lawfully seized and denied the motion.  

On appeal to the United States Court of Appeals for the Sixth Circuit, the appellants contended that the district court's ruling on their motion for return of property should be reversed, since documents sought to be returned were seized illegally by government agents acting under color of overbroad and unreasonable forthwith grand jury subpoenas duces tecum and an invalid search warrant. Further, appellants maintained that consent to seize the documents was coerced and, therefore, not voluntarily given or that, if consent had been given initially, it was revoked before any of the documents were taken from the premises.  

Although the court did not condone the conduct of the government agents, Judge Engel, writing for the Sixth Circuit majority, agreed with the district court ruling denying the appellants' motion for return of property and held that the corporate employees, as custodians of the documents, had consented voluntarily to the examination and delivery of the documents and, therefore, appellants were not subject to an unlawful search and seizure. In ruling, the court placed great weight on the fact that advice was given to the corporate employees by counsel, thus vitiating any coercive atmosphere created by the government agents.  

Judge Weick, vigorously dissenting, characterized the use of the forthwith subpoenas as a "gross abuse of the Grand Jury pro-

of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

10. Judge Krupansky ruled as follows:

[P]laintiffs' Motion for Return of Seized Property, pursuant to Rule 41(e), Fed. R. Crim. P., must be and hereby is denied. It appearing to the Court, however, that the great volume of documents subpoenaed from petitioners could understandably impede the operation of their business for a protracted period, the Court hereby ORDERS the Government to return to petitioners the originals of all documents produced pursuant to the instant subpoenas duces tecum by October 18, 1976. This order does not preclude the Government from copying any or all such records.

599 F.2d at 772.

11. Id. at 774.

12. Id. at 773-74.
cess." Because he felt that compliance with the subpoenas was coerced and that the subpoenas were far too sweeping in their command, Judge Weick urged the reversal of the district court.

**Background**

The grand jury subpoena duces tecum, the process by which the production of evidence is compelled to aid grand jury investigations, is limited by the fourth amendment “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The fourth amendment limitations of the subpoena power were firmly established by the Supreme Court in *Oklahoma Press Publishing Co. v. Walling.*

In *Walling,* the Wage and Hour Administrator issued subpoenas duces tecum to newspaper publishing corporations seeking production of certain specified records to determine whether the corporations were violating the Fair Labor Standards Act. In order to clarify the then-existing confusion between the actual search and seizure and what the Court termed the “figurative” or “constructive” search by the compelled production of corporate documents through the subpoena power, the Court held that “[t]he gist of the [fourth amendment] protection is in the requirement . . . that the disclosure sought shall not be unreasonable.” Consequently, the Court enumerated three requirements of reasonableness. First, no specific crime need be alleged; “[i]t is enough that the investigation be for a lawfully authorized purpose . . . .” Second, because no crime need be charged, the requirement of probable cause necessary to the validity of a search warrant is dispensible; the validity of the subpoena merely requires that the documents be relevant to the investigation. Finally, the requirement of particularity, applicable to search warrants, is satisfied by a “specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry.”

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13. *Id.* at 775 (dissenting opinion).
14. *Id.* at 776-80.
17. *Id.* at 202-14. The difference between the actual and “constructive” search is that the “constructive” search requires the subpoenaed party to produce the documents sought, whereas the actual search is conducted by the government without regard to the volition of the subject.
18. *Id.* at 208.
19. *Id.* at 209.
The government's burden to establish the lawfully authorized purpose of the investigation and the relevancy of the documents is minimal. The government must establish: "1. That there is a pending grand jury investigation; and 2. The general nature of the subject matter of said grand jury investigation; and 3. That some possible relationship exists between the subpoenaed documents and the subject matter of said investigation." In addition, the government need not establish the relevance of each particular document to the grand jury investigation, only each general category of subpoenaed documents. In the final analysis, because of the broad authority given grand juries to investigate criminal activity and the slight burden of proof on the government to establish the requirements of an authorized investigative purpose and relevancy of the subpoenaed documents, the protections afforded are minimal.

The third requirement in Walling, the adequate specification requirement, has two prongs. First, the subpoenaed documents must be described with adequate particularity so that the subpoenaed party may know what he is requested to produce. Second, the breadth of the subpoena must be specified with adequate particularity so that the production of the documents does not harass or oppress the subpoenaed party and cause an unreasonable business detriment (i.e., the demand to produce must not be too broad and burdensome). Objection under the latter requirement, particularity of breadth, is usually grounded on the subpoena's demand for the production of an unreasonably large quantity of documents and the related ground that the period of time covered by the subpoena is unreasonably long.

A search pursuant to a valid consent is not unreasonable in the

21. In reference to this requirement, the government need not enumerate the precise statutory provision thought to be violated; it is enough that the government give a mere generic characterization of the subject matter under investigation. Id.
22. Id. at 998 (emphasis added).
23. This necessarily permits the grand jury to compel the production of some documents which are not relevant so long as they fit into a general category which is. Id.
fourth amendment context. The Supreme Court in Schneckloth v. Bustamonte established the framework for the determination of a valid consent search:

[T]he question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a "voluntary" consent - the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.

Thus the Court made clear that a consent is not a waiver where, under the doctrine of Johnson v. Zerbst, the government has to demonstrate an intentional relinquishment of a known right or privilege. The Court reasoned that the requirement of a knowing and intelligent waiver has been applied only to those rights which are guaranteed a criminal defendant in order to preserve a fair trial.

The utility of the "voluntariness" test, which was found to be an "elusive, measureless standard" to test the voluntariness of confessions and which is now applicable to the validity of consent searches, is dubious at best. One commentator stated that no particular combination of factors will ensure a finding of consent or no consent. He mentioned two reasons for his belief: "(i) the inherent ambiguity of the voluntariness test, and (ii) the resulting freedom of trial and appellate courts to inject their own values into the decision process while purporting to follow the dictates of the Su-

30. Id., at 227 (emphasis added).
33. The Court stated as follows:
   The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. Rather, as Mr. Justice Frankfurter's opinion for the Court put it in Wolf v. Colorado, 338 U.S. 25, 27, the Fourth Amendment protects the "security of one's privacy against arbitrary intrusion by the police. . . ."
   Id. at 242.
Nevertheless, the claim of lawful authority to search by law enforcement is one factor which may dictate the finding of an invalid consent. The leading case is *Bumper v. North Carolina*. In *Bumper*, four white law enforcement officers visited the home of Mrs. Hattie Leath, a sixty-six year old Negro widow and grandmother of the petitioner, who lived with her. One of the officers announced that he had a warrant to search the house, whereupon Mrs. Leath opened the door and told them to go ahead. Once inside, the officers found a .22 caliber rifle. The rifle was admitted into evidence against the petitioner, the prosecutor relying upon the consent rather than the search warrant to justify the search.

The Court held that there can be no consent to search "when that ‘consent’ has been given only after the official conducting the search has asserted that he possesses a warrant." In addition, the Court stated that once the government seeks to rely upon consent to justify the lawfulness of the search, the burden of proving that the consent was given freely and voluntarily is on the government. This burden is not discharged "by showing no more than acquiescence to a claim of lawful authority."

The applicability of the *Bumper* rationale to situations where consent to search is obtained by a claim of lawful authority pursuant to forthwith grand jury subpoenas, as opposed to search warrants, is unsettled. This writer has found only one case extending *Bumper* to the forthwith grand jury subpoena context, *In re Nwamu*. In *Nwamu*, several forthwith grand jury subpoenas were served upon officers of a corporation on two consecutive days. The first subpoena was served by Special Agent Gulley of the F.B.I. upon David Singler. Singler attempted to contact the corporation's attorney but was unsuccessful. After the F.B.I. agent told Singler that the forthwith subpoena demanded immediate compliance and that failure to comply would place Singler in contempt of court, Singler turned the files over to the agent. On the next morning, Special Agent Chandler, accompanied by two additional agents, served another forthwith subpoena duces tecum upon Singler and

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35. 2 W. LaFave, Search and Seizure § 8.2(a) at 637-38 (1978).
37. Id. at 548.
38. Id.
39. Id. at 548-49.
one upon a secretary employed by the corporation. A third subpoena for personal appearance only was served upon the corporation’s president. Before Chandler left the premises, he spoke with the corporation’s attorney, who insisted that Chandler leave without the subpoenaed property. Chandler ignored the command and left with the property.

Upon motion for the return of illegally seized property, the district court rejected the government’s contention that the movants, or their employees, consented to the agents taking the subpoenaed property. 41 The court found “from the totality of circumstances . . . that all the government has proved is that the movants or their employees acquiesced and yielded to the appearance, and express claim, of lawful authority.” 42

In addition, the court held that not even a valid forthwith grand jury subpoena duces tecum bestows the power of seizure characteristic of search warrants upon government agents met with a refusal to comply, nor does it give the agents the power to demand immediate compliance under threats of contempt. 43 To hold otherwise would be either to equate the forthwith grand jury subpoena with the search warrant and deny the movants their right to an independent judicial determination of the existence of probable cause, or to treat the forthwith grand jury subpoena for what it is and deny the movants their right to challenge the validity of the subpoena under Rule 17(c) of the Federal Rules of Criminal Procedure. 44 The district court concluded as follows:

The methods used here allowed the government to obtain possession of subpoenaed documents not by the appearance of the witness “forthwith” before the grand jury, where the witness is clothed with rights protected by the court, including the right to challenge the
subpoena by refusing to comply until the court ruled on its validity and ordered compliance, but by compelling instant surrender of the subpoenaed items to the agents, without court order, by threats of contempt and claim, or color, of authority. This, we think, constitutes an unlawful search and seizure, in violation of the Fourth Amendment, however broad the subpoena power of the grand jury. 46

The Court's Reasoning

In an opinion conspicuously devoid of any cited authority (barring footnotes 46), the Sixth Circuit Court of Appeals upheld Judge Krupansky's ruling that the appellants, since they consented to the examination and to the delivery of the documents to the grand jury were not "aggrieved by an unlawful search and seizure," and thus were not entitled to relief under Rule 41(e). 47 In making its decision, the court relied heavily upon Judge Krupansky's election, after having heard the witnesses personally, to assign greater weight and credibility to the government's witnesses than to the appellants' witnesses with respect to the issue of voluntariness. Nevertheless, the court did not condone the procedures employed by the government. 48

The most decisive factor in the court's determination of a voluntary consent was the presence of counsel; the court pointed out that the documents were delivered only after the advice of the appellants' attorneys was given, and particularly only after attorney Jackson advised Bosse that he was not required to surrender the documents sought. 49 The court failed to notice the ambiguous nature of the advice to Bosse by his attorney. 50 In addition, the court rejected the appellants' argument that attorney Kalette was a mere "law clerk" who allowed himself to be intimidated by the government agents. 51 Further, the court failed to recognize the fact that Kalette did not give any advice which was qualitatively different from Jackson's.

The court gave little credence to appellants' argument that if the

46. The second footnote itself is interesting where the court declares that it is troubled by the question of jurisdiction but finds that the question is moot, since the appellants are not entitled to relief on the merits of their claim. Consumer Credit Ins. Agency, Inc. v. United States, 599 F.2d at 772 n.2.
47. Id. at 773-74.
48. Id. at 774.
49. Id. at 773.
50. See note 5, supra.
court should find that Bosse or Wachs had given their consent before the arrival of Orrico, that consent was subsequently revoked by Orrico after he was served with the subpoena addressed to him.\textsuperscript{52} Bravo testified that Orrico said, "[i]f you want me to go you're going to have to take me in handcuffs."\textsuperscript{53} Bravo then told him that until a court ruled otherwise, he would expect Orrico to comply with the subpoena; and if Orrico failed to do so, he would have no other choice than to ask a federal judge to issue a warrant.\textsuperscript{54} The court interpreted this not as a threat, but as a rational presentation of alternatives to Orrico.\textsuperscript{55} In any event, the court thought that Orrico's objections were directed more towards the subpoena's command for his personal appearance than towards its command for the production of documents.\textsuperscript{56} Further, the court found that Bosse had persuaded Orrico to comply after Bosse was informed by Bravo of possible adverse publicity resulting from non-compliance.\textsuperscript{57}

Finally, the court dismissed the appellants' contention that the government agents should have left the premises after having executed the search warrant and having served the subpoenas.\textsuperscript{58} The court placed great emphasis on the fact that Bosse invited the government agents to stay in order to assist in complying with the demands of the subpoena, and, therefore, the court ruled that the presence of the officers did not amount to so high a degree of coercion as to nullify the otherwise proper consent.\textsuperscript{59} Further, the court pointed out that these were business premises, that the agents entered the premises in the company of and with the permission of Wachs, and that other office employees were present, thus diminishing the effect of any show of force.\textsuperscript{60}

\textbf{The Dissenting Opinion}

Judge Weick, in a vigorous dissent, found five facts uncontested by the evidence:

\textsuperscript{52} Id. at 773-74; Plaintiffs-Appellants' Opening Brief at 47-51. See generally 2 W. LaFave, supra note 35, § 8.2(c) at 633-35.
\textsuperscript{53} Id. at 773.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 774.
\textsuperscript{56} Id. at 773.
\textsuperscript{57} Id. at 773-74.
\textsuperscript{58} Id. at 774.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
First, at least three, and as many as six, Government agents (including Special Attorney Bravo) were present on the plaintiffs' premises for over an hour before any "request" was made that they stay at all. Second, the F.B.I. agents and Special Attorney Bravo repeatedly emphasized that the forthwith command of the subpoenas mandated immediate compliance. Third, the plaintiffs' custodians were never informed by the Government agents of the right to refuse compliance in order to test the validity of the subpoenas. Fourth, Special Attorney Bravo admittedly threatened plaintiffs' custodians with arrest and with unfavorable publicity. Fifth, the normally beneficial effects of the advice and presence of counsel were reduced in this case because Attorney Jackson expressed ignorance of the plaintiffs' rights under a forthwith subpoena duces tecum, and the plaintiffs did obtain, promptly, other counsel to file their motion for the return of property. 61

In addition, the dissent gave great weight to the agent's failure to comply with Rule 17(d) of the Federal Rules of Criminal Procedure and Rule 45(c) of the Federal Rules of Civil Procedure. 62 In proper compliance with those rules, Judge Weick believed that the subpoenas should have been served by a federal marshall and that the agents should have left the premises after having served the subpoenas and having executed the search warrant. 63

The dissent felt that the duress and coercion present here was much greater than that in United States v. McCaleb, 64 where the Sixth Circuit found the consent to search not to be freely and voluntarily given. In McCaleb, the three defendants were observed by DEA agents in an airport returning to Detroit, after a short trip, on a non-stop flight from Los Angeles; they had only one suitcase among them and two of the defendants appeared to be nervous. The three defendants were escorted to a small office where an

61. Id. at 778. (Weick, J., dissenting).
62. Rule 17(d) of the Federal Rules of Criminal Procedure is substantially the same as Rule 45(c) of the Federal Rules of Civil Procedure. Rule 17(d) states as follows:

Service.

A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.

(emphasis added).
64. 552 F.2d 717 (6th Cir. 1977).
agent told McCaleb that he wanted to search the suitcase and that if McCaleb refused, the three would be detained until a search warrant could be obtained. The court concluded that the government has not shown the consent to have been freely and voluntarily given. Accordingly, the dissent in the present case followed the McCaleb decision "which condemned 'any duress or coercion'" and found the district court's determination of a voluntary consent to be unsupported by the evidence.

Under Rule 41(e) of the Federal Rules of Criminal Procedure, a person is not entitled to relief unless he has shown that he is entitled to the lawful possession of property which has been illegally seized. In Nwamu, the district court held that the seizure itself, pursuant to the express claim of lawful authority inherent in the grand jury subpoenas, but in the face of a refusal to comply, constituted the illegal seizure entitling the movants (the parties aggrieved by the unlawful seizure) to relief. Consequently, that court did not address the issue concerning the reasonableness and thus the validity of the subpoenas. Conversely, the dissent in the present case would condition relief upon an additional finding that the subpoenas themselves are unreasonable and thus unlawful. The only element reconciling the two seemingly inconsistent views is the finding in Nwamu that the movants had refused to comply, whereas here the dissent found not a refusal but merely a lack of consent.

Nevertheless, Judge Weick believed that the appellants were entitled to relief under Rule 41(e) since the subpoenas were imper-

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65. Id. at 721.
67. See note 9, supra.
69. Consumer Credit Ins. Agency, Inc. v. United States, 599 F.2d at 778. (Weick, J., dissenting). The majority did not address the issue of the reasonableness and thus the validity of the subpoenas since their finding of a voluntary consent precluded the determination. Id. at 774 n.3.
72. The subpoenas in the present case commanded the forthwith production of the following:
   all books and records of Consumer Credit Insurance Agency Inc., Consumer Fidelity Insurance Agency, Inc., Lee Hoffman and Associates, Thomas A. Mills and Associates, Inc., and American International Assurance Co., Ltd., for the period from January 1, 1974 to September 9, 1976 said records to include, but not be limited to, corpo-
missibly overbroad and unreasonable, amounting to an illegal search and seizure. The dissent said that the subpoenas in effect required the production of all the appellants' business records for a period of two years and nine months, and only two categories of documents were limited to a particular type of transaction. The dissent could not find a clearer example where the production of documents interfered so impermissibly with the continued operation of plaintiffs' business. Thus, because of their sweeping command, the subpoenas were unreasonable and constituted an illegal search and seizure.

Analysis

It is apparent, from both the severe castigations levied by the majority and the firm position of the dissent, that the government agents were on the fringes of a fourth amendment violation. The only redeeming circumstances saving the government from a contrary result appears to be the district court’s election, and the Sixth Circuit's concurrence, to believe the government's witnesses rather than the appellants'.

The result immediately brings to mind the prognostications of the commentator who agreed with Justice Clark that the "totality of circumstances" test is an "elusive, measureless standard" to determine the voluntariness of a consent search and who predicted that no particular combination of factors will reliably ensure a finding of consent or no consent. This is particularly true here where such divergent results are produced by the majority and dissenting opinions upon the facts as presented (granted the fact that

rate minute book(s), correspondence, memoranda, books of account including all journals and ledgers, bank statements, cancelled checks, check stubs, savings account books, records of all insurance policies written, computer printouts, all agreements, contracts, treaties, or understandings with any insurance companies and any agreements, contracts, treaties or understandings with any automobile, trailer, boat or mobile home dealers.

Id. at 779.

73. Id. at 778-80. Interesting to note is the fact that Judge Krupansky quashed a fourth subpoena, substantially identical to the subpoenas in issue here, served on another of appellants' employees, Paul Paczolt, because the subpoena was impermissibly overbroad and therefore unlawful. In re Paczolt, No. C-76-998 (N.D. Ohio, Sept. 17, 1976), cited in Consumer Credit Ins. Agency, Inc. v. United States, 599 F.2d at 779 (Weick, J., dissenting).

74. Id.

75. Id. at 780.

76. Id. at 773.


78. 2 W. LAFAVE, supra note 35.
the testimony was not wholly consistent). Thus, we cannot help but speculate whether the freedom of trial and appellate courts to inject their own values into the decision process, because of the inherent ambiguity in the voluntariness standard, did not, at least to a certain extent, dictate the result in this case.\footnote{79. Id.}

Interesting is the court’s failure to extend the \textit{Bumper}\footnote{80. \textit{Bumper v. North Carolina}, 391 U.S. 543 (1968).} rationale to the context of the unlawful grand jury subpoena \textit{dues tecum}.\footnote{81. \textit{Contra}, \textit{In re Nwamu}, 421 F. Supp. 1361.} Perhaps more interesting is the court’s failure even to discuss the issue. \textit{Bumper} held that a search cannot be justified as lawful on the basis of consent when the “consent” has been given only after the official conducting the search has asserted that he possesses a warrant.\footnote{82. \textit{Bumper v. North Carolina}, 391 U.S. at 548.} Thus, the prosecutor’s burden of proving a voluntary consent to search “cannot be discharged by showing no more than acquiescence to a claim of lawful authority.”\footnote{83. Id. at 548-49.} The Court stated that “[a] search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.”\footnote{84. Id. at 549.}

Thus, with regard to the grand jury subpoena \textit{dues tecum}, it would seem to follow that a search conducted pursuant to the lawful authority of the subpoena cannot be justified on the basis of consent if the subpoena is later found invalid. On the contrary, the court in the instant case did not apply \textit{Bumper} and consequently did not find the consent of the appellants’ employees (the custodians of the documents) to be a mere acquiescence to a claim of lawful authority. Perhaps the court’s considerable reliance upon the presence of counsel may have been the distinguishing factor which insured the absence of coercion in light of the claim of authority. In any case, because of the failure to address the issue, we will never know.

The court’s failure to extend \textit{Bumper} is more significant in light of the forthwith requirement of the instant subpoenas, the requirement which demands the immediate compliance with the subpoenas. The dissent recognized the inherent danger of the forthwith requirement in placing a premium on the party’s knowledge of his right to refuse compliance until the subpoena has been tested in...
court. 85 Otherwise, absent this knowledge, the subpoenaed party may unwittingly forego his right to judicial review. The dissent warned that "[s]ince subpoenas are generally served without any antecedent judicial intervention, reviewing courts should be cautious where it appears that the forthwith requirement may have been used to preclude any review." 86

On the other hand, the court's failure to extend *Bumper* may be due to its recognition of the inherent differences between the subpoena duces tecum and the search warrant. Particularly significant, in this regard, is the *Bumper* Court's statement that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." 87 The subpoena duces tecum makes no such announcement. The subpoenaed party always has the right to resist compliance until the subpoena has been tested in court. 88 Perhaps this is the reason for the court's considerable reliance upon the presence of counsel as a factor dictating a finding of voluntary consent to the commands of the subpoenas, for who but counsel is more capable, under the facts of the present case, to preserve the right to a fair determination of the validity of subpoenas before compliance.

**Conclusion**

One cannot help but think that the result would have been different had the advice and actions of counsel been complete. Had counsel steadfastly advised the appellants to refuse compliance with the commands of the subpoenas, the rights of the appellants would have been preserved and their opportunity to test the subpoenas in court secured. Thus, to prevent future injustices, the case teaches us that proper and unwavering advice from counsel is critical in the "forthwith" grand jury subpoena context.

**Mark N. Hardig**

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86. Id.

The malicious prostitution of legal remedies to subserve unworthy personal ends is not only an injury to the victim of the particular persecution, but also to society at large, if it is suffered to go un-whipped of justice. If the law will not punish such conduct, public confidence in the merits of our system of jurisprudence must inevitably be shaken, and the courts themselves will seem to have forsaken their high function as protectors and vindicators of invaded rights and to have become, instead, the accomplices of evil men. Kolka v. Jones, 6 N.D. 461, 71 N.W. 558, 565 (1897).

Introduction

The epidemic of medical malpractice litigation, which surged to record levels in 1975 and now seems poised to erupt again,1 brought recognition of and cries for relief from a hitherto obscure subclass of such litigation: the frivolous and wholly unjustified lawsuit.2 The burgeoning volume of unwarranted professional malpractice litigation (confronting physicians, in particular) and the general inadequacy of the remedies therefor have prompted a multifaceted response by professional organizations and the defense bar. For example, a bill sponsored by the Florida Medical Association, requiring the losing party in a medical malpractice action to pay all attorneys' fees, became law in Florida on June 5, 1980.3 In Illinois, a non-profit corporation4 was formed in 1979 for the purpose of enhancing public awareness of and promoting solutions to the problem of frivolous malpractice suits. On another level, beleaguered and angry physicians, after prevailing in totally unjustified malpractice litigation, have resorted to countersuits against the un-

* Copyright 1980, Jeffrey D. Parker, M.D.
2. “Available statistical information suggests that a significant percentage of the malpractice claims filed lacks either a legal or factual foundation.” Kisner, Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?, 26 CASE W. RES. L. REV. 653, 655 (1976).
successful plaintiffs and their attorneys. According to two recent tabulations, approximately 89 to 111 physician countersuits have been filed in the past two decades; the vast majority of these suits were instituted in the past five years.

Until recently, the countersuit trend has met only with failure at the appellate level, mainly due to technical factors (explored later in this article) and the paucity of favorable precedent. As late as 1976, one author noted that “[w]hether a physician who has been subjected to a medical malpractice suit can prevail on a malicious prosecution claim remains to be seen.” In 1980, this query was finally answered when the Courts of Appeals of Tennessee and Kentucky became the first two appellate courts in the United States to uphold lower court jury awards to physicians in countersuits against plaintiffs’ counsel in the preceding malpractice actions.

In the malpractice action underlying the Kentucky countersuit, Raine v. Drasin, a left shoulder fracture was discovered while the plaintiff, Robert Browning, was hospitalized for a heart attack. Mr. Browning did not know the precise cause of the fracture. However, after his discharge from the hospital, he contacted a Louisville attorney, J. D. Raine, Sr., for the purpose of bringing a malpractice suit for the injury. After examining Mr. Browning’s hospital record, Mr. Raine prepared a complaint charging the hospital with malpractice. “Because Mr. Raine represented another hospital, he did not want his name to appear as attorney of record for the plaintiff, so he requested . . . James H. Highfield, an attorney who

5. Birnbaum, Physicians Counterattack: Liability of Lawyers For Instituting Unjustified Medical Malpractice Actions, 45 FORDHAM L. REV. 1003 (1977); Singer & Giampietro, The Countersuit, 6 LITIGATION 1, 18 (1979); Kisner, Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?, 26 CASE W. RES. L. REV. 653 (1976); Annot., 84 A.L.R.3d 555 (1978); Adler, Malicious Prosecution Suits as Counterbalance to Medical Malpractice Suits, 21 CLEV. ST. L. REV. 51 (1972). It has been reported that countersuit funds have been established by the state medical associations in California, Michigan, Illinois, and Georgia to assist physicians in litigation against malpractice plaintiffs and their attorneys, Smith, Medical Malpractice: The Countersuit Fad, TRIAL, Dec. 1976, at 44.


7. 26 CASE W. RES. L. REV. supra n. 2, at 656.


shared office space with him, to sign the complaint." Mr. Highfield complied, and the complaint was filed on November 21, 1975. An amended complaint, prepared by Mr. Raine and again signed by Mr. Highfield was filed on July 15, 1976. The amended complaint accused two Louisville physicians, Dr. George F. Drasin, a radiologist, and Dr. Ronald J. Fadel, an orthopedist, of fracturing and dislocating Mr. Browning's shoulder. The doctors, however, had not even seen the patient prior to the injury, but had been called in after the shoulder fracture was suspected to diagnose and treat the patient. A cursory inspection of the hospital records would have showed these facts.

Mr. Raine was aware of and acknowledged the physicians' complete innocence of any wrongdoing. An order was later signed, dismissing with prejudice the complaint against the two doctors, who then brought suit against the plaintiff's attorneys for malicious prosecution and abuse of process.

The trial court dismissed the claim for abuse of process, but the jury returned a verdict for the physicians on the claim for malicious prosecution, awarding each of them $5,000 for physical and mental pain and suffering, $5,000 for humiliation, mortification, and loss of reputation, and $15,000 as punitive damages.

The order of the trial court dismissing the claim for abuse of process was sustained by the court of appeals on rehearing because of the absence of a showing of injury to person or property. However, writing for a unanimous court of appeals, Judge Wilhoit had no difficulty recognizing the presence of all essential elements in the malicious prosecution claim against Mr. Raine. First, the underlying malpractice action had been terminated unequivocally in the physicians' favor, not "through any compromise or settlement of the claim, any quid pro quo, [but] because the appellant Raine was aware of and acknowledged the appellees' complete innocence of any wrongdoing." Second, the evidence showed that Mr. Raine had the complaint against the physicians filed despite the fact that he was "well aware of the lack of any probable cause to sue the [physicians]." Third, malice was properly inerrable from the improper motives which had prompted the naming of the

11. Id. at 5.
14. Id. at 6.
physicians as defendants in the malpractice suit. Judge Wilhoit pointed out that the malice which is necessary to sustain an action for malicious prosecution is

not limited to a finding of ill will to the individual prosecuted but it may be found in any evil or unlawful purpose on the part of the actor motivating commencement of the action. . . . The lack of probable cause for believing in the guilt of the accused is evidence that the prosecution was not begun for a proper or lawful purpose. 15

Furthermore, there was "evidence indicating that [Mr. Raine's] motivation may have been to obtain discovery for his case against the hospital by suing the [physicians] rather than [by] employing the proper means of discovery provided in the Civil Rules." 16 These facts were sufficient to permit the jury to infer that Mr. Raine had acted from improper or unlawful motives, tantamount to malice.

Judgment against Mr. Raine for compensatory damages was affirmed, but the judgment against Mr. Highfield was reversed, because the testimony had established that Mr. Highfield was ignorant of the lack of probable cause for bringing suit against the physicians and that his involvement in the case was motivated solely by a "willingness to assist Mr. Raine in obtaining the proper adjudication of his client's claim." 17 From these facts "the jury could not properly infer the existence of malice on the part of this appellant." 18

The jury instructions in this case referred to a "duty" of the appellants "not to institute a legal proceeding against [the appellees] without probable cause, and/or to institute such proceedings maliciously," 19 and permitted an award of punitive damages if the jury found that the appellants had been guilty of "gross negligence" in the breach of that duty. The award of punitive damages which followed these instructions as to negligence was reversed on the basis of Hill v. Willmott. 20 Although punitive damages were not properly

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15. Id. at 5, 6.
16. Id. at 6.
17. Id.
18. Id.
19. Id.
20. 561 S.W.2d 331 (Ky. App. 1978) (Wilhoit, J., concurring) (malicious prosecution action is physician's sole remedy against an attorney who represented a former patient in an allegedly unfounded medical malpractice suit; negligence complaint dismissed, since attorney owed no duty to the physician to exercise care in the filing of the malpractice claim against him).
awarded for negligence, they could have been awarded depending upon the "seriousness of the injury and the culpability of the one causing the injury." Judge Wilhoit therefore remanded the case for a new trial on the sole question of punitive damages against Mr. Raine.

The significance of this decision will be discussed following a review of the legal background from which it emerged.

Inherent Difficulties in Physician Countersuits

In Kentucky, and in most other states, malicious prosecution has been held by the courts to be a physician's sole available remedy in a countersuit action. Attempts by physicians to recover for damages sustained in unwarranted malpractice actions have met with uniform failure when advanced under other theories of liability, such as attorney negligence, prima facie tort, abuse of process, defamation, barratry, and outrageous conduct. The problem facing physicians who must rely on a malicious prosecution action for redress is that neither the law nor the courts favor such actions.

Twenty-four states, including Kentucky, allow the institution of a malicious prosecution action upon a showing by the plaintiff that the original proceeding was instituted against him without probable cause, and with malice or improper purpose, and that it has been terminated in his favor. This so-called "American rule," en-

21. Id.
26. 45 FORDHAM L. Rev. supra n. 5, at 1045.
29. Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1917); Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966 (1932); Leek v. Brasfield, 226 Ark. 316, 290 S.W.2d 632
endorsed by the Restatement (Second) of Torts,\textsuperscript{30} is conceptually economical and straightforward; but, as a practical matter, the demonstration of malice and lack of probable cause on the part of patients and their attorneys in these majority jurisdictions has presented a nearly insurmountable obstacle. For example, patients who have unjustly sued a physician may take refuge in the absolute defense of good faith reliance upon the advice of counsel, which constitutes probable cause for commencing a malpractice action.\textsuperscript{31} The patient's attorney is likewise virtually immune to charges of malice and lack of probable cause, because he owes no duty of care to the adverse party to investigate the truth or merits, or to consider the probable outcome, of a malpractice claim before filing suit, as long as he can demonstrate either good faith reliance upon assertions made to him by his client\textsuperscript{32} or the existence of a debatable legal issue which he reasonably entertained and espoused.\textsuperscript{33} The attorney is amply shielded by the wide latitude of discretion afforded by the law to advocates who must zealously pursue their clients' interests without fear of retaliation. Even violation by an attorney of the ABA Code of Professional Responsibility Disciplinary Rule which prohibits the filing of a suit "when it is obvious that such action would serve merely to harass or maliciously injure another" has been held not to warrant or increase liability within the context of a malicious prosecution action.\textsuperscript{34} In

\begin{footnotes}
\footnotetext[30]{30. \textit{Restatement (Second) of Torts} § 674 (1976).}
\footnotetext[31]{31. Baber \textit{v.} Fitzgerald, 311 Ky. 382, 224 S.W.2d 135 (1949); Saadoff \textit{v.} Bourgeois, 301 So.2d 423 (La. App. 1974); Kunz \textit{v.} Johnson, 24 S.D. 577, 583, 57 N.W.2d 116, 119 (1953).}
\footnotetext[32]{32. Maechtlen \textit{v.} Clapp, 121 Kan. 777, 250 P. 300 (1926); Peck \textit{v.} Chouteau, 91 Mo. 138, 3 S.W. 577 (1887); Annot., 27 A.L.R.3d 1113 (1969).}
\footnotetext[34]{34. DR 7-102(A)(1). Brody \textit{v.} Ruby, 267 N.W.2d 902 (Iowa 1978); Martin \textit{v.} Trevino, 578}
\end{footnotes}
effect, only the most flagrant abuse of discretion in instituting a medical malpractice suit will suffice to deprive an attorney of his mantle of immunity as an officer of the court. 58

*Peerman v. Sidicane,* 8 the predecessor of *Raine v. Drasin* and the first of only two physician countersuits to survive the cynical scrutiny of the state courts of appeals, owes part of its success to just such an inexcusable, extreme, and atypical abuse of an attorney's prerogatives. A medical malpractice suit was filed alleging negligent diagnosis and treatment of acute pelvic inflammatory disease and receipt by the physician of a “kickback” of a portion of the fees charged for laboratory tests. There was no factual basis to any of these allegations. Furthermore, the plaintiff's attorney, Sidicane, who later surrendered his license to practice law in Tennessee for other reasons, had no reason to believe that Dr. Peerman (a noted gynecologist and subsequently President of the Tennessee Medical Association) had engaged in fee-splitting. Sidicane apparently made no effort to prove or support this allegation which was pure speculation on his part and which was not predicated on any information his client had given him. After the malpractice suit had been dismissed on summary judgment and a countersuit for malicious prosecution and abuse of process had been commenced, Sidicane applied to the court of appeals for a writ of error, and, without the knowledge or consent of his client, continued to press the malpractice case. In the trial of the countersuit, the jury awarded Dr. Peerman $3,500 in actual damages and $8,000 in punitive damages. Sidicane again appealed, contending that the jury should have been instructed that he had an “absolutely privileged” right to make any allegations within the context of judicial proceedings, even though such statements were malicious. The Tennessee Court of Appeals disagreed and unanimously sustained the jury award for malicious prosecution and abuse of process.

That *Peerman* and *Raine* have been the only successful malicious prosecution countersuits by physicians, despite the similarly outrageous nature of other malpractice suits for which redress has


been vigorously, justly, and vainly sought, is a vivid reflection of the intrinsic difficulty of establishing the elements of such an action — even in Tennessee and Kentucky, both of which are majority (American rule) jurisdictions where the requirements for pursuing such an action are comparatively liberal. It is worthy of note that Peerman is also the only such countersuit which has succeeded on a theory of abuse of process and which has sustained an award of punitive damages.

The viability of malicious prosecution, as a practical remedy for spuriously sued physicians, is even more impaired in seventeen states which adhere to the English common law derived from the Statute of Marlbridge. In these minority (English rule) states, an action for malicious prosecution will not lie absent a showing of some "special injury." In some of these states, the special injury must consist of injury to or interference with the person or property (i.e., by arrest or seizure of assets) of the defendant in the original suit. In such states, physician countersuits for malicious prosecution have, without exception, been dismissed at the outset, since arrest of the physician and seizure of his assets is unnecessary and never undertaken in conjunction with the commencement of a medical malpractice suit. Without a showing of such interference the countersuit cannot survive. The physicians in these states are thus deprived of an effective remedy and have become the repeated, helpless victims of indiscriminate, unwarranted, and defamatory medical malpractice suits. Such suits have been instituted with impunity for such deplorable purposes, as to extort a nuisance settlement from the physician or his insurer, to force


38. 52 Hen. 3, c. 6 (1267).

39. Avco Delta Corp. v. Walker, 22 Ohio App.2d 61, 258 N.E.2d 254 (1969) (no action will lie for malicious prosecution of a civil suit where there has been no arrest of person or seizure of property).

40. Rosenberg, He Sued His Malpractice Accusers Right Back — For $3,000,000, MED. ECON., Dec. 8, 1975, at 69, 74.
the physician to reduce his bill for services rendered,41 and to secure the testimony of the physician as an expert or as a means of discovery.42

Other minority (English rule) states43 countenance, in theory at least, other forms of special injury, i.e., those that would "not necessarily [result in] all suits prosecuted to recover for like causes of action."44 In other words, an indispensable element of a malicious prosecution countersuit in these states is a showing by the physician that he has sustained an injury (from the previous malpractice suit) so unique and extraordinary that it would not befall other physicians who are sued for malpractice. This unreasonable and archaic requirement has proved to be a universal snafu to physicians seeking redress for meritless malpractice actions in the English rule jurisdictions, which have turned a blind eye and a deaf ear to entreaties for relief from the usual damages inflicted upon physicians by means of such groundless suits. These states adhere unsympathetically to the notion that "[s]uch ordinary trouble and expense as arise from the ordinary forms of legal controversy should be endured by the law-abiding citizen as one of the inevitable burdens which men must sustain under civil government."45 One justification traditionally given for imposing the inscrutable special injury requirement is that:

the courts should be open to all who think they have a just cause of action, and it would deter many honest litigants from asserting their rights if they knew they were to be penalized by a counter-action for damages based on alleged malice if for any reason they failed in winning their cause.46

Thus, the rights of maliciously sued defendants are willingly sacrificed by the minority states, and the rights of all who would resort to litigation, justly or unjustly, reasonably or maliciously, are indiscriminately, jealously, and equally preserved to such an extent that the possibility of relief through a malicious prosecution action is

rendered a mere fiction, a window-dressing, designed to convey the false appearance of equal justice under the law.

This harsh attitude contrasts sharply with the more discerning and flexible sentiment in the majority (American rule) jurisdictions.

A wise policy requires that the honest claimant should not be frightened from invoking the aid of the law by the statutory threat of a heavy bill of costs against him in case of defeat. But certainly no such policy demands that malice should, by the assurance of protection in advance, be encouraged to vex, damage, and even ruin a peaceful citizen by the illegal prosecution of an action upon an unfounded claim.  

The critical question in the minority states is whether there is any form of "special injury" which will support malicious prosecution and render it a practical remedy for physicians who have been unjustly sued for malpractice. For if there is nothing of a practical and realistic nature which can penetrate the seemingly invulnerable citadel of special injury, then honesty and candor would demand an admission by the minority states that malicious prosecution is not a viable cause of action in their jurisdictions. Such an acknowledgement of the ultimate effect of the special injury rule would spare endless time and expense of physicians who are under the illusion that the law affords them a remedy through litigation and would encourage the development of alternate, less misguided forms of relief.

Can the Citadel of Special Injury Be Cracked?

Despite approximately 56 physician countersuits in minority jurisdictions, no allegations of damages have been accepted by the courts involved as constituting "special injury," and a search for candidates which might satisfy this requirement has been discouraging. Presumably, the loss of hospital privileges or the loss or suspension of the right to practice medicine would constitute a special injury adequate to maintain a suit for malicious prosecution. However, such damages are unlikely to arise proximately from a meritless malpractice suit which has been successfully defended,

48. Extrapolated from Illinois State Medical Society compilation, supra n. 6.
and are therefore of no value in fulfilling the special injury requirement.

In *Brody v. Ruby* the court appeared amenable to recognizing loss of practice, diminished income, and harm to professional reputation “that would not accompany most professional malpractice actions” as actionable forms of special injury if such injury had been demonstrated by the physician-plaintiff. However, no other minority jurisdiction has recognized such damages as special injury. Indeed, in *Balthazar v. Dowling* the court upheld the dismissal of a malicious prosecution countersuit on the ground that the physician’s loss of income, transportation costs, telephone calls, increase in malpractice insurance premiums, and impairment of professional reputation did not constitute special injury, since these damages are incidents of all malpractice litigation. There is precedent holding that unfounded proceedings alleging bastardy, insanity, or insolvency give rise to special injury. However, as such charges are unlikely to appear in medical malpractice suits, they are useless to the physician seeking a pragmatic footing for a countersuit. Indeed, until 1980, there was little hope of finding any form of special injury which would enable physicians in English rule states to mount a countersuit.

In *Raine*, while discussing another issue, i.e., the extent of recovery allowed by Kentucky law in a malicious prosecution suit, Judge Wilhoit may have provided an intriguing clue to a limited solution of the seemingly insurmountable special injury obstacle. Relying upon the Restatement (Second) of Torts, Judge Wilhoit found that where the allegations contained in the pleadings are libelous per se, the defendant’s reputation has been “assailed” in a manner sufficient to permit additional recovery in a malicious prosecution action. In other words, where the malpractice plaintiff’s allegations are not only malicious and without probable cause but defamatory to a degree not warranted by or limited to the facts of the case, a special injury to professional reputation, which is not necessarily encountered by all malpractice defendants, is presumed to occur.

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50. 267 N.W.2d 902 (Iowa 1978).
51. Id. at 905.
53. *Restatement (Second) of Torts* §§ 681(b) & 573, Comment c (1976).
Libel per se, as a special form of harm to reputation which does not beset all malpractice defendants, would certainly seem to qualify under the traditional concept of special injury. Whether a plaintiff's statement contained in a pleading about a physician is libelous per se depends upon whether the statement imputes to the physician a general want of professional knowledge or skill, or only a want of skill in a particular instance. The former is always actionable; the latter is actionable "only if the act fairly implies an habitual course of similar conduct, or the want of the qualities or skill that the public is reasonably entitled to expect of persons engaged in such a calling." This opinion is consistent with Kentucky law.

In Raine, the allegations made against the physicians, although apparently couched within a particular context (i.e., attributing the cause of the plaintiff's shoulder fracture to the defendant physicians), nevertheless implied a more profound professional neglect, ignorance, and incompetence, which necessarily and adversely affected the physicians' professional reputations. Judge Wilhoit eloquently captured the essence of this implication by asking rhetorically:

[W]ould not an orthopedist and a radiologist who treated a cardiac patient so carelessly and negligently as to cause him 'to suffer a fracture and dislocation of his left shoulder and other damage to the bones and tissue thereabout' be such arrant bunglers that their reputations as men of knowledge and skill would receive essential damage?

The libel per se inherent in this deliberate, false allegation was held to constitute a special harm to reputation which opened the gate to recovery of additional damages under Kentucky law.

It should be noted here that while the absolute privilege accorded to statements made within the context of judicial proceedings is generally held to preclude subsequent liability for defamation, no such protection can be invoked as a defense within the context of a malicious prosecution action.

54. Id. § 573, Comment c.
55. Id.
58. Sebree v. Thompson, 126 Ky. 223, 103 S.W. 374 (1907).
59. "Where an action for libel or slander is unavailable because of the absolute privilege, a physician may still be able to interpose an action for malicious prosecution . . . ." 45 Fordham L. Rev. supra n. 5, at 1047. See supra n. 36 & accompanying text.
The probability of acceptance of the libel per se distinction by minority courts is dubious. As previously noted, a broad claim of harm to reputation has been tested and rejected by minority jurisdiction courts as a legitimate form of special injury. In O'Toole v. Franklin a patient sued two physicians alleging that he had been given a medication which caused damage to his hearing. The physicians, however, had not seen the patient until after the medication had been discontinued. The physicians' attorneys notified the plaintiff's attorney that they could not possibly have played any role in the alleged injury, and repeatedly requested that the action against them be dismissed. The plaintiff's attorney ignored these entreaties, and six months were required to obtain a judicial dismissal of the action against the two doctors. In the meantime, they suffered from substantial adverse publicity and coverage by the news media. A subsequent countersuit against the patient, his attorney, and other attorneys in his firm was dismissed by the circuit court. On appeal to the Oregon Supreme Court, the physicians' attorney argued that "[loss of professional reputation is a special injury that is not an ordinary result of litigation. . . . Defamatory matter asserting incompetency to conduct one's profession is libelous per se and requires no proof of special injury. Damages are presumed."

The Oregon Supreme Court apparently ignored the distinction between ordinary harm to reputation arising in malpractice suits, and the libel per se alleged to have occurred in the suit before them. Dismissal of the countersuit was sustained on the ground that harm to reputation arising from an alleged unfounded charge of malpractice is not the "special injury" required for imposing liability for malicious prosecution of a medical malpractice action. The physicians' attorney interpreted this to mean that "not only do you have to prove malice — which wasn't contested in this case — but that a doctor suffered 'extraordinary damages' to his reputation to a degree that would not have been sustained by anyone else in a similar case."

This additional feature is exactly the void which libel per se seems capable of filling, if argued specifically and considered analytically, as in Raine. However, the unique character of libel per se, as an excessively broad and unwarranted form of harm to reputa-

60. 279 Or. 513, 569 P.2d 561 (1977).
62. Id. at 80 (emphasis in original).
tion which does not occur in all malpractice cases, has not been vigorously pursued as a potential solution (albeit limited to particular circumstances) to the special injury requirement. Instead, the libel per se distinction has been overlooked, because minority jurisdictions have always summarily swept aside the entire, undivided category of harm to reputation, without careful analysis, and rejected it as an embodiment of special injury.

This cursory rejection, combined with the virtual impossibility of identifying any other acceptable and realistic form of special injury which would permit physician countersuits for malicious prosecution to survive, has led enlightened members of the legal community to advocate abandonment of the obsolete and unreasonable special injury rule, which serves merely to guarantee that the victims of malicious litigation will have no recourse. In this vein, the Chief Justice of the Oregon Supreme Court, in a dissenting opinion, stated in 1975:

I would adopt the rule presently accepted in the majority of American jurisdictions that no allegation of proof of “special damages” is required to recover for malicious prosecution of a suit known to be groundless. I would do so because, as stated by Dean Prosser:

“[T]here is no policy in favor of vexatious suits known to be groundless, which are a real and often a serious injury; and the heavy burden of proof upon the plaintiff, to establish both lack of probable cause an an improper purpose, should afford sufficient protection to the bona fide litigant and adequate safeguard against a series of actions.” Prosser on Torts 855 (4th ed. 1971).

There is no more reason to require “special damages” here than in cases based, for example, on outrageous conduct.63

In O'Toole v. Franklin,64 the Oregon Supreme Court acknowledged Chief Justice O'Connell's position, advocating abrogation of the special injury rule, but it refused to heed his advice or to depart from precedent. The court suggested legislation as an appropriate avenue for relief.

This result in Oregon is typical of that in other minority jurisdictions. Every challenge to the logic, timeliness, exclusivity, or overkill of the special injury rule in these states has been thwarted by its dwindling but loyal supporters, who continue to brandish

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64. 279 Or. 513, 569 P.2d 561 (1977).
this anachronistic weapon with a certain stubborn, if not perverse, glee. The probable reluctance of these courts to look favorably upon the libel per se approach adumbrated in Raine — if and when this theory is pleaded in their jurisdictions — may also be anticipated for other reasons. First, it would constitute a tacit admission that their traditional blanket rejection of harm to reputation as a form of special injury was not carefully thought out. Second, it would bring the minority states one step closer to acknowledging the wisdom of the Restatement (Second) of Torts which has long since bypassed the insatiable special injury requirement to which these courts have clung so tenaciously. Third, it would acknowledge the correct reasoning of a court in Kentucky, a majority state. Fourth, the minority states believe that it would lead to an interminable chain of countersuits — an unfounded suspicion which has not been confirmed by logic or the experience in majority jurisdictions.

Thus it appears that the libel per se approach in Raine will probably not contribute to a resolution of the impasse faced by unjustly sued physicians in minority jurisdictions, where the problem remains acute, where the courts remain intransigent in their insistence upon a showing of the so-far mythical entity of special injury, and where patients' attorneys remain impervious to liability for instituting unjustified proceedings.

Impact of Raine in Majority Jurisdictions

The results in Raine and Peerman signify nothing more than the mere possibility of a successful countersuit in a majority jurisdiction when attorneys flagrantly abuse their professional prerogatives by filing false and libelous claims against physicians who are known from the outset to be innocent of any wrongdoing. These countersuit victories are largely attributable to the obviousness of the unjustified claims filed against the doctors, and should not be construed to represent: (1) a relaxation of the prohibitive proof requirements for malicious prosecution actions; (2) a change in judicial attitude toward doctors or countersuits; or (3) the emergence of a trend.

65. "The suitor who has sustained the burden of one action will not assume the expense of a second suit unless he has a strong guaranty that he can convince a jury that the original action was instituted maliciously and without probable cause." Kolka v. Jones, 6 N.D. 461, 71 N.W. 558, 561 (1897). An examination of the approximately 78 countersuits lost by physician-plaintiffs in the past 5 years reveals no subsequent counter-countersuits.
It is a sobering fact that of approximately 34 countersuits filed by physicians in majority jurisdictions in the past five years, only these two have prevailed. This less than 6% success rate can hardly be regarded as encouraging. Moreover, the same legal and judicial machinery which has spawned the overwhelming defeat of physician countersuits is still intact, with no promise of material change on the horizon.

It should be noted that the above statistics are skewed by several factors, including the settlement of similar cases of outrageous attorney conduct which might have resulted in judgments for the physicians involved. For example, in southern California a patient died following surgery. The pathologist who performed the autopsy to determine the cause of death was named, and retained for several years, as a defendant in a wrongful death action, even though the plaintiff's attorney had long since discovered that the pathologist could not have caused the patient's death. The pathologist's countersuit was settled.

In 1979, a countersuit by a Sacramento, California surgeon who had been unjustly sued for malpractice was settled with a check for $10,000 and a letter of apology from the attorney-defendants, stating in part:

We . . . apologize for any inconvenience, embarrassment, expenses, or other problems caused you by the commencement and the prosecution of the action against you. . . . Had we been more diligent in our discovery . . . we would have realized that you should not have been kept in as a defendant. Should this situation ever arise again in the future, we will certainly be more diligent.

A countersuit brought by a Florida cardiologist was settled with a check for $15,000 and an "offer of judgment" by which the attorney-defendants, in effect, confessed judgment against themselves, thereby precluding the likelihood of a more costly jury award.

66. Extrapolated from Illinois State Medical Society compilation, supra n. 6.
While it cannot be determined how many successful countersuits have thus been avoided through settlement, the overall tally in litigated cases is certainly discouraging. It can be safely concluded that the deck is still stacked against the doctor.

The positive value of Raine and Peerman lies simply in dispelling the hitherto mounting suspicion that the prospect of a doctor prevailing over his attorney-tormentors is a mere pipedream, a sheer impossibility. The difficulty of achieving such a result, however, even in majority jurisdictions, remains unmitigated.

KENTUCKY IN CONTEXT

There has been much unnecessary confusion and misunderstanding in the minds of commentators and judges over whether Kentucky is a majority or a minority state with respect to the necessity of showing special injury, and this issue deserves final clarification. In Woods v. Finnell the court clearly rejected the English rule (“We perceive no good reason for following this rule...”) and held that:

[W]here the claim is not only false, but the action is prompted alone by malice and without any probable cause, the defendant’s right of recovery, for the expenses incurred and damages sustained, should be as fully recognized as if his property had been attached or his body taken charge of by the sheriff. . . . [I]t would be a singular system of jurisprudence that would admit the wrong and still withhold the remedy.

This much-cited case identified Kentucky unequivocally as a majority jurisdiction which endorses the American rule and eschews the necessity of showing special damages as a foundation for a malicious prosecution action. The Woods court went on to say that “[w]hen the reputation has not been assailed, or the defendant imprisoned, or his property seized, or its use prevented, the damages should be confined to the loss of time, and the reasonable expenses incurred in the defense of the action beyond the ordinary costs.” Thus, special injury is not required as a basis for a malicious prosecution action in Kentucky, as it is in the minority jurisdictions, but is only a rule of evidence with respect to the type of

70. 76 Ky. (13 Bush) 628 (1878).
71. Id. at 632.
72. Id. at 633.
73. RESTATEMENT (SECOND) OF TORTS § 674 (1976). See Annot., 150 A.L.R. 897, 900 (1944) which classifies Kentucky as a majority state.
damages recoverable, beyond those which are automatically permissible in such cases.

However, in Smith v. Smith75 and Harter v. Lewis Stores, Inc.,76 the Kentucky Court of Appeals confused the role of special injury with respect to these separate issues (i.e., basis of action, extent of recovery) to such a degree that they appeared to be thereby merged and transformed by arbitrary judicial fiat into a statement of the very English rule which the Woods court had expressly jettisoned.

For example, in Harter the court stated that "[t]he rule seems to be that the institution of a civil suit maliciously and without probable cause is a sufficient basis for an action for malicious prosecution where one has suffered special damages,"77 implying that special damages are necessary to a "sufficient basis" for the maintenance of a malicious prosecution action. This flies in the face of the Restatement78 and Woods, neither of which impose any such requirement. Indeed, the Oregon Supreme Court was recently so misled by this confusing statement in Harter as to cite Kentucky as an example of an English rule jurisdiction.79 A recent commentator was similarly misled by Smith v. Smith80 and mistakenly designated Kentucky as an English rule jurisdiction.81 It remains for subsequent Kentucky decisions to correct this perversion of the majority rule enunciated so clearly in Woods.

The controversy in Raine did not concern the basis of a malicious prosecution action but was confined to the issue of whether the reputations of the physician-defendants had been "assailed" in a manner sufficient to unlock the door to additional recovery. As to this latter issue, a relevant conflict, quietly circumvented in Raine, is apparent between Kentucky law and the Restatement (Second) of Torts which Judge Wilhoit embraced as an authoritative source for interpretation of Kentucky law. The conflict relates to the conditions and extent of recovery for wrongful use of civil proceedings, i.e., malicious civil prosecution. While the Restatement allows broad and unconditional recovery,82 Kentucky law, followed con-

75. 296 Ky. 785, 178 S.W.2d 613 (1944).
76. 240 S.W.2d 86 (Ky. 1951).
77. Id. at 87 (emphasis added) (citations omitted).
78. RESTATEMENT (SECOND) OF TORTS § 674 (1976).
80. 296 Ky. 785, 178 S.W.2d 613 (1944).
82. When the essential elements of a cause of action for wrongful civil proceedings
sistent since \textit{Woods}, adheres to a narrower rule limiting damages to loss of time and expenses of defense unless the reputation of the original defendant has been assailed, or his body imprisoned, or his property seized. No persuasive reason is apparent for favoring the narrower Kentucky rule of recovery over that in the Restatement which is followed by the other majority jurisdictions. Moreover, reliance upon such selective extrapolation from the Restatement to interpret state law with which the Restatement is in fundamental disagreement belies the soundness of the argument. Hopefully, this disparity will be confronted and resolved in subsequent Kentucky decisions.

\textbf{Conclusion}

While any surge of euphoria in the medical community over the sudden appearance of two impressive countersuit victories must be quickly tempered by the sobering realization that these results are tentative, isolated mutations in a legal world that remains generally unsympathetic to the plight of unjustly sued physicians, so attorneys, who would irreverently flaunt their historical immunity to liability for malicious prosecution of medical malpractice suits, must heed the unmistakable admonition sounded in \textit{Raine} and \textit{Peerman}, lest they become the unwitting victims of their own impecable folly.

Unfortunately, the lessons of \textit{Raine} and \textit{Peerman} will probably go unheeded in the minority jurisdictions, where unjustly sued physicians are, and will continue to be, the preferred sacrificial offerings of an archaic legal philosophy which deifies the rights and immunities of malpractice plaintiffs and their attorneys, regardless of motive or consequence.

There is nothing sacred or immutable, however, about this regrettable imbroglio. If the fairness and flexibility of malicious prosecution actions, which are currently being tested and refined by an

have been established, the plaintiff is entitled to recover for

(a) the harm normally resulting from any arrest or imprisonment, or any dis-
    possession or interference with the advantageous use of his land, chattels,
    or other things, suffered by him during the course of the proceedings, and
(b) the harm to his reputation by any defamatory matter alleged as the basis
    of the proceedings, and
(c) the expense that he has reasonably incurred in defending himself against
    the proceedings, and
(d) any emotional distress that is caused by the proceedings . . . .

\textit{Restatement (Second) of Torts} § 681 (1976).
angry medical community, continue to be found wanting, and the countersuit successes unduly scarce, an intense lobbying and legislative assault can be expected. The traditional immunities and statutory defenses of malpractice plaintiffs and their attorneys will then no longer be challenged within the same outmoded framework of built-in obstacles and handicaps for the physician, but rather will be over ridden by imaginative legislation.

One example of such an approach is the controversial new Florida statute which went into effect on July 1, 1980 and requires the losing party in a medical malpractice suit to pay the adversary's attorney's fees.\(^8^3\) This statute cleared the Florida House by a vote of 98 to 5 and the Florida Senate by a vote of 34 to 5. The chairman of the American Bar Association's Medicine and Law Committee commented: "The doctors are sick and tired of being sued by the lawyers. . . . You can see the doctors have muscle in the legislatures. If they succeeded in Florida, they can do it elsewhere."\(^8^4\) The proliferation of similar legislative solutions can be anticipated as the increasing expense and annoyance of capricious malpractice suits, coupled with the absence of pragmatic remedies, provoke an already irate and frustrated (but undaunted) medical community to muster its hitherto fragmented and underutilized political clout.

This burgeoning legislative trend, inspired by the exasperating proof requirements imposed upon physicians who wish to countersue, may eventually supersede malicious prosecution actions altogether and render them obsolete — victims of their own lopsided constraints.

On the other hand, another curious trend is now emerging which may provide lawyers with the incentive to facilitate, rather than to oppose, the rejuvenation of malicious prosecution as a workable cause of action. Lawyers have suddenly become the targets of legal malpractice suits handled by their colleagues in unprecedented numbers. This alarming wave of internecine litigation within the legal profession is beginning to resemble an unrestrained intra-tribal cannibalism. It is flourishing at 2\(\frac{1}{2}\) times the rate of legal malpractice suits ten years ago, and is currently estimated to involve 5\% to 8\% of U.S. lawyers as defendants every year.\(^8^5\) The

average award in such cases is now thought to exceed $10,000.86 A recent Toledo, Ohio jury returned a $2.35 million legal malpractice verdict against an attorney,87 and three weeks later a San Francisco jury awarded a $3.55 million legal malpractice verdict arising from an antitrust case.88

The traditional reluctance of lawyers to take their brethren to court on behalf of dissatisfied clients seems to have vanished, and the growing prospect of large awards against legal malpractice defendants has catapulted attorneys into the same realm of potential jeopardy as physicians. “Lawyers are at the same position the doctors were in 1975. They are scrambling to get coverage.”89 “ ‘There is a feeling of utter fright among lawyers here now,’ said one Toledo attorney who did not want to be identified. ‘Everybody is digging their [insurance] policies out and looking at their files to see what they did and didn’t do.’ ”90

While the dimensions of the problem of unfounded malpractice actions against attorneys are not yet clear, aggrieved attorney-defendants are beginning to consider retaliation through countersuits. Ironically, they are haunted and stymied by the same technical obstacles which afforded them virtual immunity against physician-plaintiffs in medical malpractice countersuits. For example, a malicious prosecution action by an Illinois attorney was recently dismissed, because, among other things, the harm to his professional reputation arising from the underlying action did not constitute a “special injury” sufficient to maintain a cause of action for malicious prosecution — a nauseatingly familiar refrain.

The search for remedies which will effectively discourage groundless professional malpractice actions should generate an ample and urgent common interest among physicians and attorneys. It is at least conceivable that malicious prosecution may yet be overhauled, revamped, and revitalized as one means of dealing with the imminent danger to members of both professions from a

86. Id.
public which has grown increasingly disenchanted, sophisticated, avaricious, and boldly litigious. Legislative remedies, now in the embryonic stage, may also be expected to mature and abound.

Postscript

An $85,000 medical malpractice countersuit award based upon abuse of process by an attorney has just been unanimously upheld by the Nevada Supreme Court. This is the third and largest suit by an American physician, the first to be upheld by a state supreme court, the second to succeed on an abuse of process theory, and the second to include an award of punitive damages (i.e., $35,000 compensatory damages and $50,000 punitive damages).

JEFFREY D. PARKER, M.D.

93. See the sentence in text which precedes the sentence citing n. 37, supra.

The campaign to assure the city of Covington a suitable land area in which to establish a suburban growth pattern continues to intensify. In the center of battle stand the courts of the Commonwealth. Their role in the annexation process is of critical importance. The ebb and flow of the fortunes of battle depend upon judicial interpretation of critical statutory language, as is clearly seen in City of Covington v. Liberty Construction Company.¹

The Statutes

The Kentucky Constitution confers upon the legislature the authority to assign classifications to municipalities and to organize the governments of those cities within those classifications.² Annexation of territory by a municipality is embraced within the general term of “organization and government” of cities of the class to which the municipality belongs.³ Pursuant to that authority, the legislature enacted chapter 81 of the Kentucky Revised Statutes.⁴

* During the 1980 session of the Kentucky General Assembly, the state legislature passed House Bill 20. This bill allows a vote on the issue of annexation if 50% of the residents of the area petition for such a referendum. Annexation would be denied if, upon that referendum, 75% of the voters in the area proposed to be annexed voted against the plan. The language of the referendum is contained within a new section of Chapter 81 of the Kentucky Revised Statutes.

2. Ky. Const. § 156.
3. Lewis v. Town of Brandenburg, 105 Ky. 14, 48 S.W. 978, 979 (Ky. 1899).
   (1) Within thirty (30) days after the enactment of an ordinance proposing to annex unincorporated territory to a first-class city, or to reduce its limits, one or more residents or freeholders of the territory proposed to be annexed or stricken off may file a petition in the circuit court of the county, setting forth the reasons why the territory or any part of it should not be annexed, or why the limits should not be reduced. Summons shall issue on the petition and be executed on the chief executive officer of the city, and the answer of the city shall be filed within twenty (20) days after service of the summons. The case shall be tried according to the practice prescribed for the trial of jury cases.
   (2) If the jury finds, upon a hearing, that less than seventy-five per cent (75%) of the freeholders of the territory to be annexed or stricken off have remonstrated, and that the adding or striking off of the territory will be for the interest of the city, and will cause no manifest injury to the persons owning real estate in the territory sought to be annexed or stricken off, the annexation or reduction shall be approved and become final. If the jury finds that seventy-five per cent (75%) or more of the resident freeholders of the territory sought to be annexed or stricken off have remonstrated, the annexation or reduction shall not take place, unless the jury finds from the evidence that a failure to annex or strike off will materially retard the prosperity
Section 81.140, when read together with sections 81.100 and 81.110, outlines the procedure by which a second class city adds to or reduces its territory. The method of annexation followed by a second class city is to be contrasted with the method prescribed to be followed by a city of the fourth class in sections 81.210 and

of the city, and of the owners and inhabitants of the territory sought to be annexed or stricken off, in which case the annexation or reduction shall take place notwithstanding the remonstrance.

(3) An appeal from the judgment may be taken as in other cases, but there shall be no change of venue from the county. Costs shall follow the judgment.

(4) The judgment shall, when entered, be certified to the city legislative body, which may thereupon annex to or strike from the city the territory described in the judgment, and the territory shall then become, or cease to become, a part of the city.


Annexation of unincorporated territory or reduction of territory by second-class city. - Any city of the second class may annex any unincorporated territory or reduce the boundaries of the city, in the same manner and under the same procedure as is provided in KRS 81.100 and 81.110 for annexation of unincorporated territory or reduction of boundaries by cities of the first class, with the following exceptions:

(1) The ordinance proposing annexation or reduction must be adopted by two-thirds (2/3) vote of the governing body of the city.

(2) The proceedings in the circuit court shall be tried according to the practice prescribed for the trial of equity cases, without the intervention of a jury.

(3) The number of freeholders whose remonstrance will control the question of annexation or reduction shall be fifty per cent (50%). No freeholder of the territory to be annexed or stricken off shall be considered to have remonstrated unless said freeholder be joined as a party plaintiff in the proceedings in the circuit court within ninety (90) days after the enactment of the ordinance proposing to annex or to strike off such territory.

(4) The circuit court may find and decree that only a part or parts of the territory proposed to be annexed shall be annexed, in which event the court shall specifically indicate and prescribe by metes and bounds, or other clear and specified description, the territory which the court finds should be annexed, and that part only shall be annexed.


Annexation or reduction of territory by fourth-class city. - Whenever a fourth-class city desires to annex any territory or to reduce the boundaries of the city, the city legislative body shall, by ordinance, accurately define the boundary of the territory proposed to be annexed or stricken off. The ordinance shall be published pursuant to KRS chapter 424. Within thirty (30) days after the adoption, publication and advertisement of the ordinance, a petition shall be filed in the circuit court of the county within which the city is situated, in the name and on behalf of the city, setting forth the passage, publication and advertisement of the ordinance and its object and purposes, together with an accurate description by metes and bounds of the territory proposed to be annexed or stricken from the city, and praying for a judgment to annex the territory or strike it from the city. Notice of the filing of the petition shall be given in the same manner as notice of passage of the ordinance. The circuit court shall not have jurisdiction of the proceedings unless the required publication or advertisement of the ordinance contains notice of the proposed proceedings in the

Protest against annexation by fourth-class city - Trial - Judgment. - (1) Within the time fixed by the court by its order, any one or more of the resident voters of the territory proposed to be annexed or stricken off may file a defense in the proceeding, setting forth the reasons why the territory or any part of it should not be annexed to the city, or why the limits of the city should not be reduced. The case shall be tried by the court without the intervention of a jury. If the court, upon hearing, is satisfied that less than a majority of the resident voters of the territory sought to be annexed or stricken off have remonstrated against the proposed extension or reduction, and that the proposed extension or reduction of the limits of the city will be for the interest of the city and will cause no material injury to the owners of real estate in the limits of the proposed extension or reduction, the proposed extension or reduction shall be decreed. If the court finds that a majority of the resident voters in the territory to be affected, or the owners of the property if there are no resident voters, have remonstrated against the change, and that the change will cause material injury to the owners of real estate in the limits of the proposed extension or reduction, the extension or reduction shall be denied. Costs shall follow the judgment. An appeal shall lie from the judgment as in other cases.

(2) If the judgment is in favor of the city, the clerk of the court shall certify the judgment to the city legislative body, which shall enter the judgment on its records and shall thereupon, by ordinance, annex to or strike from the city the territory described in the judgment.


tion of territory by a first class city involves a jury, a second class
city’s annexation ordinance is tried by the court.¹¹

The court is to apply two distinct tests to the ordinance passed
by the legislative body of a second class city, depending upon the
number of freeholders within the proposed area who protest the
annexation. If less than half the resident freeholders within the
area object to annexation by the city, the court, in its review of the
impact of the ordinance, is to apply the “manifest injury” test, ap-
proving and making final the annexation where adding the terri-
tory “will be for the interest of the city and will cause no manifest
injury to the persons owning the real estate in the territory sought
to be annexed.”¹² Manifest injury is defined as meaning not some
injury to some of such property holders by annexation, but mani-
fest injury to property holders as a class or majority of them.¹³

If the court determines that more than half the resident free-
holders in the area protest the action by the city, the court is to
apply a prosperity test, invalidating the ordinance unless it finds
from the evidence that “a failure to annex . . . will materially re-
tard the prosperity of the city and of the owners and inhabitants of
the territory sought to be annexed.”¹⁴ The term “retard prosper-
ity” means to delay progress of the community as gauged by its
attainments in the many fields affecting the welfare of its inhabi-
tants and the owners of property comprising its territorial limits.
Economic, religious, social, safety, and sanitary conditions are fac-
tors to be taken into consideration in determining the prosperity of
the community as a whole.¹⁵ Upon favorable application of the
prosperity test to the annexation ordinance, “annexation . . . shall
take place notwithstanding the remonstrance.”¹⁶

In contrast to annexation by a second class city, which may be
completed without court action, a fourth class city’s attempt to ex-
pand its land area and population must be accomplished under the
supervision of the circuit court.¹⁷ In the event any petitions of re-
monstrance by resident freeholders setting forth reasons why the

¹⁷. Ky. Rev. Stat. § 81.210 (Supp. 1978); see note 6, supra. See also Buchanan v. City of
Dayton, 363 S.W.2d 92, 93 (Ky. 1962).
annexation should not take place are submitted, the court is to apply the material injury test to the ordinance. Under the statute, "the burdens on landowners in an area to be annexed by a fourth class city must be weighed against the benefits" of annexation. "[T]here must be a substantial excess of burdens over benefits to defeat annexation." Having proven a prima facie case of substantial benefit (for example, police and fire protection) to the property proposed for annexation, the burden of persuasion shifts from the fourth class city to the remonstrants, who must produce a clear and obvious showing of the imposition of manifest and substantial burdens upon the freeholders and inhabitants of the area should the court approve the ordinance.

The legislature clearly and concisely set forth a model for action by the courts in matters involving annexation. A complete and accurate set of facts for the court’s consideration is essential for the correct implementation of that model. How effectively the trial court discharges its responsibility under the statute is governed by the degree of care with which the court assembles facts upon which to base its decision.

The Report of the Master Commissioner

From the year 1890 until 1920, the area of the City of Covington rose from 453.6 acres to 4,055.88 acres, and its population grew from 37,371 in 1890 to 57,121 in 1920. From 1920 to 1960, there was no territorial expansion of the municipal boundaries and the population grew by only 3,255. The lack of orderly geographic expansion during those years resulted in the development of 98% of the land within the city limits. Younger generations of Covingtonians moved to the surrounding residential areas outside of, but often contiguous to, the boundaries of the city. This outmigration was aided by the municipal government’s provision of water distribution and sewer services to those areas, without annexation by the city.

The replacement population... older, poorer and less educated, re-

19. McClellan v. Central City, 375 S.W.2d 823, 824 (Ky. 1964).
quired more services which increased the expenses to the City, and at the same time, caused a decrease in the ad valorem tax base primarily because they were unable to provide the required maintenance and general updating of the aging structures within the City. The combination of increased expenses and a reduction in the ad valorem tax base results in an increase in the ad valorem tax rate and the imposition of additional kinds of taxes such as occupational and payroll taxes.\(^{24}\)

Faced with the prospect of becoming yet another deteriorating city, the municipal government embarked on a program of urban renewal, together with a comprehensive program of annexation as a two-pronged effort to improve the existing inner city and to provide land area in which to establish an improved suburban growth pattern.\(^{25}\) The annexation program of the city is divided as follows:

<table>
<thead>
<tr>
<th>Name of Annexation</th>
<th>Number of Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>Schlosser property</td>
<td>5.70 acres</td>
</tr>
<tr>
<td>Kenton Hills</td>
<td>71.74 acres</td>
</tr>
<tr>
<td>Kyles Lane area</td>
<td>212 acres</td>
</tr>
<tr>
<td>Annexation Area #1</td>
<td>4,074.80 acres</td>
</tr>
<tr>
<td>Annexation Area #2, also known as Banklick Creek Area</td>
<td>1,620 acres</td>
</tr>
<tr>
<td>Annexation Area #3</td>
<td>1,423.32 acres</td>
</tr>
<tr>
<td>Ohio River</td>
<td>102.64 acres</td>
</tr>
<tr>
<td>Annexation Area #4</td>
<td>2,984.30 acres</td>
</tr>
<tr>
<td>Annexation Area #5</td>
<td>1,760 acres</td>
</tr>
<tr>
<td>Annexation Area #6</td>
<td>2,415 acres</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>14,669.50 acres</strong></td>
</tr>
</tbody>
</table>

The Schlosser property was annexed in 1963. The Kyles Lane and the Kenton Hills areas were annexed in 1965, and the Banklick Creek area was annexed in 1968. The remaining proposed areas of annexation are in various stages of litigation.\(^{26}\) One of the latest offensives in the continuing war of annexation waged between the City of Covington and the outlying unincorporated residential areas gave momentum to Covington's plans when the Kentucky Court of Appeals issued its decision in *City of Covington v. Liberty Construction Company*.\(^{27}\) The appellate court reversed a ruling by the Kenton Circuit Court denying effect to an annexation ordi-

\(^{24}\) Id. at 18.

\(^{25}\) Id. at 23.

\(^{26}\) Id.

nance passed by the legislative body of the city, and remanded the
case to the lower court with instructions to properly apply the
prosperity test prescribed by statute to determine the validity of
the city's action.\textsuperscript{28}

By ordinance enacted September 5, 1968,\textsuperscript{29} the City of Covington sought to annex approximately 1,840 acres or 3 square miles.\textsuperscript{30} The initial ordinance was published ten times between September 19th and October 1st, 1968.\textsuperscript{31} "On September 27th and October 2d, 1968, remonstrance actions were filed by appellees which were consolidated for trial."\textsuperscript{32} Prior to the February, 1974 trial in which the proposal was reviewed, two additional acts were passed by the municipality's legislative body amending the description of the land sought to be annexed and reaffirming the desire of the city to include the property within its boundaries.\textsuperscript{33}

The trial court referred the matter to the Master Commissioner for the Kenton County Circuit Court in order to obtain as thorough a review of the circumstances surrounding the annexation ordinance as possible.\textsuperscript{34} The Master Commissioner conducted a hearing lasting nine days which resulted in a transcript of testimony some 1,293 pages long.\textsuperscript{35} A final report of 61 pages was filed by the Master Commissioner. Within that report, the commissioner undertook a careful review of the present financial condition of the City of Covington, the general development of the municipality, services available from Covington generally and which might be provided the area proposed for annexation, together with a review of those services available to the area from entities other than the City of Covington.\textsuperscript{36}

As to the prosperity of the City of Covington, the court based its determination on two findings made by the Master Commissioner:

1. As a result of annexations of additional territory by the City of
Covington during the 1960's, that City has acquired sufficient undeveloped territory in order to establish its own suburban growth pattern; and 2. The continued prosperity of the City of Covington is not dependent upon the annexation of additional territory, but upon the continued redevelopment of Old Covington in order to create a physical and cultural environment which will attract to the central city a more desirable population - the young, high income, well educated, tax producing leaders which Covington has lost to the suburbs.\textsuperscript{38}

As to the second issue involved in any application of the prosperity test, that is, whether "a failure to annex . . . will materially retard the prosperity . . . of the owners and inhabitants of the area sought to be annexed,"\textsuperscript{39} the decision of the trial court was reached after a review of the land usage, topography, population, and services generally available to the area.\textsuperscript{40}

According to the report accepted and adopted by the Kenton circuit court:

Municipal incorporation . . . will not affect the principal services of water distribution and sewage collection and treatment. It will not influence the educational services, telephone communication services, electrical distribution services or the transportation services available to the area.

Municipal incorporation will affect police protection, fire protection, planning and zoning administration, interior sewer and street maintenance, and building code enforcement and garbage collection. In each case, said services are available to said area from other governmental units or by private contracts at levels of efficiency and cost which are adequate to promote the . . . progress and prosperity of the residents and freeholders of said area.\textsuperscript{41}

The Master Commissioner found that annexation of the west portion of the area in question would have the following results: (1) substantially reduce real estate market values located in the west; (2) the annexed western portion would be separated from the main part of the city and would become a "satellite community;" (3) Covington had not planned for development of the area in question; (4) services provided by the City of Covington are more expensive and less efficient, and often duplicative of those already available from other sources; (5) residents of the proposed annexed

\textsuperscript{38} Id. at 39-40.

\textsuperscript{39} Ky. Rev. Stat. § 81.110(1) (1970); see note 4, supra.

\textsuperscript{40} See Master's Report at 40-49.

\textsuperscript{41} Id. at 56-57.
area would be required to assume the burdens of debts incurred through past mismanagement of the city government. The eastern portion of the area, consisting primarily of grazing land, would not benefit from annexation, because the topography of the area prevented the development of an urban basis.42

Because freeholders and residents of the area proposed to be annexed presently have available to them all the services which are necessary for their progress and prosperity, the circuit court adopted the Commissioner's conclusion that a failure by the city to annex the area would not materially retard the prosperity of the owners and inhabitants of the area.43

Court of Appeals Decision

While commending the Master Commissioner for production of "an excellent and scholarly report,"44 the appellate court simultaneously condemned the circuit court for accepting and adopting the report as its decision.45 Citing City of Louisville v. Kraft,46 the appellate court stated: "It is clear that the [trial] court ignored the mandate of Kraft and has determined the future of the City of Covington on the question of policy, not fact."47 The Kraft decision concerned the validity of an annexation proposal by the City of Louisville to which less than 75% of the residents and freeholders remonstrated. The governing statute involved was Kentucky Revised Statute section 81.110, and the test to be applied was the manifest injury test, not the prosperity test as applied in the case under review by the court.48

In its decision, the Kraft court stated:

[T]he creation of municipalities, and the increase or reduction of their boundaries, are matters of legislative function. The political and economic advisability of annexation, and the policy questions involved in the problems of municipal expansion, are to be determined by the legislative branch of the government. It is incumbent upon the legislature to prescribe the facts and conditions under which annexation may take place. The only function of the courts is

42. Id. at 58-59.
43. Id. at 60.
45. Id. at 6.
46. 297 S.W.2d 39 (Ky. 1956).
48. 297 S.W.2d at 42.
to find whether the prescribed facts and conditions exist.\textsuperscript{49}

The statute leaves to the court the determination of what is “for the interest of the city” and what would be “manifest injury” to the property owners.\textsuperscript{50} The court found:

The fact that the legislature seemingly has delegated a broad range of discretion to the court in determining annexation questions cannot be used by the courts as a justification for exercising such a discretion . . . . [T]he courts must limit themselves to the fact finding function, doing the best they can to draw some line between fact and policy.\textsuperscript{51}

In \textit{Kraft}, the court had before it the question whether land, urban in nature and adaptable to municipal uses, should be annexed.\textsuperscript{52} In \textit{Liberty Construction}, the land in question was suitable only for grazing or separated by cliffs from the main part of the city.\textsuperscript{53}

Within the realm of clear and obvious facts, it is difficult to conceive of any situation in which the annexation of urban territory to a city could be contrary to the interest of the city, except where annexation would cause an overextension of the capacities of the city to function as a sound going concern.\textsuperscript{54}

A fact cited by the Master Commissioner and adopted by the trial court in \textit{Liberty Construction} was that for six of the twelve years in the period between 1960 and 1972, the City of Covington ran at a deficit. In 1969, the city was required to issue bonds in excess of eight hundred thousand dollars to fund the accumulated floating indebtedness.\textsuperscript{55}

The Kenton circuit court cited \textit{City of Lexington v. Rankin} for the proposition that where there is almost total opposition to the annexation, it would be an abuse of discretion to permit a proposed annexation in the absence of some compelling reason why the proposed annexation is vitally essential to the welfare of city.\textsuperscript{56}

\textit{Rankin} involved section 3051 of the Kentucky Statutes, the forerunner of today’s section 81.110. The City of Lexington, then a sec-

\textsuperscript{49} Id.

\textsuperscript{50} Ky. Rev. Stat. § 81.110(1) (1970); see note 4, supra.

\textsuperscript{51} 297 S.W.2d at 43.

\textsuperscript{52} Id.

\textsuperscript{53} Master’s Report at 58-59.

\textsuperscript{54} 297 S.W.2d at 43.

\textsuperscript{55} Id.

\textsuperscript{56} Accord City of Lexington v. Rankin, 278 Ky. 388, 392-93, 128 S.W.2d 710, 712 (1939) cited in Master’s Report at 39.
ond class city, attempted to annex a residential area near the city with a total of 635 freeholders, of whom 534, or 87%, remonstrated against the action. Proof was produced that more than 90% of the freeholders in the area remonstrated.\(^57\)

The court in *Rankin* held that the burden was on the city to show that the failure to annex [would] materially retard the prosperity of both the city and the owners and inhabitants of the area.\(^58\) Each attempt by Lexington to meet its burden was met by a strong counter-argument by the remonstrators. To the allegation that a portion of the area in question was without sewer lines and was forced to use septic tanks harmful to the area, proof was produced that the residents without sewer service had their septic tanks regularly inspected by the county health department. To the assertion that garbage collection was nonexistent, the residents pointed out that under private contract, removal of garbage was as prompt and efficient as the city's service. No particular fire hazard existed in the area and county fire protection proved sufficient. It was conceded by the city that schools in the area were excellent and that the city would have to make certain additions to its facilities if new territory was to be annexed.\(^59\)

In ruling that the City of Lexington had not met its burden of proof, the *Rankin* court recognized the distinction between the prosperity test set forth in section 3051 and applicable to second class cities where half or more remonstrate, and the material injury test in section 3438 and applicable to the review of any annexation ordinance proposed by a fourth class city. The court of appeals said:

> In the case of a city of the second class, it is not necessary, in order to prevent annexation, to show that material injury to the owners of real estate in the territory sought to be annexed will result, but . . . [it is necessary] . . . to show that a failure to annex will materially retard the prosperity both of the city and of the owners and inhabitants of the adjacent territory.\(^60\)

In the *Rankin* decision, the court cited *Giley v. City of Russell*,\(^61\) a case involving the application of section 3438, in which some 90% of the residents of a proposed area fought annexation, where

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57. 128 S.W.2d at 710.
58. Id. at 712.
59. Id. at 711.
60. Id. at 712.
61. 212 Ky. 798, 280 S.W. 101, 102 (1926).
the court of appeals had stated, "Under these conditions (large percentage of remonstrators) in the absence of some controlling reason why the annexation as proposed is vitally essential to the welfare of the city, it would be an abuse of discretion to adjudge it." The court in Rankin applied that reasoning to its own fact situation under section 3051 stating "we are not prepared to say the circuit judge abused the discretion vested in him." Rankin was not decided solely on the issue of abuse of judicial discretion; the result depended heavily upon the city's failure to meet its burden of proof.

In criticizing the Kenton circuit court's decision, the 1979 Court of Appeals stated:

In light of the language of every case decided since Rankin, we do not feel that this [judicial approval of annexation in the face of total opposition being an abuse of discretion] is the present law. That case seems to say that no annexation will be approved unless the city cannot exist without the territory. It stands alone in the case law and, in our opinion, has been so modified as to have no present effect.

To support its contention, the court cites a series of five cases, all but two of which involved a fourth class city and application of the material injury test under section 81.220. The fourth case cited by the appellate court was City of Louisville v. Kraft involving an instance where less than 75% of the resident freeholders remonstrated against an action taken by a first class city, triggering the manifest injury test under the mandate of Kentucky Revised Statute section 81.110(2) rather than the prosperity test derived from the same statute and applicable only when more than 75% of the freeholders remonstrate against the actions of a first class city. Under the statute involved in Liberty Construction, the percentage of remonstrating freeholders necessary to apply the

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62. Id. at 798, 280 S.W. at 102 cited in City of Lexington v. Rankin, 278 Ky. 388, 128 S.W.2d at 712.
63. 128 S.W.2d at 712.
65. The cases were City of Hickman v. Choate, 379 S.W.2d 238 (Ky. 1964) (4th class city); City of Prestonsburg v. Conn, 317 S.W.2d 484 (Ky. 1958) (4th class city); Mitchell v. Central City, 354 S.W.2d 281 (Ky. 1962) (4th class city); City of Louisville v. Kraft, 297 S.W.2d 39 (Ky. 1957) (1st class city); Ward v. City of Ashland, 476 S.W.2d 205 (Ky. 1975) (2d class city).
66. 297 S.W.2d 39 (Ky. 1957).
manifest injury test was less than 50%; any more than that would require application of the prosperity test in the trial court's review. In *Liberty Construction*, 100% of the resident freeholders remonstrated against the annexation ordinance passed by the city's legislative body. The fifth case cited by the court of appeals in its questioning of the trial court's reliance on *Rankin* as support for its argument was *Ward v. City of Ashland*, a case decided on the issue of whether the city had produced enough evidence to discharge its burden of proof.

**When Should the Test be Applied**

In reaching its conclusion that "the overwhelming proof was that the prosperity of the city would be materially retarded without the annexation" and that "[t]he lower court erred in finding to the contrary and applying the standards utilized," the 1979 court of appeals points out that the Master Commissioner considered circumstances as they were in 1974 and 1975, rather than in 1968 when the initial ordinance was passed. The decision states:

> The report indicates that, because the services which could have been provided by the city at the time the annexation ordinance was passed have subsequently been acquired from another source, the annexation ordinance should be defeated. This is simply not the manner in which the Prosperity Test should be applied.

Based upon his review of the circumstances, the Master Commissioner not only found that services provided by the City of Covington are more expensive and less efficient, and are often duplicative of those already available from other sources, but also found that annexation of the western portion of the area in question would substantially reduce the real estate market values of property; the annexed western portion would be separated from the main portion of the city and would become a satellite community; that Covington had not planned for the development of the area in question; and that the residents of the area would be required to assume the burden of debts incurred through past mismanagement of the city government. The topography of the east-

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68. 476 S.W.2d 205 (Ky. 1975).
70. *Id.* at 6, 7 (emphasis added).
ern portion of the proposed area was unsuitable for urban basis.\textsuperscript{71} The opinion of the appellate court continues: "[s]imply stated, the Prosperity Test is whether failure to annex would materially retard the prosperity . . . \textit{at the time of the annexation ordinance}. To hold otherwise would encourage delay and procrastination, as well as a search for other sources of needed services."\textsuperscript{72} Two years before, in \textit{Sullivan v. City of Paducah},\textsuperscript{73} a different panel\textsuperscript{74} of appellate court judges had occasion to comment on the proper application of the prosperity test by the trial court:

The trial court must find from the evidence that a failure to annex will materially retard the prosperity of the city and of the owners and inhabitants of the territory to be annexed. There is nothing in the statute to indicate that the court's findings must relate back to the date of the annexation ordinance rather than the time of trial. The question of the prosperity of the city and of the area to be annexed necessarily involves the future development and progress of the community. This court concludes that the trial court must make its findings in light of the actual conditions existing at the time of trial.\textsuperscript{75}

In \textit{Sullivan}, Paducah, a second class city, attempted to annex approximately 250 acres located adjacent to the city and to the Paducah floodwall.\textsuperscript{76} The court of appeals affirmed the trial court's approval of the ordinance, holding, in part, "[t]he trial court did not err in considering events which had transpired between the enactment of the annexation ordinance in 1971 and the trial in 1975."\textsuperscript{77}

Citing \textit{Sullivan}, the court of appeals in \textit{City of Covington v. Liberty Construction Company} stated, "[i]f the evidence indicates that the area has grown and prospered since the enactment of the ordinance because services which could have been provided by the city have been obtained from another source, it should be considered as proof that the annexation should be approved."\textsuperscript{78}

\textsuperscript{71} Master's Report at 58-59.
\textsuperscript{73} 547 S.W.2d 769 (Ky. Ct. App. 1977) \textit{reh. den.} March 30, 1977.
\textsuperscript{74} Judges Hays, Lester and Park heard the appeal in \textit{Sullivan}; in \textit{Liberty Construction}, Judges Gant, Cooper, and Howard were on the bench.
\textsuperscript{75} 547 S.W.2d 769, 770 (1977).
\textsuperscript{76} Id. at 769.
\textsuperscript{77} Id. at 770.
Conclusion

The court of appeals denied a request for rehearing of City of Covington v. Liberty Construction Company.79 The decision of the three judge panel did merit careful review. Though the court's decision is correct regarding the test to apply to Covington's attempt to annex the 1,840 acres involved, the amount of consideration given the Master Commissioner's report, a work acknowledged by the appellate court as "excellent and scholarly" should have been greater.80

The Master Commissioner distinguished the proper test to apply, the prosperity test, from the manifest injury test stating "it appears to the Master that any cases dealing with the 'Manifest Injury' test . . . are not applicable to the case at hand, and those cited by the City of Covington cannot be considered."81 Rehearing by the full appellate court would have allowed the court to review its reliance on fourth class city cases to limit the effect of the Rankin decision.

The Master Commissioner's report reflects consideration of factors other than the availability of services from entities other than the City of Covington acquired subsequent to the adoption of the annexation ordinance in question. That point is but one of five findings of the Master Commissioner based on the nine days of hearings which produced a transcript of 1,293 pages.

In any attempt by a trial court to apply the prosperity test, the judge must exercise inherent discretion to properly evaluate a given set of facts. By refusing to review the decision of the three judge panel, the court has failed to define the role of judicial discretion in reviewing data pertinent to the issue of annexation. An opportunity to give the trial judges guidance in the matter of discretion, already recognized as being broad in the Kraft82 decision, was missed. The degree of discretion allowed is of great importance in determining how active a court will be in an annexation dispute.

An effort should have been made to resolve the apparent conflict between the language of Liberty Construction and that appearing in Sullivan on the point at which the prosperity test is to be applied by the circuit court. Is the test to relate back to the date of

79. 26 K.L.S. at 10.
82. 297 S.W.2d at 42, 43.
annexation or is it to be applied to circumstances as they exist at the time of the trial? Without some effort by the court of appeals to resolve the question by distinguishing *Sullivan* or by overruling it, the trial judges are caught in a crossfire of counter authorities, their rulings open to attack on either side by barrages of pleadings, the result of which may be the very delay and procrastination sought to be avoided by the appellate court.

JOHN H. WALKER
Installment Land Sale Contract—Forfeiture Clause Held Invalid—Seller's Remedy for Breach of the Contract is to Obtain a Judicial Sale of the Property—Sebastian v. Floyd, 585 S.W.2d 381 (Ky. 1979).

The Facts

Jean Sebastian contracted to buy a house and a lot situated in Covington, Kentucky, from Perl and Zona Floyd, Respondents, on November 8, 1974. Sebastian paid $3,800.00 down and was to pay the balance of the $10,900.00 purchase price in monthly installments of $120.00. A forfeiture clause in the contract provided that if Sebastian failed to make any monthly payment and remained in default for 60 days, the Floyds could terminate the contract and retain all payments previously made as rent and liquidated damages.

During the next 21 months, Sebastian missed 7 installments, paying (including the down payment) a total of $5,480.00 rather than the $6,320.00 which was called for by the terms of the contract. Of this amount $4,300.00, or nearly 40% of the contract price ($10,900), had been applied against the principal.

The Floyds brought suit in the Kenton Circuit Court against Sebastian in August, 1976, seeking, among other things, enforcement of the forfeiture clause. Sebastian admitted in her answer that she was in default but asked the court not to enforce the forfeiture clause. Sebastian counterclaimed for all payments made pursuant to the contract, and on advice of counsel, ceased to make payments after the institution of this law suit.1

The court of appeals, affirming the decision of the Master Commissioner and the concurrence of the Kenton Circuit Court, upheld the forfeiture clause in the installment land contract, but only after careful consideration of the equitable remedies available to all parties. The court compared the amounts paid by the purchaser to reasonable charges for rent, repairs, insurance and taxes, and found that they "would total a sum of money that would more than counterbalance the $3,800.00 initially paid, plus the fourteen contract payments."2 The court even went so far as to consider arguments for an equitable mortgage, but it concluded that "the facts here do not support the application of such principles."3

1. Sebastian v. Floyd, 585 S.W.2d 381 (Ky. 1979).
3. Id. at 5.
The supreme court, in reversing, relied on the principle that the original intent of the parties was to transfer title to the property from the seller to the buyer. The forfeiture clause was no more than a penalty for a breach of the contract. Combining these two factors, the court determined that the penalty was too harsh and that all parties would be more equitably served if the installment land contract was treated as an equitable mortgage, requiring the remedy of a judicial sale.  

**History of the Installment Land Contract**

The installment land contract is the most commonly used substitute for the mortgage or deed of trust. The installment land contract and the purchase money mortgage both fulfill the same economic function—the financing by the seller of the unpaid portion of the real estate purchase price.  

In the case of a conventional mortgage, the buyer usually borrows money from a third party (i.e., a lending institution) called the mortgagee and makes payment in full to the seller, completing the actual sales transaction. The buyer now holds both legal and equitable title to the real estate; but as a mortgagor under the agreement with the lending institution, the buyer offers the mortgagee a lien against the land as security for payment of the debt. In the event of a default on the payments by the mortgagor (buyer), his entire interest in the property is not forfeited. The buyer has the right to redeem the property by paying the full debt plus interest and expenses incurred by the creditor due to default. The creditor can cut off this right of redemption by instituting a judicial foreclosure sale, selling the land to obtain the funds necessary to secure payment of the debt. If this judicial sale, however, secures funds in excess of those required to pay the debt owed to the creditor, the remaining sum will be given to the buyer-debtor. This method of purchasing land has only two significant drawbacks. First, in order for the creditor to obtain relief by instituting legal action, he faces a delay, oftentimes of many months, before

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4. Sebastian v. Floyd, 585 S.W.2d at 384.
8. Lewis & Reeves, supra note 7, at 252.
he can obtain the relief afforded by a judicial foreclosure. This
time delay is probably a significant factor in creating the second
drawback—an increasingly high rate of interest for the buyer when
obtaining a loan.

Undoubtedly, higher interest rates, together with the rising costs
of real estate, made it increasingly difficult for the buyer to obtain
financing for his proposed purchase. This in turn left many sellers
in the dilemma of not being able to find a purchaser for their prop-
erty at a profitable price to the seller. Thus, when buyer and seller
sought a common remedy that benefited both parties, the install-
ment land contract was formed.

The basic idea of the installment land contract is a simple one:
the seller takes the place of the lending institution and enters into
a long term contractual agreement with the buyer. Since the seller
can not collect the full purchase price at the time of the sale, cer-
tain conditions are built into the contract. “Under an installment
land contract, the [buyer] normally takes possession and makes
monthly installment payments of principal and interest until the
principal balance is paid off. The [seller] retains legal title until
the final payment is made, at which time full title is conveyed to
the [buyer].”

In addition to retaining legal title, the seller would usually in-
clude a “forfeiture” clause in the terms of the contract. Under a
typical forfeiture clause, if the buyer went into default in making
his payments, the seller could, at his option, rescind the contract,
reclaim full title to the real estate, and keep any monies paid as
liquidated damages for breach of contract. This forfeiture clause
leaned heavily in favor of the seller, but nonetheless afforded many
prospective purchasers the opportunity to purchase real estate
when they did not have sufficient credit to obtain a conventional
mortgage.

The Law in Kentucky

Kentucky is practically devoid of cases which involve forfeiture
clauses in installment land contracts. The supreme court in the
present case relied on Real Estate & Mortgage Co. v. Duke. In
that 1933 case, the court invalidated a forfeiture clause in an in-
stallment land contract stipulating that upon default by the pur-

10. Lewis & Reeves, supra note 8, at 251.
11. 251 Ky. 385, 65 S.W.2d 81 (1933).
chaser "all payments retained by the seller in the event of a rescission should be taken and retained as and for liquidated damages for the breach of the contract and not as a penalty." Using clear, concise, and very direct language, the court continued: "It would be an absurdity to call the payments sought to be retained by [seller] liquidated damages. They clearly amounted to a penalty and one that . . . a court of equity will not enforce." The court was clearly not impressed with the rationalization that the forfeiture of both land and monies paid was equal to liquidated damages. The Duke court concluded that the "forfeiture clause was intended simply as a security for the payment of the purchase price. In these circumstances, the forfeiture provided for by the contract will be disregarded." Nearly 20 years later in Henkenberns v. Hauck, the court of appeals held that under a similar contract the buyers "became the real owners, and [the seller] held nothing but the bare legal title in trust for them, as security for the payment of the purchase price." In the instant case, the court relied upon the security interest in the land and followed the rationalization of an Indiana case, Skendzel v. Marshall, quoting:

A conditional land contract in effect creates a vendor's lien in the property to secure the unpaid balance owed under the contract. This lien is closely analogous to a mortgage—in fact, the vendor is commonly referred to as an "equitable mortgagee." . . . In view of this characterization of the vendor as a lienholder, it is only logical that such a lien be enforced through the foreclosure proceedings.

Thus, the Kentucky Supreme Court follows the modern trend and treats land sale contracts as analogous to conventional mortgages. The seller's remedy for breach of the installment land contract now is to obtain judicial sale of the property, subject to Kentucky statutes governing judicial sales relating to mortgages.

12. Id. at 389, 65 S.W.2d at 82.
13. Id.
14. Id. at 389, 65 S.W.2d at 82.
15. 236 S.W.2d 703 (Ky. 1951).
16. Id. at 704 (emphasis added).
18. Id. at 648. See also H & L Land Co. v. Warner, 258 So.2d 293 (Fla. 1972).
19. 585 S.W.2d 381, 384 (Ky. 1979).
The Impact of the Decision in Kentucky

In holding forfeiture clauses in installment land contracts invalid, the court did not proceed against a great weight of precedent to the contrary. Several cases that seemingly upheld forfeiture clauses are not on point. For example, in both *Ward Real Estate v. Childers* and *Graves v. Winer*, the court upheld forfeiture clauses where the buyers, after placing an "earnest money" deposit on a short-term real estate contract pursuant to executing a deposit receipt agreement, failed to execute the contract. The buyers never entered into the land purchase contract and, therefore, could not forfeit an interest in the land that they never had. The court in both cases reasoned that the sum specified as liquidated damages clearly bore a reasonable relation to the actual damages suffered by the seller. Likewise, the court in *Miller Dairy Products Co. v. Puryear* upheld a forfeiture clause in a long term lease. Under the lease agreement, the lessee had neither equitable nor legal title to the land, and the intent of the lease was that full title to the land remained with the owner/lessor.

*Sebastian* did, however, expressly overrule two decisions, *Kravitz v. Grimm* and *Miles v. Proffitt*, insofar as they upheld the validity of forfeiture clauses in installment land contracts. A close inspection of these two cases reveals a subtle twisting of logic to reach what normally would be inaccurate results.

In *Miles*, the purchaser made several payments under the terms of an installment land contract. Then, based upon the claim that he was fraudulently induced into entering the contract, he discontinued his payments. The court, relying heavily on *Kravitz*, decided some 16 years earlier, held that the forfeiture clause, though inequitable, was still enforceable.

In *Kravitz*, the purchaser had also made several payments under the terms of a similar installment land contract. Then for some unknown reason, he discontinued his payments. The *Kravitz* court

21. 223 Ky. 302, 3 S.W.2d 601 (1928).
22. 351 S.W.2d 193 (Ky. 1961).
24. 310 S.W.2d 518 (Ky. 1957).
25. 273 Ky. 18, 115 S.W.2d 333 (Ky. 1954).
26. 266 S.W.2d 333 (Ky. 1954).
27. Sebastian v. Floyd, 585 S.W.2d 381, 384 (Ky. 1979).
28. 266 S.W.2d 333, 337 (Ky. 1954).
based its decision upon *Ward Real Estate v. Childers*\(^{29}\) in upholding the forfeiture clause. In *Ward*, however, unlike *Kravitz*, a contract had never been entered into, and the forfeiture only consisted of the “earnest money” put up to secure the entering of the contract.\(^{30}\) Thus, it appears that the *Kravitz* court overstepped the limits of *Ward* and reached an erroneous decision\(^{31}\) leading to a similarly erroneous decision in *Miles*. In overruling these two cases, *Sebastian* is merely correcting a judgmental error to meet the standards established in *Real Estate & Mortgage Co. v. Duke*\(^{32}\).

**The Law in Other Jurisdictions**

The current Kentucky view of invalidating forfeiture clauses in installment land contracts is by no means a trend-setter in this country. In Oklahoma, for example, a statutory provision states that installment land contracts:

for purchase and sale of real property made for the purpose or with the intention of receiving payment of money and made for the purpose of establishing an immediate and continuing right of possession of the described real property . . . shall to that extent be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.\(^{33}\)

This legislation, coupled with another statute which permits only judicial foreclosure on mortgages and not a power of sale,\(^{34}\) practically renders installment land contracts obsolete in Oklahoma.\(^{35}\)

Several states have attempted to ease some of the harshness in forfeiture clauses by enacting legislation regulating the circumstances under which forfeiture is permitted. These statutes often incorporate a “grace period” within which late payments must be accepted. Among these states are Iowa,\(^{36}\) Minnesota,\(^{37}\) North Dakota\(^{38}\) and South Dakota.\(^{39}\)

\(29.223\) Ky. 302, 3 S.W.2d 601 (1928).
30. Id.
31. 273 Ky. 18, 115 S.W.2d 368 (1938).
32. 151 Ky. 385, 65 S.W.2d 81 (1933).
35. Osborne, Nelson & Whitman, *supra* note 5, at § 3.27.
Legislation in Ohio governing termination of an installment land contract is unique. It combines a "grace period" with the additional requirement that after either five years, or payment of twenty percent of the purchase price, judicial foreclosure is required. Thus, forfeiture is permitted and regulated during the early part of the contract, whereas mortgage law takes over thereafter.\textsuperscript{40}

Several states follow common law standards to determine the equitable basis for upholding or striking forfeiture clauses. In Missouri, a vendee who defaulted on a payment under an installment land contract sued for specific performance and tendered the balance owing on the contract. The Missouri Court of Appeals upheld the trial court's decision to grant specific performance by holding that enforcement of the forfeiture clause would have been inequitable.\textsuperscript{41} In Utah, the courts look to the terms of the individual contract to measure the vendor's damages at the fair "rental value" of the property during the period of the purchaser's occupancy, plus incidental damages such as court costs, repairs to the property, and even a sales commission on the resale of the property.\textsuperscript{42} Usually, the courts conclude that these items exceed the purchaser's payments and enforce the forfeiture clause against the vendee;\textsuperscript{43} but in cases where the vendee's payments exceeded the vendor's damages, the courts will order restitution to the vendee of the excess.\textsuperscript{44} This method, adopted by the Kentucky Court of Appeals in \textit{Sebastian}, was rejected by the Kentucky Supreme Court.

In Florida, common law standards were set in a case noted by the Kentucky Supreme Court in \textit{Sebastian}, namely, \textit{H \\& L Land Co. v. Warner}.\textsuperscript{45} In an effort to "afford well-established safeguards to an installment buyer and to allow an installment seller a reasonable and traditional remedy,"\textsuperscript{46} the Florida court held that the vendor, under a specifically enforceable installment land contract, is in essentially the same position as a vendor who has taken a

\begin{footnotes}
\item 40. \textsc{Osborne, Nelson \\& Whitman, supra note 5, at § 3.27 n.29. See also Ohio Rev. Code Ann. §§ 5313.01-.10 (Page 1978).}
\item 41. \textsc{Nigh v. Hickman, 538 S.W.2d 936 (Mo. App. 1976).}
\item 42. \textsc{Weyher v. Peterson, 16 Utah 2d 278, 399 P.2d 438 (1965).}
\item 43. \textsc{Strand v. Mayne, 14 Utah 2d 355, 384 P.2d 396 (1963).}
\item 44. \textsc{Kay v. Wood, 549 P.2d 709 (Utah 1976); Jacobson v. Swan, 3 Utah 2d 59, 278 P.2d 294 (1954).}
\item 45. \textsc{258 So.2d 293 (Fla. App. 1972).}
\item 46. \textsc{Id. at 296.}
\end{footnotes}
purchase money mortgage.\textsuperscript{47} It must be noted however, that the Florida court narrowly limited the decision only to installment land sale contracts and specifically omitted contracts such as short term real estate contracts, non-enforceable sales contracts and purchase option contracts.\textsuperscript{48}

Thus, while the decision of the Kentucky Supreme Court will work a definite hardship on sellers under installment land contracts, this solution is accepted in many states. The greatest inequity will occur on that contract where the buyer has made only a few payments, perhaps causing the greatest loss to the seller. While this inconsistency could be easily remedied by adopting a policy similar to that of Ohio which allows a forfeiture when a certain percentage of the contract has been paid,\textsuperscript{49} the present decision does not appear to be out of line with the general consensus of the courts throughout the land.

\textbf{Conclusion}

While the decision to invalidate forfeiture clauses in installment land contracts may seem to be a giant step in Kentucky property and contract law, it is hard to deny that since \textit{Real Estate & Mortgage Co. v. Duke}\textsuperscript{50} in 1933, the courts have consistently leaned towards granting equity to the vendee under an installment land contract. The only two cases upholding the forfeiture clause under installment land contracts in Kentucky appear to be based on law intended to validate the forfeiture of "earnest money" paid on a short term contract to enforce a closing and, therefore, cannot be seriously considered in a "pro" forfeiture clause argument.

The supreme court in \textit{Sebastian} made only a passing mention of the Florida case, \textit{H & L Land Co. v. Warner},\textsuperscript{52} but close inspection reveals that the Kentucky court is intrigued with its rationale. \textit{Warner} has stood since 1972 with no noticeable decline of the use of installment land contracts in Florida. There is no reason to believe that the \textit{Sebastian} decision will have any different impact on the future use of installment land contracts in Kentucky.

\textbf{Marc I. Rosen}

\begin{itemize}
\item \textsuperscript{47} \textit{Id.} at 295.
\item \textsuperscript{48} \textit{Id.} at 296.
\item \textsuperscript{49} Ohio Rev. Code Ann. §§ 5313.01 - .10 (Page 1978).
\item \textsuperscript{50} 251 Ky. 385, 65 S.W.2d 81 (1933).
\item \textsuperscript{51} Miles v. Proffitt, 266 S.W.2d 333 (Ky. 1954); Kravitz v. Grimm, 273 Ky. 18, 115 S.W.2d 368 (1938).
\item \textsuperscript{52} 258 So.2d 293 (Fla. App. 1972).
\end{itemize}
ABUSE OF DISCRETION BY A TRIAL JUDGE—United States v. Hickman, 592 F.2d 931 (6th Cir. 1979)

Introduction

With over 12,000 judges in the United States,¹ there are times, though infrequent, when their conduct necessitates discipline. The ever present and inherent weaknesses in human nature from time to time rear themselves, circumventing man-made safeguards and taking their toll. As a result, the efficiency of our courts decreases and litigants, the consumers of law, feel the damaging effects of appearing before an unfit judge.² A public trust rests in our judges, for nearly every decision they make requires a choice between conflicting interests. While perfection in any system is unattainable, any factor which renders a judge’s performance unsatisfactory undermines the basic premise that our legal system can settle disputes fairly. The problem, therefore, is defining standards that should be applied in determining judicial misconduct. No definitive, universal rules exist. Each jurisdiction creates its own standards to guide its judges.

In any trial it is difficult to analyze when a trial judge has overstepped his discretionary authority. Numerous factors must be considered. Judicial intervention may be warranted if the issues become obscured, counsel is unprepared or obstreperous, if witness conduct is improper, or testimony confusing.³ In determining whether a federal judge has abused his discretionary authority, one must, upon analysis, retain the notion that a trial is a quest for the truth. A federal judge is more than a neutral arbiter, yet his undue interference with the presentations of counsel and trial has the potential of making a mockery of a defendant’s right to a fair trial even in the absence of open hostility.⁴

The governing role of a trial court judge in the Sixth Circuit is easy to define yet difficult to apply because of the wide discretionary authority allowed a judge. In Sixth Circuit jury trials, a federal trial judge is not merely a moderator but rather the trial’s governor, to assure proper conduct and to determine all questions of law.⁵ While the mere asking of questions is not improper, a trial

¹. The American Bench at v (2d ed. 1979).
³. United States v. Frazier, 584 F.2d 790, 793 (6th Cir. 1978).
⁵. Quercia v. United States, 289 U.S. 466, 469 (1933).
judge in a federal court is more than a mere arbitrator. His job is to conduct the trial in an orderly way with the purpose of extracting the truth and attaining justice between the parties by ruling upon objections and instructing the jury. He has a duty to keep the testimony understandable and the issues clear. He has the right to interrogate witnesses for these purposes, but such interrogation must be qualified. Potential prejudice lurks behind each intrusion, because a judge's position before a jury is overpowering increasing his slightest action to one of great weight. He should sedulously avoid all appearances of advocacy as to those questions which are ultimately to be submitted to the jury. Judge Lively has stated that the basic requirement is one of impartiality in demeanor as well as in actions. The Sixth Circuit has disapproved extensive questioning of witnesses by a trial judge and discourages trial judges from pursuing such questioning.

The Facts

Judge Oren Lewis is a federal district court judge for the Fourth Circuit, and his actions in United States v. Hickman, a Sixth Circuit case where he sat in as judge, have created a controversy which calls for examination. In Hickman, appellants Hickman and Head were jointly tried in the United States District Court for the Western District of Kentucky by Judge Lewis. Both defendants were found guilty of being convicted felons in possession of a sawed-off 12 gauge shotgun and of a .32 calibre revolver in violation of United States Code title 18, appendix section 1202(a)(1).

In addition, appellant Head was found guilty of simple possession of marijuana in violation of title 21, section 844(a) of the United States Code. The jury was unable to agree on charges against both men on possession of marijuana with intent to distribute. Subsequently, the court of appeals became sufficiently troubled

8. United States v. Lanham, 416 F.2d 1140, 1144 (5th Cir. 1969) (citing Adler v. United States, 182 F. 464 (5th Cir. 1919)).
9. Frantz v. United States, 12 F.2d 737, 739 (6th Cir. 1933).
13. 592 F.2d at 936 n.6.
14. Id. at 932.
15. Id.
with Judge Lewis' conduct, considering it improper, that it reversed and remanded the case for a new trial. Appellants charged that Lewis' conduct rendered a fair verdict impossible claiming that he voluntarily interjected into the proceedings of the trial over 250 times. The court of appeals frowned upon the serious problems created by Lewis' handling of the trial, and characterized him as a "surrogate prosecutor."\(^{16}\)

In *Hickman*, the court had no choice but to find Lewis abused his discretion resulting in an unfair trial, Lewis' partial treatment of the case was evident from the onset when he refused defense counsel's request to reserve his opening statement until after the government presented its case. A futile attempt by the defense counsel to make an on-the-spot opening statement immediately after the close of the prosecution's case was briskly admonished by Lewis.\(^{17}\) This specific interruption was but one example of Lewis' manner throughout the trial which frustrated the defense and hampered the fairness and flow of litigation. A defendant facing possible conviction, in order not to jeopardize his position before the jury is easily influenced by the judge's decrees. Any compulsion by the defendant to object to Lewis' rulings during the trial became futile.\(^{18}\)

By voluntarily interjecting himself over 250 times, Lewis metamorphized his role from that of governor to advocate, thereby making a fair trial impossible. The court of appeals was of the opinion that this was a simple, routine, one-day trial revolving

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17. [Defense counsel] was barely able to state that 'I want to remind you just briefly of some of the principles of our system of law . . .' when he was immediately interrupted by the court: 'Now, I won't let you do that. I won't let you argue it now. You can argue it later.' This initial interruption was all too typical of other interruptions which took place throughout the trial.
592 F.2d at 934 (citation omitted).
18. Further illustrative of the unfortunate tone which the district judge's interference set for the trial was the following brief colloquy:
   Q. Where was the third suspect?
   A. The third suspect?
   Q. Yeah.
   A. I did not personally see him. He was in a car at the time I first saw Mr. Head.
   Q. And if I told you the third suspect was standing by the — BY THE COURT: (interrupting) Wait a minute, wait a minute. I'm not going to let you tell him anything.
   (Interrupting) Well,
   BY THE COURT: (Continuing) — because you can't testify.
592 F.2d at 934, n. 4.
around the principal question of whether the two men were guilty of constructive possession of weapons and drugs.\textsuperscript{19} Admittedly occasions arise in difficult and complex cases when numerous comments by a judge — out of the presence of the jury — are proper.\textsuperscript{20} However, in this case, Lewis’ multiple interjections could not be justified on grounds of complexity.

It would be naive to believe that Lewis’ actions did not alter the status of fairness in the trial so that defendants were prejudiced. His decisions did not attempt to clarify facts or to hasten the trial, but rather to exhaust all possible doubts in the minds of the jury as to the defendant’s innocence. In short, his undue interference with the normal prosecution of the case made a fair and expeditious trial difficult, bringing prejudice and uncertainty. This explains why the jury could not agree on charges.

The destructive effect of the judge’s intrusions appeared most readily in his handling of the defense’s cross-examination of expert witnesses. After the defense counsel finished examining a crucial government chemist, Lewis immediately stepped in and rehabilitated the witness’ testimony,\textsuperscript{21} shadowing the defense counsel’s previous examination.\textsuperscript{22} The judge usurped the role of prosecutor

\textsuperscript{19} United States v. Hickman, 592 F.2d 931, 932 (6th Cir. 1979).
\textsuperscript{21} United States v. Hickman, 592 F.2d 931, 934-35 (6th Cir. 1979).
\textsuperscript{22} After defense counsel continued cross-examination as to the reliability of the second test performed by the chemist, the court interrupted once again:

\textbf{BY THE COURT:} Well, I’ll save time. Have you got any chemist that’s going to show that this is not marijuana?

\textbf{MR. KAGIN:} That’s right.

\textbf{BY THE COURT:} Proceed. You haven’t tested it?

\textbf{MR. KAGIN:} No, Your Honor.

\textbf{BY THE COURT:} You haven’t tested.

\textbf{MR. KAGIN:} I want to see if he has —

\textbf{BY THE COURT:} (Interrupting) Well, he says he has and there’s no evidence to the contrary.

Counsel was then permitted to continue and amply cross-examine the witness further. Unfortunately, immediately after counsel had finished, the district judge stepped in at once and rehabilitated the witness’ testimony. The entire sequence deserves reproduction:

\textbf{Q.} Is the thing layer chromatography test in and of itself conclusive for the presence of marijuana?

\textbf{A.} No, sir. It could have been hashish, it could have been Cannibin [sic], which is an active ingredient of marijuana.

\textbf{Q.} And it could have been something else that you’ve gotten here that’s totally unrelated to marijuana and something that’s not under control?

\textbf{A.} Well, if I hadn’t done the microscopic test —
by taking over the entire cross-examination for some additional ten pages of transcript. It has been established that undue interference results when a judge takes over examination by counsel. 2

Lewis' attitude toward witness testimony was also prejudicial. This is evidenced by his statement made prior to the swearing in of the defense witness: "Is this witness in the same category?" 3

The court of appeals found the clear import of this statement to be one of contemptuous disbelief, designedly portraying for the jury his disbelief of the defense's contentions. 24

Lewis' wholesale takeover of cross-examination, extensive questioning, and premature responses during witness testimony eliminated crucial, objective testimony. This put to rest any hopes the

Q. (Interrupting) All right. Let's take that and say if you hadn't.
A. All right.
BY THE COURT: Well, now, you're arguing with the gentleman. You remember he's the one that made the tests. You're not going to testify yourself. I'm not going to let you.
Q. Are you telling me that this test is not of itself conclusive, is that correct?
A. That is correct.
Q. So we have Test No. 1 that is not conclusive, Test No. 2 that is not conclusive and Test No. 3 that's not conclusive. And from that you conclude its marijuana, is that correct, sir?
A. That's correct.
Q. No further questions.
BY THE COURT: Well, let's get this finished, and you can step down. Did you use the standard testing procedure that all United States chemists use in testing a substance to determine whether or not it is marijuana?
THE WITNESS: I used three, the three.
BY THE COURT: The standard ones that they use?
THE WITNESS: Well, some people use two of them, but I used these three.
BY THE COURT: I understand you used all three of them.
THE WITNESS: That's correct.
BY THE COURT: And in your professional opinion the substance in each of these three samples is in fact marijuana?
A. That's correct.
BY THE COURT: Step down.

The district judge's brilliant redirect examination would have been entirely proper had it been done by the prosecutor. It was improper for the judge to have assumed the prosecutor's role under the circumstances.

The judge's unfortunate handling of the testimony of witness Nathaniel Boyington further illustrates the need for reversal. Boyington was the younger brother of defendant Fred Head. He presented an improbable tale that the drugs and the weapons found in the apartment belonged to him not his brother.

592 F.2d at 936.

25. Id. at 936.
defendants had for a fair trial. In jury cases, an objective demeanor by the judge is important. The court found strong inference that Lewis’ demeanor was anti-defendant when he admonished the defense counsel for improper argument remarking before the jury, “I won’t let you tell them rotten law.” In some cases it may be necessary to admonish incompetent counsel; however, the court of appeals here found counsel for both sides able and at all times within proper conduct. Counsel’s failure to vehemently object during the trial cannot be held against him since it is both a difficult and hazardous predicament to make frequent objections in the presence of a jury, especially when the questions stem from the trial judge. The jury will be easily swayed by the judge’s pro-government attitude.

It should be noted that Lewis’ repetitive behavior has not been of recent vintage. His courtroom misconduct has been passed upon in numerous appeals cases. In these cases the court found it necessary to review, and in some instances reverse, Lewis. The reversals were based upon continued undue and inappropriate remarks during trial, participation in the interrogation of witnesses, prejudicial comments on the significance of evidence, and elicitation of testimony damaging to defendants. The court in some instances

28. Id. at 936.
31. The following shows how Lewis assumed the role of a witness.

**DIRECT EXAMINATION OF HARRY EARL POLLARD**

By Mr. McLeod:

Q. Okay. What if any treatment did you receive while you were in the hospital?
THE COURT: Just tell the jury, son, in your own words, not technical, what you remember of how they had you in bed, what they did to you, just in boy’s language; don’t worry about doctor language; they will tell that when they get here. Tell them what they did to you. Did they keep you in bed or have you stretched out?
THE WITNESS: Yes, sir.
THE COURT: Tell the jury.
THE WITNESS: I remember waking up in a operating room where they had taken a steel pin and run it through my right knee through the bone and afterwards fell asleep and woke up pulling my leg down at the foot of the bed and the head of the bed, and my left leg was in traction.
found the conduct not to be so inflammatory as to thereby

THE COURT: How long did they keep you in bed when you were under traction, couldn't move.
THE WITNESS: From the night I got hit until sometime in January.
THE COURT: From November until January they had you in, strapped down to the bed where you couldn't move?
THE WITNESS: Yes, sir.
THE COURT: All right.
Go ahead.

Q. How long were you in the hospital bed at your home?
THE COURT: So the jury will thoroughly understand, was this cast clear up to the shoulder and all the way down, you couldn't move?
THE WITNESS: No sir.
THE COURT: Somebody had to carry you or move you, you couldn't walk or move at all?
THE WITNESS: I could.
THE COURT: Move your arms, but you couldn't move your body or hips or anything, could you?
THE WITNESS: No sir.
THE COURT: All right. Go ahead.

Pollard v. Fennell, 400 F.2d 421, 424 n.2 (4th Cir. 1968).
Advocacy on the part of the district judge was also exhibited in his apparent impatience to bring to the jury's attention demonstrative evidence of the extent of plaintiff's injuries.

CONTINUATION OF DIRECT EXAMINATION OF MR. POLLARD.
By Mr. McLeod:
Q. What is the condition of your leg at this time?
A. I can't bend my right leg all the way back and it is an inch shorter.
THE COURT: Get down and show the jury. Get down and show them where you can't bend it and how, so walk in front of them. Pull your trousers up and let them see it if you want to, I mean if they can't.

MR. McLEOD: Take your pants off.
THE COURT: Let him do whatever he wants to.
MR. McLEOD: Take your pants off if you will and show the jury your right leg. You might take your shoes off.
THE COURT: He can walk up there and let you look at it.
MR. McLEOD: Take your shoes off and your pants all the way off so you won't trip.
(Witness complied)
MR. McLEOD: You walk down here.
(Witness complied)
THE COURT: Stop right there. Let them look over, the jury can. You point out to them son, about the knee and bend it, show them where the trouble is.
THE WITNESS: Right there is as far as I can bend the leg, (demonstrating).
THE COURT: In other words, you can't sit down or squat all the way down.
THE WITNESS: No, sir.

Id. at 425 n.3.
That the judge's impartiality was removed from the trial is evident in the following
prejudice the case. However, the repetitiveness of such conduct exchange.

CROSS-EXAMINATION OF MR. POLLARD
By Mr. Dupree:

Q. And that went on for about two weeks, didn't it?
A. Longer than that.
Q. About two weeks?
THE COURT: Let's be fair with the boy. It went on for a year. What do you mean two weeks, Mr. Dupree? I can't be operated on—I don't care what he said in that deposition.
MR. DUPREE: I follow it with some questions.
THE COURT: Yes, sir. But I don't want you to take this young boy like this and say he only had two weeks of pain when he was in a cast from his chest down to his toes for four months and then went back for two operations, and there is no question in my mind he hurt all the time for a long period of time. You take it from there. There isn't any question about it.
MR. DUPREE: No, sir.
THE COURT: Is there?
MR. DUPREE: Your Honor, I would just like to ask him the length of time over which he experienced this pain.
THE COURT: You can ask him, but I will tell the jury to use their own experiences on that. I am not going to allow this young boy who obviously doesn't know if he is under medication to have the record show that he only had two weeks of pain on a broken leg of this type and the time that he was in the cast and coming back a year later and wheel chair. You know it isn't right yourself. And he had to have a cast to sleep on at night. I mean I want the jury to get the facts. Go ahead.
MR. DUPREE: Yes, sir.

Q. Your deposition in this case was taken by me on the eleventh of March, 1967, wasn't it?
A. I think so.
Q. And at that time you were asked questions concerning your injury, were you not?
A. Yes, sir.
Q. Is your recollection of how you felt at that time as good as it is now?
A. When I was sitting down talking to you my leg was hurting.
Q. The question, sir, is whether or not your recollection of how you had felt in the hospital and everything at the time when your deposition was taken was as good as it is now?
A. No, sir.
Q. What have you done since that time to refresh your recollection or make you know anything more about it than you did at that time?
THE COURT: Mr. Dupree, wait a minute, I am not going to permit this. That is not fair at all. You want to introduce his deposition, introduce it, let the jury read it. I mean there is no—this boy—there is no evidence that this boy has changed his story in the slightest. There isn't. I am not going to stand still for it on this kind of a case. This is an infant.
MR. DUPREE: Yes, sir.
THE COURT: Yes, sir.
But I want the record to show that this is an infant, and I am not going to let you.
prompting numerous reviews which sometimes resulted in reversals, enlightens us to the fact that court warnings were going unheeded. The seriousness of this problem climaxed in *Hickman* by means of a severely worded opinion and unavoidable reversal. Yet, even this did not solve the problem, for in the subsequent case of *United States v. Robinson* Lewis continued to abuse his discretionary authority.

Reviewing the situation one must logically question the courts' reluctance to take more stringent action if in fact they had the power to do so. Logically, the courts should have and probably were waiting for an abusive trend to develop in Lewis' conduct. However, was not such a trend clearly established long before the scorning *Hickman* opinion? Realistically, the courts recognized a trend and responded through the only means immediately available to them, warnings and reversals. Obviously, however, this was not enough.

The underlying premise as to why the courts would not move towards a more gripping action is a justified reluctance to criticize each other, the hope being that the lower court judge will take the hint and "heal thyself." Such hinting, evident in the court of appeals opinions, is commendable and was probably the best approach when the problem first surfaced. However, when the situation reaches runaway, epidemic proportions, sanctions outside the realm of the higher court are appropriate and necessary. To allow the situation to run its course violates the defendant's sixth amendment right to an impartial trial by jury. Court reprimands cannot justify the continual obstruction of constitutional guarantees. Moreover, the unequal trade off of sparing a judge embarrassment at the expense of violating one's sixth amendment rights is an unjust exchange. With regard to Judge Lewis, a more timely and stringent sanction was needed to provide justice in our courts,

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32. Lewis abused his discretion in denying the government's motion for a continuance following the defendants motion to suppress statements, since the suppressed statements went to each count of the indictment, and defendant did not charge bad faith on the part of the government, did not raise any speedy trial issues, and did not allege prejudice not connected with evidence suppressed. *United States v. Robinson*, 593 F.2d 573 (4th Cir. 1979).

33. The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. U.S. Const. amend VI.
insure the guarantees of our constitution and restore the faith of the public in our legal system. Such a means was beyond the court of appeals.

Since Judge Lewis was appointed to his office for life by the President, he need not worry about his conduct for purposes of re-election. Presently, the only procedure available to remove a problem judge is through the most cumbersome process of impeachment.34 "Impeachment was made purposely cumbersome because it was conceived for the removal of the President" with other officers being "added to the impeachment clause at the last minute, almost as an afterthought."35 Congress is loath to paralyze its law-making function due to the time needed to evaluate and impeach a problem judge.36 There are, as many may argue, other remedies such as humbling press coverage, bar association condemnations, informal contacts by other judges, discretionary assignment of cases, continued appellate reversal and reprimand. However, such methods at most amount to only weak tactical pressures against a determined judge.

Arbitrary and abusive judges have disgraced the bench for years; Lewis is not the only exception. Willis W. Ritter, the nation's oldest federal chief judge, had a Justice Department suit pending against him calling for his removal from federal government cases at the time of his death, March 5, 1978. The Justice Department writ stated that Ritter ignored judicial procedure, rendered arbitrary and erratic decisions, insulted United States attorneys and generally brought disrepute into the federal courts.37 The Utah Attorney General and United States Solicitor General were similarly seeking to bar Ritter from hearing matters involving the state of

36. Whether other officers included judges is debatable. It was determined that while other officers could be removed by the President without resort to impeachment, judges were protected from such removal by tenure during good behavior. Tenure was terminable upon bad behavior declarable by judges whereas impeachment was considered as an additional remedy if the judiciary failed to appropriately evaluate tenure. Furthermore, "Congress will not take three to five weeks off from momentous affairs to try a judge for bribery or the like." Id.
37. See also, Webbe v. McGhie Land Title Co., 549 F.2d 1358 (10th Cir. 1977); Usery v. Ritter, 547 F.2d 528 (10th Cir. 1977); United States v. Ritter, 540 F.2d 459 (10th Cir. 1976); Ferr-McGee Corp. v. Ritter, 461 F.2d 1104 (10th Cir. 1972); Utah - Idaho Sugar Co. v. Ritter, 461 F.2d 1100 (10th Cir. 1972); United States v. Ritter, 273 F.2d 30 (10th Cir. 1959).
Utah. Ritter, who held a degrading view of the government, also prompted resolutions calling for his impeachment from the Utah Bar Association.

Federal law allows a party to request the removal of a judge who has a personal bias or prejudice either against the party, or in favor of an adverse party if made in a timely and factual affidavit. In effect, however, this only amounts to a case-by-case remedy which must occur ten days prior to entering court, doing little for the party who already has been and continues to be prejudiced. Section 455(a)(b)(i) of title 28 of the United States Code more broadly encompasses the situation requiring a judge to disqualify himself when his impartiality is questioned or where he possesses a personal bias or prejudice against a party or when he has knowledge of disputed evidentiary facts. This, too, like section 144, suffers the same shortcomings of being a case-by-case review. In addition it also asks the judge to make the decision himself to step down. This is hardly an effective tool against a purposely vindictive judge. While these statutes, along with the previously mentioned tactical pressures, may have some impact on a judge who occasionally side steps judicial bounds, they do not address the problem of a runaway judge.

In 1978, the Senate ratified a bill establishing a special commission and disciplinary court to investigate, censure and remove abusive judges. The bill met a quick fate when the House refused to acknowledge it due to constitutional problems. While it is true that the constitution does protect federal judges, citizens also have a constitutional right to a fair and impartial trial. Recent abuses of judicial power have prompted the Senate Judiciary Committee to make an in-depth study of the problem with an eye towards constitutional values. The current idea is that federal judicial councils should be established to censure, remove cases, or recommend impeachment.

The time has come to adopt and impose sanctions short of removal upon justices. Lewis' actions illustrate that past attempts to

40. Id.
42. N.Y. Times, Jan. 22, 1979, at 20, col. 1.
43. U.S. Const. art. III § 1 guarantees that they serve during good behavior, protects them against salary cuts and establishes impeachment as the only removal mechanism.
44. U.S. Const. amend. VI.
control problem judges have not been effective. When a judge becomes an advocate to any stage of the trial, he should always be reversed. If the practice continues, rigid, pre-established standards should apply in a mechanical fashion. Such standards should be drawn from a wide spectrum of sanctions ranging from a mere warning, to the discretionary delegation of certain cases, and ultimately removal. The unbalanced positions between the judge and the accused, one with the power to commit and the other deeply concerned to avoid prison, at once raises questions of fundamental fairness. Once the judge becomes an advocate, the trial's quest for the truth is nullified; and at this point, a sanctioning body needs to fulfill its role.

Conclusion

Lewis's cross-examination, rehabilitation of witness testimony, and prejudicial courtroom tones bring to light the awesome power he had in making a mockery of the Hickman trial. By becoming a participant in the trial the judge brings the full force and majesty of his office to bear upon the defendants. The court of appeals, upon examination of the Hickman case, was justified in finding that the conduct of the trial judge left the jury with such a strong impression of his belief of the defendants' guilt that the jury could not freely perform its function of independent fact finder. His conduct amounted to plain error. However, to merely reverse and remand is no longer enough. His recurring metamorphosis to the role of advocate has become common. A judicial oversight body could use such conduct as a starting point to take action which is mandatory to our scheme of justice. To reverse and let the situation run its old, unending course is to confirm to any defendant in Lewis' court that a trial is nothing more than a myth. In this age of increasing cynicism and profound lack of faith and trust in public institutions, we can no longer wait to bring into balance the sixth amendment trial guarantees.

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45. N.Y. Times, Mar. 12, 1978, at 26, col. 3 with regard to Federal District Court Judge Willis W. Ritter for the Tenth Circuit where petitions were sought barring Ritter from hearing certain cases.