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"DEEP THROAT" JOURNALISM AND THE SUPREME COURT: A CASE OF "BURNING THE BARN TO ROAST THE PIG?"

By Allen Sultan*

As a working foreign correspondent in the United States for thirty-five years, I came to realize, and never more than during some dangerous constitutional crisis, that the Court and the Court alone guards the rights of the citizen, whether he is a bum or a banker, the President or an infant [. . . . The Court is] the watch dog of the ordinary citizen . . . it will be a bad day for the United States if the mass of Americans come to lose their faith in it as their fair and final protector.¹

We in the United States do not enjoy the political advantages of relative conformity and tranquility derived from a single culture and religion, such as exist, for example, in Sweden and Italy. Rather, the population of the United States, at first blush, seems to require an authoritarian rather than democratic formula. The tensions, pressures, and conflicts one would expect from our heterogeneous ethnic base, with its many races, religions, cultures, and national origins suggest that any republican system that vests sovereignty in so varied a group of peoples was doomed to failure. The reason it has not failed is most directly due to the wisdom of our Founding Fathers who framed the three basic documents of our national polity, the Declaration of Independence, the Constitution, and the Bill of Rights, and the subsequent wisdom of many of the judges who served on the United States Supreme Court. The Justices have dampened the inevitable centrifugal forces of our mixed and varied population; and, in the process, they have not only consistently expanded the application and thereby the citizens’ enjoyment of rights physically embodied in those instruments, they have also added and expansively applied a host of other rights, like association and privacy, as if they were a written part of our organic law.²

These are the reasons that the Supreme Court, in the parlance of the media, “makes excellent copy.” Simply stated, the Court has

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glamour, drama, and mystic qualities — all because it possesses the ultimate power\(^3\) of operative government. That power, however, is conditioned on the sovereignty of the people.\(^4\) And, therein lies the danger! For a system that vests ultimate power in the people cannot afford a sentiment of idolatry towards any branch of government — be it the White House that can spew a Watergate, the Congress that can coin a Gulf of Tonkin Resolution,\(^5\) or a Supreme Court that can explode a *Dred Scott*\(^6\) decision on a nation highly agitated over the moral issue of the ownership of one human by another. Since the best of institutions can also err, uncouthous attribution is dangerous. Rather, true security lies in the constant vigil of the people. It rests in that ongoing interaction with government that evidences the clear rejection of attitudes of paternalism and *noblesse oblige* that are the almost inevitable consequences of a sentiment of idolatry. It rests at bottom with the demand by the body politic that "transcendent values"\(^7\) be respected and that failure by government to do so risks the type of

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4. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). This sovereignty is exercised through the amendatory provision, U.S. *Const.* art. V. For a further discussion of this point, *see, e.g.*, L. *Orfield,* *Amending the Federal Constitution* 154 (1942): ("In the last analysis, one is brought to the conclusion that sovereignty in the United States, if it can be said to exist at all, is located in the amending body. The amending body has often been referred to as the sovereign, because it meets the test of the location of sovereignty." ) *See also,* Potter, *The Method of Amending the Federal Constitution*, 57 U. Pa. L. Rev. 589, 592 (1909): ("In a government controlled and limited by a written Constitution as is ours, the test of actual sovereignty is to be found in the power to amend the Constitution. When you ascertain where, and how, and by whom that power is exercised, you have located the source of sovereignty.").


The ultimates, identified with transcendent values, must in their very nature lie outside the Constitution, just as basic rights have their source outside the Constitution . . . . In the end its decision on ultimate values must be sustained by some higher law rooted in the common consciousness and understanding . . . . the conscience of the nation lies outside the Constitution and supports it. The conceptions rooted in common understanding are the stuff of a nation’s aspiration and moral vision. It is in the shaping of a common ethnic of the people which draws its inspiration from religious, moral, and philosophical sources . . . .

public eruption that followed that ignominious maneuver, "The Saturday Night Massacre."

Thus, the benchmark of our concern when reflecting on the impact of any particular form of media activity is not does it destroy any public myths about officials or institutions. It is not does it topple any idols that need toppling. Rather, it is submitted that the correct standard is: Does the impact of the media activity serve the public interest in that it engenders the proper degree of respect (or lack of it) for the individual or institution of government that is the object of journalistic inquiry and evaluation? The suitability of this standard is proven by the very reason underlying the extensive protection of media activity conferred by our constitutional system. That purpose, clearly recognized by the media, was eloquently characterized by what is developing into a classic statement of Mr. Justice Brennan:

[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.  

Using the proper degree of respect standard, a presidency that successfully guides us through a global war of the Missile Crisis is deserving of approval, while a criminal in the White House (hypothetically speaking, of course) is deserving of immediate removal. A Supreme Court that declares that rocks don't vote and trees don't vote but people do or that unanimously rejects a social philosophy which causes black children as young as three years to

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8. For example, the first standard of the "Code of Ethics" adopted by the Society of Professional Journalists, Sigma Delta Chi, at their national convention on November 16, 1973 reads as follows:

Responsibility: The public's right to know the events of public importance and interest is the overriding mission of the mass media. The purpose of distributing news and enlightened opinion is to serve the general welfare. Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust.

Studying the list of standards in the Code, one also finds: "Ethics: Journalists must be free of obligation to any interest other than the public's right to know... Journalists will seek news that serves the public interest, despite the obstacles. They will make constant efforts to assure that the public's business conducted in public records are open to public inspection."

prefer white dolls over black ones.\textsuperscript{12} is a Supreme Court deserving of public respect. Moreover, when granting that respect continues a practice that has existed, with one notable interruption,\textsuperscript{13} since the days of Chief Justice John Marshall,\textsuperscript{14} it fosters general acceptance of decisions resolving highly divisive political issues.\textsuperscript{15} decisions that are issued by a tribunal that is a virtual political oligarchy.\textsuperscript{16} Given these philosophical, historical, and political factors, media erosion of that respect must stand upon a firm foundation of tested and accepted standards of journalism; both the public interest and fairness can demand no less. Public interest demands no less, because "the power of the Court depends entirely on [that] public respect."\textsuperscript{17} Fairness stands on its own bottom, verbal justification being superfluous.

By and large reporting on the nation’s highest tribunal has more than met these minimum requirements. As a result, it has produced substantial public information regarding the work of the Court and the justices who have sat on it, as well as equally valuable information about ourselves as a society. One only has to parallel two dramatic incidents in the life of the Supreme Court to illuminate this conclusion — one that occurred in 1916 and the other in 1937. These two incidents not only exemplify the value to the "public interest" of full and accurate journalistic inquiry with

\begin{itemize}
  \item \textsuperscript{12} The experiments conducted by psychologists Kenneth and Miami Clark are described in R. Kluger, Simple Justice 317-18 (Vintage ed. 1977).
  \item \textsuperscript{13} For some decades following the Dred Scott decision, supra note 6.
  \item \textsuperscript{14} See, e.g. L. Pfeffer, This Honorable Court 119-20 (1965):
  \begin{itemize}
    \item [Marshall] took a Supreme Court which had been considered by the constitutional fathers as of little value and had been abandoned by Jay and Ellsworth as hopelessly impotent, and singlehandedly made of it a powerful instrument for furthering, promoting and protecting economic expansion, and later, for protecting personal rights and civil liberties . . . . What Marshall was, was a statesman—but he was truly a great statesman.
  \end{itemize}
  \item \textsuperscript{16} U.S. Const. art III, § 1.
  \item \textsuperscript{17} Kurland, The Brethren, 15 University of Chicago Law School Record 15, 16 (1980) [hereinafter referred to as “Kurland”].
  \item \textsuperscript{18} See, e.g., This Honorable Court, supra note 14; A. Bickel, Politics and the Warren Court (1965); A. Lewis, Gideon’s Trumpet (1964); A. Mason, The Supreme Court — Palladium of Freedom (1962); A. Mason & Beaney, The Supreme Court in a Free Society (1959); C. Swisher, The Supreme Court in Modern Role (1965); A. Westin, The Anatomy of a Constitutional Law Case (1958).
  \item \textsuperscript{19} See, e.g., G. Dunne, Hugo Black and the Judicial Revolution (1977); M. Lerner, The Mind and Faith of Justice Holmes (1943); A. Mason, Harlan Fiske Stone — Pillar of the Law (1956); Mason, Brandeis: A Free Man’s Life (1946).
\end{itemize}
respect to the Court, they also evidence the deep concern and involvement of the American people in our most powerful judicial body.

The strident clamor, the outcry of anguish from various factions of the American body politic, resulting from Hugo Black's nomination by President Franklin Roosevelt, has become part of the folk history of the Supreme Court. With respect to successful nominations, that vehement uproar was most probably only matched by the hostile reaction that greeted President Woodrow Wilson's nomination of one of Black's early colleagues, Louis Brandeis. Both candidates were condemned by their detractors for a lack of "judicial temperament." This euphemism, like its comparable generality "judicial legislation," usually says nothing at all. With respect to these two particular judicial candidates, however, there existed a clear, sinister meaning: prior to their respective nominations both men had attacked that self-anointed private dictator of the American public order, the monied aristocracy. To this faction, which placed money ahead of people (meaning its money), that challenge was the unpardonable sin.

However, the two nominations differed in one respect: the presence of bigotry, that dark side of the human psyche. Whereas in Brandeis' case, the prejudice took the form of a rank anti-semitism on the part of many of his detractors; with Black it was the candidate who was alleged to be the bigot, for he had been a member

20. See G. Dunne, id. at 41-59; Strickland (ed.), Hugo Black and The Supreme Court 80-83 (1967); J. Frank, Mr. Justice Black — The Man and His Opinions 95-108 (1949).
22. Id. at 189; G. Dunne, supra note 19, at 50-51; A. Mason, supra note 19, at 469-70, 472.
23. These euphemisms also embrace whatever partisan conception its proclaimer wishes to ascribe to them.
25. Because of his campaigns against "entrenched wealth," Brandeis was correctly told at the time of his nomination, "By your zeal for the common good, you have created powerful enemies." W. Swindler, supra note 21, at 190. Hugo Black was a clear reflection of his rural populist roots. From the time he began what proved to be a successful law practice in Birmingham, Alabama, as the defender of the workers who suffered at the hands of their employers, to the days just preceding his appointment, when he was one of F.D.R.'s most loyal and effective New Deal soldiers in the United States Senate, Hugo Black was anything but a servant of big business. A true populist, Black possessed an inbred hostility towards the owner of the company town. G. Dunne, supra note 19, at 94, 96 & 146.
26. See, e.g., Asch, The Supreme Court and Its Great Justices (1971); A. Mason, supra note 19, at 466, 468.
of the Ku Klux Klan while a practicing attorney in Birmingham, Alabama. After confirmation, both men rendered exemplary service to the law and the nation. When one reflects on the history of the Supreme Court, they can easily be classified as two of the true "giants" among the many justices who have served on that tribunal.

In contrast to this example of valuable public knowledge resulting from the traditional form of media coverage of the Court and its personnel, "investigative reporters" Bob Woodward (of Watergate fame) and Scott Armstrong have served up to the American people a new genre of journalism through their recent book, The Brethren. Favored by a sizable advance from their publishers,
their effort was immediately catapulted to the top of the nonfiction best sellers list, where it remained for twelve weeks before being relegated to second place at the time of this writing (March 27, 1980). The volume has not only been lucrative, it has also been most controversial. This paper will attempt to evaluate the book and its surrounding controversy by the previously stated standard: “Does it serve the public interest in that it engenders the proper degree of respect (or lack of it) for the individual or institution of government that is the object of journalistic inquiry or evaluation?” Although this standard is rejected by Mr. Woodward, such efforts are rendered necessary by the fact that journalism does not possess any compulsory standards of conduct or body of ethics similar to the ones that obtain, for example, in the practice of law and medicine.

**DISAPPROBATION OF THE BRETHREN**

The avalanche of adverse criticism generated by this volume is evidence of the accuracy of Alistair Cooke’s reflection, quoted at the outset of this article regarding the prestige of the United States Supreme Court in the minds of the American people. As a result, the Court is equivalent to “the law” in the minds of many if not most Americans. One can even go so far as to suggest that, rightly or wrongly, the reaction to the volume flows in part from our national sense of injustice, that the book, taken as whole, is viewed as a “low blow,” and as such demands immediate condemnation. To the degree that this is an accurate evaluation, it not only confirms that sense of injustice but the equal validity of the legal maxim *jus est norma recti; et quicquid est contra norman recti est injuria* (law is the rule of right; and whatever is contrary to the rule of right is an injury) as well.

Generally, the condemnation of the authors’ work falls into

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29. N.Y. Times, Mar. 23, 1980 § 7 (Book Review) at 36. It was replaced by Donahue, the autobiography of the television host.

30. Lewis, Supreme Court Confidential, 27 THE NEW YORK REVIEW OF BOOKS 1, 3 (1980) [hereinafter referred to as “Lewis”]. At page 8 Mr. Lewis quotes Mr. Woodward as having stated at the Harvard forum (see text to note 42 infra.) that “[y]ou can’t, as a journalist, sit there and say, ‘What are the effects of this going to be?’”

31. The “Code of Ethics” referred to at note 8, supra as well as its predecessor “Canons of Journalism” formulated by the American Society of Newspaper Editors in 1923, are purely voluntary. A similar non-enforceable status obtains for the specialized efforts like those of the National Conference of Editorial Writers (1949) and the Radio and Television News Directors Association (1966).

32. For an excellent study in this subject, see E. CAHN, A SENSE OF INJUSTICE (1964).
seven general categories: it is often inaccurate, it is frequently too subjective, it now and then evidences excessive malice, it is at times simply not true, the authors are not properly informed about the Court and the reasons it functions as it does, the authors are often merely disseminating gossip, and (what is probably the most disparaging cut of all) the authors fail in their obligation to satisfy their basic professional responsibility as journalists. Each of these allegations is separately discussed by means of a sampling of the comments already in the public record, supplemented at times with personal reflections.

1. **Accuracy.** This appears to be the most universal negative reaction. One reviewer, Ms. Renata Adler, a journalist with a law school background, went so far as to say that the volume is "the most shallow and inaccurate piece of journalism I've ever seen in book form."³³ Although the language from other quarters may not


By the next page, we learn that the authors had "filled eight file drawers with thousands of pages of documents from the chambers of 11 of the 12 Justices" who serve in the period under investigation. Then there is an apotheosis: "In virtually every instance [of what, they do not say] we had at least one, usually two, and often three or four reliable sources in the chambers of each Justice." (emphasis added.) Apart from an occasion to smuggle that word "reliable" into what appears to be a quantitative statement, what can these vague enumerations mean? They mean that, at least as regards number, the authors prefer their own pointless secret (how many) and implication of massiveness to precise statements of simple fact . . . .

It is only that, in this first, extended confrontation — at book length, outside an actual lawsuit — between the Court (with its secrets, whatever they are) and investigative journalists (with their secrets, such as they are), the journalists' own technique seems unexamined and often very far from sound. Ms. Adler continues at 24.

[B]ut it is precisely the weakness of this kind of journalism that, because there is no way to check almost any of its assertions, the journalists themselves are sooner or later drawn into some piece of irresponsibility or idiocy; and one has to read every one of their assertions, from the most trivial to the most momentous, with the caveat "if true" . . . .

In a journalistic enterprise that relies so heavily on a sort of telephone game (Justice, for example, who confides to clerk, who tells reporter) a demonstrably inaccurate ear may be a handicap. It casts doubt particularly on extended conversations that the authors reconstruct, unqualifiedly, in quotes. . . .

Oddly enough, and for reasons of which the authors seem to have no notion, this is the only "Materials" scoop they have: the fact that clerks spoke to them; the precise number who did; the apparent smugness and foolishness of what they said; and the fact that (although they clearly believed otherwise, else why speak to investigative reporters?) the clerks knew no important secrets at all. *Id.* at 25-26 (emphasis added).
be so strong, the message is nonetheless equally clear: The authors' accuracy is suspect; and, equally dangerous, there appears to be no way of checking on the validity of their reporting.34 One highly respected reviewer makes "[t]he point . . . that the authors assert fact without any possible way of knowing whether it is fact or fiction."35

An excellent example of this quandry in the mind of the ratiocinative reader is the authors' claim that Mr. Justice Brennan "was paranoid about the press."36 This "fact" is asserted about the author of the above quoted statement regarding the vital role of the media in our system of popular democracy.37 This "fact" is advanced about the same Justice Brennan who, not satisfied with the important 1976 ruling of the Court that granted extensive freedom to the media, "went the extra mile" by calling for freedom of the press from censorship (prior restraint) even at the possible cost of an individual's right to a fair trial.38 Yet, according to Woodward and Armstrong, Brennan's "clerks knew that Brennan was paranoid about the press."39 Such is the typical fare of this volume! And with respect to the clerks, even if their knowledge was "a fact" — which is doubtful — they may wish to check their law dictionaries for the maxim *fides servanda est* (an agent must not violate the confidence reposed in him).40

(Ms. Adler presents "just one" example of alleged "large, quite complicated mistakes of law" at p. 25).


35. Frank, at 161. Mr. Frank, who has published extensively in the field of constitutional law, is a recognized expert on the Supreme Court.

36. THE BRETHREN, at 356 (emphasis in the original).

37. See note 9, supra & text thereto.


39. See note 36, supra.

40. With respect to the reliability of clerks as a source of information, one of the reviewers had this to say:

The overblown picture of law clerk functioning may have come from a few persons and may not be truly institutionally descriptive. To take but one example, I find ludicrous the notion of a law clerk's manipulating Justice White.

Let me make my own law clerk's revelation. I was a clerk to Justice Black at the October, 1942 term. During that year he passed on some 1,000 different matters. I never affected his conclusion of any one of them. I was a hard-working law clerk. The pattern was three nights a week until 10:00, one until 11:00, all day every Saturday, and some Sunday time. My justice did the first draft of every opinion except for one insignificant dissent, as I have noted elsewhere. I did the second drafts, and much of the research and footnoting went in at this stage. The opinions always went through a
Perhaps an insight into the authors' general attitudes regarding such charges can be gleaned from their recent reaction to commentary from no lesser a source than Harvard Law School's Paul Freund, one of the most respected scholars of the Court in this (and any other) time. Professor Freund not only raised the question of the book's accuracy, but he also "speculated that it might lessen the authority of Supreme Court decisions; erode lower court morale, and decrease discussion of issues among the Justices." 41 Author Woodward's vigorous response to this challenge was expressed on that same day, December 13th, before an overflow crowd attending a forum on the book in the Kennedy School at Harvard University. Woodward said, "The last time I heard [Freund's] argument is when a man named Richard Nixon said 'I know what I mean.'" 42

One may or may not agree with the propriety of Mr. Woodward's analogy; on analysis, it appears to be a little thin. Equally questionable would be any attempt to accommodate the following three additional statements made by Mr. Woodward at that forum:

1. We are convinced we have an accurate portrayal that rises above the standard that daily journalism can achieve,
2. That certain points in the book may turn out to be "not quite right."
3. That he and Armstrong have put their "reputations on the line." And so they had.43

2. Subjectivity. A second criticism leveled at the book is that too often it delves into subjective states of mind that are difficult for

minimum of three and up to six or seven drafts, culminating in a word-by-word exchange between the two of us on everything in the document. Virginia law professor A.E. Dick Howard, Black's clerk, 1962-64, confirms that this description of the Black clerks' role was not materially different 20 years later.

My justice was kind enough to suggest that I filled the bill, and the conclusion not to stay another year was mine. At no point was I a mover or shaker of anything. Nor should I have been. The president appoints and the Senate confirms a mature and experienced person to be a justice of the Supreme Court. The system was not created to give to young persons fresh from law school some important decision-making power.

But that is not the picture of law clerks that emerges from The Brethren. I have known many, many clerks over the years, including recent times, and I am sure that many of those quoted here are atypical. They suffer from megalomania.

Frank, supra note 34, at 164.
42. Tarduno, Brethren Authors Defend Selves, Book HARV. L. REC. 4 (Jan. 11, 1980) [Hereinafter referred to as "Tarduno"].
43. Id. For other charges of inaccuracy, see Lewis, supra note 30, at 3, 5.
the reader to accept at face value. One reviewer succinctly characterized the problem as follows:

The preface to the volume tells us that the authors “have attributed thoughts, feelings, conclusions, predispositions and motivations to each of the justices. This information comes from the justices themselves, their diaries or memoranda, their statements to clerks or colleagues, or their positions as regularly enunciated in their published Court opinions.” One could risk a pretty fair wager that none of those sources will sustain the existence of the fleeting thought here attributed to the chief justice.

Every lawyer “worth his salt” is familiar with the fact that in order to realize justice, “the state of a person’s mind is as much a concern of the law as the state of his or her digestion” and that subjective states of mind can only be inferred from objective facts. It must be remembered, however, that the rules of evidence utilized to reach these subjective conclusions have been fashioned through centuries of empirical trial and error, and that the propriety of their application rests in the history of their validity.

Compare, if you will, the “method” embraced by the authors of The Brethren to reach their subjective conclusions, described and analyzed by one reviewer:

We are told that Justice Rehnquist was dissatisfied with a particular assignment from the chief justice. “He suspected that the assignment was Burger’s way of telling him what he really thought of

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44. Kurland, supra note 17, at 15. One reviewer divided these journalistic obligations as the more subjective states of mind and the less subjective states of mind. Among the former one finds:

“Burger was furious.” “Harlan was furious.” “Brennan was furious.” Innumerable paragraphs begin with the information that one Justice or another was “furious,” “delighted,” “upset,” “especially upset,” “exceedingly upset,” “happy,” “not happy,” “also happy,” “disturbed,” “worried,” “pleased,” “not pleased,” “both pleased and frightened,” “glad,” “troubled,” “tormented,” “elated,” “despondent,” “overjoyed,” “shocked,” “as usual more amused than shocked,” “once again enraged,” “crestfallen,” “flabbergasted,” and so forth. Not only do the Justices ride these gusts of mood and feeling; all the more, the clerks. My favorite piece of American judicial history may be the news (page 326) that “Marshall’s clerks were miffed.”

45. Frank, supra note 34, at 161.
the Christmas party,” an allusion to a social event which allegedly dissatisfied the chief justice.

This is presented straightfaced. It assumes (a) that the chief justice was dissatisfied with the Christmas party, or at least, that Justice Rehnquist thought so; (b) that Justice Rehnquist supposed that an assignment of a burdensome and uninteresting case was made as a sort of a retaliation for a poor social experience; and (c) that Justice Rehnquist said this to someone who repeated it to the authors. "Maybe so, but my own credulity just snapped.

The plain truth is that neither we nor the authors nor, we suspect, the justices in question have any possible way of knowing when they may have been thinking that the chairs were unduly hard or wondering whether the coffee was still hot. This, we must believe, is purest historical fiction."46

Yet, in spite of the probable invalidity of these and similar conclusions, the public is served a surfeit of such subjective nonsense. At times these “conclusions” become simply too much to swallow.

3. *Malice.* Although appearing sporadically throughout the book, this most odious charge is well illustrated by the authors’ “treatment” of Chief Justice Burger and, to a lesser degree, Mr. Justice Brennan.

Probably no aspect of the book evokes greater negative reaction in the unbiased reader than the authors’ virtual vendetta against Chief Justice Burger. Their attitude approximates that of a large portion of the American public’s view of Richard Nixon during the latter stages of the Watergate crisis, in that their vindictiveness often blinds them to the positive qualities possessed by the Chief Justice. To them Burger seldom does anything right. As one reviewer synopsized the authors’ reporting, “Chief Justice Burger is described as stupid (repeatedly), inept, incompetent, devious, and asinine. He is the evil genius of the institution over which he presides.”47

This viperous attack goes so far as to deny the Chief Justice both the ability and the professional commitment necessary to “digest even the simplest cert memo.”48 Its impact is belied by any objective analysis of the Chief Justice’s ability, either from personal experience49 or from reading his opinions.50 In sum, the au-

46. Id. at 161-62 (emphasis added).
47. Id. at 162.
48. THE BRETHREN, supra note 28, at 353; Frank, supra note 34, at 163.
49. For example, Frank, supra note 34, at 163 states: “Indeed, I recently participated in a private discussion between Chief Justice Burger and some ten law students in which I was
thors have concocted a classic example of a journalistic "hatchet job." Given their credentials, Woodward and Armstrong should have realized an old axiom of politics applies to journalism as well: when you attack someone too completely, you both raise the issue of your motives and concomitantly evoke sympathy for the object of your condemnations. By leveling the broadside of the Spanish Armada against the Chief Justice of the United States, the authors have even significantly alienated many of those few informed individuals who would have shared their obvious bias.

4. Truthfulness. The charges in this category are of two general types: those that can be objectively verified and those that rest on the more tenuous foundation of subjective belief. In the interest of brevity, one example of each type should suffice. Interestingly, and perhaps paradoxically, both examples refer to the same "exposé" by the authors: Mr. Justice Brennan's controlling vote in the Moore v. Illinois case requiring Mr. Moore to serve a life sentence for a shotgun murder. Woodward and Armstrong relate the crux of the matter as follows:

One of Brennan's clerks thought that if Brennan had seen the facts as Marshall presented them, he would not have voted the other way. He went to talk to Brennan and, thirty minutes later, returned shaken. Brennan understood that Marshall's position was correct,
but he was not going to switch sides now, the clerk said. This was not just a run-of-the-mill case for Blackmun. Blackmun had spent a lot of time on it, giving the trial record a close reading. He prided himself on his objectivity. If Brennan switched, Blackmun would be personally offended. That would be unfortunate, because Blackmun had lately seemed more assertive, more independent of the Chief. Brennan felt that if he voted against Blackmun now, it might make it more difficult to reach him in the abortion cases or even the obscenity cases.

Sure, “Slick” Moore deserved a new trial. But more likely than not, it would result in his being convicted again. After all, Moore had a long record. He was not exactly an angel. Anyway, the Court could not concern itself with correcting every injustice. They should never have taken such a case, Brennan said. He felt he had to consider the big picture.

“He won’t leave Harry on this,” Brennan’s clerk reported to Marshall’s clerk.

The clerks were shocked that such considerations would keep a man in prison. They wondered whether Brennan still would have refused to switch if the death penalty had not been struck.\(^5^5\)

If true, this would be most condemnable judicial behavior; that is why it was reported in the newspaper accounts of the volume shortly after publication. The question of its accuracy is in serious doubt, however. The challenge supported by objective verification comes from the authors’ fellow journalist, the highly respected New York Times Editor and Columnist, Anthony Lewis. Also author of a widely-read book on the Supreme Court,\(^5^6\) Lewis’ extensive investigation of the charge against Justice Brennan indicates that it simply is not true.\(^5^7\)

This approach at rebuttal is contrasted to the one based upon subjective belief. Although resting upon a less firm foundation, we

\(^{55}\) The Brethren, supra note 28 at 225 (emphasis added).

\(^{56}\) Gideon’s Trumpet, supra note 18.

\(^{57}\) The account of the investigation is found in Lewis, supra note 30. The authors’ response to this challenge and Lewis’ reply thereto are both found at The Evidence of The Brethren: An Exchange, The New York Review of Books 47 (June 12, 1980) [hereinafter referred to as “authors’ response” and “Lewis’ reply”].

Lewis’ challenge was summarized by Time, supra note 33 as follows:

New York Times columnist Anthony Lewis decided to probe this account of cynical legal horse-trading, which the book suggested was based on the recollection of an unnamed former Brennan clerk. Lewis found the ex-clerk, Paul R. Hoeber, now a law professor at the University of California at Berkeley. Hoeber denied that he told Woodward and Armstrong anything of the sort; he insists that Brennan voted with Blackmun only because he felt that the facts of the case required him to do so.
have seen that legal reasoning embraces subjective analyses and conclusions that are worthy of respect when supported by sufficient evidence. With respect to the issue of whether this Brennan incident is "worthy of respect," however, significant deference should be granted the following comment:

Justice Brennan has his detractors as well as his supporters. As one who has been an unswerving admirer of this good man since he stood up to Senator McCarthy over outrages in his native New Jersey in the 1950s, I personally believe this account to be a damnable lie. After 31 years on the bench and votes in more than 100,000 cases, it should not be necessary to affirm that Justice Brennan votes with his conscience.

In determining the validity of this particular piece of journalistic revelation regarding Justice Brennan, the reader should be aware of the fact that authors Woodward and Armstrong, when presented with the question of its accuracy, stood by their account of what in fact transpired, a posture that resulted in the publication of extensive evidence supporting Lewis' challenge. As a result, the public witnessed a rare clash of resolute journalists.

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58. See text to notes 44 & 45 supra. This principle also applies to opinion evidence. See, e.g. McCormick on Evidence § 187 (2d ed. 1972).

59. Frank, supra note 34, at 162. See also Lewis' reply, supra note 57, at 49, where he quotes Mr. Larry A. Hammond, a clerk to Justice Powell during the term Moore was decided by the Court:

I just don't believe that Justice Brennan is the kind of man who would do that. My God, the man has been at the Supreme Court almost as long as I've been alive, and his record of sensitivity to constitutional principle is unequaled. He has been one of the people most concerned, most careful in his scrutiny, certainly where prisoners' rights are concerned.

60. "[O]ur reporting was not only scrupulous, but, as best we can determine on further examination, completely accurate. We stand by our story." Authors' response, supra note 57, at 47. Woodward and Armstrong's substantiation was followed by these conclusions: After following the Court for over two decades Lewis has never reported it as news or anything else. He has simply withheld it from his readers. . . we cannot share his perception that the proper role for journalists is as a press officer and official apologist for the Court.

Id. at 48.

Upon reading this, Mr. Lewis struck back. In the 1971 term the Justices had among them thirty law clerks. I reached all thirty by telephone and asked about the Moore case. Their verdict on the story told by Woodward and Armstrong was overwhelmingly negative. The prevailing tone of their comments was disbelief, verging on contempt.

Lewis' reply, supra note 57, at 48. He then quoted Mr. Justice Marshall as follows:

"I never heard it before the book," he said. "And don't you think I would have remembered? But my law clerks at that time remember talking to Brennan's law clerks. And it's just a complete falsehood."
5. Lack of Information. The criticism that the authors lack a proper information base regarding the judicial decision-making process in general and that of the Supreme Court in particular, if true, explain many of the alleged shortcomings of their volume. It would not, however, explain their lack of wisdom in undertaking such a study in the first place. Significantly, they suffered from a paucity of knowledge about what goes on in the mind of a competent appeals judge; quality, time-tested sources are readily available to correct any shortcomings they may have possessed.

Aside from general remarks regarding their possible lack of information, depreciation of the authors centers on two consequences of their alleged limited knowledge: that relating to the general purpose of the Supreme Court’s deliberative process and that relating to the efforts of the judges (and particularly those of the Chief Justice) to achieve unanimity (or, failing that, near-unanimity) in certain “landmark” decisions. To the degree that either of these charges are true, its effect would seriously compromise the efficacy of the volume. Ignorance with respect to both could be shattering.

The former claimed deficiency, that relating to the deliberative

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Did he think Justice Brennan had deserted him in the Moore case? I asked. Marshall laughed. "It’s not a question of deserting me" he said. "It’s a charge of deserting what he stands for. And he stood for those things long before he knew me."

_id._ at 49. In addition, pointing to a letter in the Hartford Courant, Lewis quoted Justice Brennan’s former clerk, Paul Hoeber, as having written:

“Woodward’s statement that I was the source is an outright lie. It is, moreover, a most implausible lie. Unlike nearly all other persons Woodward interviewed, I spoke to him not in confidence but on the record. For Woodward to claim that I — a former Brennan clerk with the greatest admiration and respect for the Justice, and one speaking on the record with every expectation of being quoted by name — would tell such a story is plainly incredible.”

_id._ at 51. Finally, after extensive substantiation, Lewis concluded, not without a touch of sarcasm:

Very likely the facts that a survey of thirty law clerks shows no evidence for their story, that serious people respect Paul Hoeber, and so on will not impress Bob Woodward or Scott Armstrong. They believe that there is a conspiracy to defile their best-selling book; and the more people agree that their Moore story is preposterous, the more sign there is of the conspiracy. I say that because the authors have made so clear their feeling that they are the victims of an establishment cover-up.

_id._ at 52. In the interest of brevity, the writer has merely related the highpoints of that clash of journalists. Those who find it interesting are strongly encouraged to read it in its entirety; doing so will probably be a rewarding experience.


62. Bernstein, supra note 34, at 12.
process in general, can be addressed with brevity. Its existence is suggested by what one reviewer has characterized as the authors’ fascination with “shifting votes.” 63 Perhaps, one would be more accurate to say that their central interest lies in the reasons for the Justices’ shifting votes. In either case, common knowledge declares that the deliberative process generally exists for the very purpose of persuasion 64 — to realize proper shifts — and not as an end in itself. And, as to the alleged “reasons that persuade” the Justices, the authors’ claims are to a very large degree subject to the host of criticisms discussed earlier. Since exercises in circular reasoning are to be avoided at all cost, one must be content to let this charge live or die with one’s conclusions regarding that serious challenge to the book.

With respect to the authors’ alleged deficiency — relating to efforts by members of the Court to achieve greater unanimity of opinion — one deals with a less elusive phenomenon. If true, this particular informational ignorance is most sad indeed. It impacts in a most disconcerting manner on the utility of their work. Far more significantly, if the charge is true, the volume can be viewed as the means of seriously misguiding the public about the work of the Court in particular and the functioning of our constitutional system in general. These conclusions are based on the fact that, from the days of Chief Justice John Marshall, the value of unanimity, if possible (and near-unanimity, if not), on the “great issues” that frequently reach the Court has been considered to be nothing less than axiomatic. 65 That is why the language of many of its opinions is altered during the process of deliberation, even to the point where one reading the final product would expect the Court to come to the opposite result. 66 As characterized by one student of the Court, “on great questions in particular the country is entitled,

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63. Adler, supra note 33, at 26.
64. Id.
The Supreme Court is at its worst as a collection of soloists, yet the authors treat the decision-making process as if it were a kind of a nine-month-long football season, with winners and losers scoring points. It seems never to occur to them that the goal is to achieve consensus where possible and to reserve differences for the necessary occasions.
Frank, supra note 34, at 163.
65. See, e.g., L. PFEFFER, supra note 14, at 89; A. MASON, supra note 19, at 554.
66. An excellent example of this practice is found in the first principal “parochiad” case, Everson v. Board of Educ., 330 U.S. 1 (1947), where Mr. Justice Black adopted broad anti-establishment language to obtain a majority of five judges. See, G. DUNNE, supra note 19, at 264-67.
if humanly possible, to be given the answers in one voice. The accounts related [in The Brethren], if accurate, reflect strong minds wrestling together until a mutually acceptable result is reached.

One would expect a “court watcher” to inform the public about the fundamental importance of this process and the stability that it offers our governmental institutions. One would expect them to point out that our personal security from official lawlessness, as well as the continued enjoyment of our many individual liberties, are enhanced by this tension toward unity of decision. Yet, authors Woodward and Armstrong appear to grasp this phenomenon as a contagion unearthed by their superior journalistic talents. They seem to suggest that its eradication, by means of exposure to the sunshine of public opinion, will direct the Court to more righteous paths and thus enrich the quality of the Republic. Perhaps the best response to this ridiculous proposition that seems to pervade their thinking was expressed many years ago by Judge Learned Hand: “While it is proper to find fault when their judges fail, it is only reasonable that [the critics] should recognize the difficulties. . . . Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand them.”

6. Dissemination of Gossip. The accusation that this volume propagates gossip is a charge that is difficult to dispel. The work is permeated with “juicy” little “tidbits” about the individuals (not only the Justices) who occupy that marble edifice on the far side of Capitol Hill. Referring to the authors, one reviewer ventured to conclude that “[t]he reason they cannot address in any depth even

67. Frank, supra note 34, at 163. More than any other member of the Court, authors Woodward and Armstrong focus this criticism on Chief Justice Burger. Another explanation of the same behavior by the Chief Justice can be found in Alschuler, Burger’s Failure: Trying Too Much to Lead, Nat. L. J., Feb. 18; 1980, at 19. No defender of the Chief Justice, Mr. Alschuler in part characterizes the reasons for his acts as follows:

This desire may sometimes play a part, but Burger’s behavior may have another, somewhat less invidious explanation. The Chief Justice may simply want to preserve credibility with his fellow justices and to be an architect of consensus on the Supreme Court. People who bend with the majority and who strive to “work from within” usually think of themselves as realists and as team players. They are usually surprised that their hidden agendas are perceived, that their lack of “straight shooting” is resented, and that they frequently incur the enmity of all factions.

Id.

68. Kurland, supra note 17, at 16.

the important questions of which they are aware lies in their un-
usual preoccupation with a very odd kind of gossip: who voted how 
and when, and whose vote changed; who thought what about 
whose earlier drafts; but, above all, who liked or disliked whom.”70

Given the vast array of reports, stories, compelled reflections, 
and other various and sundry types of hearsay (often of the third 
or fourth order),71 almost any reader is sure to find one or two al-
leged incidents that are personally satisfying or psychologically up-
lifting. For example, if this reviewer was asked to select the one he 
most enjoyed reading, the following report, dealing with the period 
when the Justices were considering the Nixon Tapes case72 would 
be immediately cited as my favorite:

The clerks turned to humor to kill time as they waited to learn what 
was going on. One of Powell's clerks, disturbed by his boss's memo 
the day before, drafted a phony opinion and gave it very limited 
circulation to the clerks' dining room. "We believe the principle of 
executive privilege is important .... This case is different from all 
others that will come before the Court. The Court should be guided 
by a solicitous concern for the effective discharge of the President's 
duties and the dignity of his high office.

"However, we're deciding this case differently, because Nixon is a 
crook and somebody ought to throw the son of a bitch in jail."73

Enjoyable as any particular alleged story or occurrence may be, 
evaluating the propriety of such "retailing of gossip"74 must be 
measured by the entire public offering rather than by any part or 
parts of the collection. In this instance, the price is public exposure 
of many matters that are best left unsaid. For example, we are in-
formed of the fact that the universally respected Justice Harlan 
made an innocent (and most probably physically unavoidable) er-
ror on his death bed.75 We also learn a most significant event in

70. Adler, supra note 33, at 25.
71. See note 53, supra.
(1974).
73. Id. at 310.
74. Bernstein, supra note 34, at 12.
75. The Brethren, supra note 28, at 157. What may be termed a "just sentence" was 
passed on this piece of journalistic "good taste" when it was commented that Woodward 
and Armstrong 

have what they may well regard as their choicest tidbit of the imminent death of 
Justice Harlan. That fine gentleman, scholar, and lawyer was in the Walter Reed 
Hospital, blind and dying of cancer. Some clerk brought to Harlan an order that 
needed to be signed, explained it to him, and Harlan concluded to sign it. The clerk
the life of Justice Douglas — that champion of civil liberties, the midwife (if not the father) of our constitutional right to privacy, and the strident voice protesting the rape of mother earth. The vital fact was: seriously paralyzed, in a wheelchair, but refusing to give up ("The Court is my life. What will I do if I leave? I will be committing suicide."76), Bill Douglas could not control his body functions, with negative olfactory consequences.77

One could make a valid plea for the mandatory retirement of justices — which the authors do not attempt78 — in a more direct way than this unseemly disclosure about the man who even the authors recognize served thirty-six years on the Court,79 longer than anyone else in history. But then to have good taste one must first be sensitive; furthermore, when put to the test, that sensitivity must be able to subdue baser motivations like fame and fortune.

7. Responsibility of Journalism. This last category takes us back to our earlier standard, namely, does the volume "serve the public interest in that it engenders the proper degree of respect (or lack of it) for the individual or institution of government that is the object of journalistic inquiry or evaluation?" One may question the propriety of this utilitarian norm, however, few will debate the fact that, given its propriety, The Brethren fails miserably as an important contribution in the literature on the Court. Indeed, the book probably will not even reach the level of approval as an accurate, interesting, but historically inconsequential volume.

The final question one must ask is why? What are the reasons two respected journalists have so little to show for their extensive and energetic efforts? Various theories have been advanced in response to this question. One commentator believes the answer to be, "at no place in these 444 pages do the authors appear to recognize that the issue is not whether 'I win' or 'You win,' but 'Does the country win?'"80 Another believes that the failure lies with the authors' attempt to utilize the technique of investigative reporting,

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76. The Brethren, id. at 391.
77. Id. at 391-92.
78. See id. at 397 where they simply relate Justice Douglas' acts with respect to the issue.
79. Id. at 390.
80. Frank, supra note 34, at 163.
believing it to be inappropriate when one focuses upon an institution like the Court. According to this view, certain techniques, that are well suited to the investigation of breaking stories of a criminal nature, are entirely unsuited to extended, serious analyses in other contexts.\footnote{Adler, supra note 33, at 27.}

There is perhaps another related reason why the work fails so dismaly. Rather than a work about the private or public lives of the justices, \textit{The Brethren} is concerned about how they interact in an institutional framework. Thus, it is fundamentally a book \textit{about the Court} and any successful work about the Court \textit{must} include a proper emphasis upon the \textit{consequences} of the Court’s substantive lawmaking. It must not only be concerned with \textit{how} the Court functions but also with whether its efforts impact positively or negatively upon the public interest. By these standards, any successful volume about the Court must be, at bottom, an historical effort. It may deal with recent constitutional history or with constitutional history of more distant times but, dealing properly with the work of the Court as an institution, an author’s end product is a work about the constitutional history of the United States. I submit, therefore, that the basic flaw of \textit{The Brethren} results from the authors’ failure to properly deal with the work product of the Court in its broader historical context, all their posturing efforts in that direction notwithstanding.

Woodward and Armstrong’s treatment of Chief Justice Burger makes an excellent case in point. One need not bother with the well-known fact that the Chief Justice and the “fourth estate” are not on the best of terms. One may even agree with the view as expressed by one presumptively knowledgeable student of the Court, that “Burger was an easy target for the gossip-mongering of which this book largely consists, for surely at times he is vain, overbearing, crotchety, self-righteous, and thin-skinned.”\footnote{Kurland, supra note 17, at 15.} Yet,

\begin{footnotes}
\footnote{Adler, supra note 33, at 27. Ms. Adler continued her evaluation with the following comments:}
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\footnote{The only scoop there could possibly be about an institution as public as the Supreme Court would be a revelation of crime or corruption (of which Woodward and Armstrong, at least, found none). It may be that an analytic mind and an integrating theme — an instinct for which facts have meaning, which are meaningless and which are not even facts — are more suitable than an investigative reporter’s sheer persistence, and obsession with keeping (his own) and breaking (others’) secrets, to pursuing certain kinds of stories. Most stories — apart from affairs of the military, of crime, and sometimes of the heart — are not, after all, secrets \textit{as such}.}
\footnote{\textit{Id.} (emphasis in original).}
\footnote{Kurland, supra note 17, at 15.}
\end{footnotes}
should all of that be admitted — and the writer pleads lack of sufficient information — Chief Justice Burger remains the person who has brought a great amount of energy to improving the quality and efficiency of the Federal Judiciary in particular and the legal profession in general. It is further submitted that these efforts deserve some consideration in any objective and well-balanced discussion of his activities on the Court.

Even if one chose to consider such achievements to be of minor importance and thus evaluate "the Chief" the same as we would one of the "side justices," any objective and well-balanced inspection of Warren Burger's opinions while on the Supreme Court will prove the shoddy nature and at times vindictive character of Woodward and Armstrong's treatment of the Chief Justice.

Take, for example, Burger's praiseworthy pronouncements in the field of freedom of conscience. In this area Americans can proudly proclaim to lead the world. Thus, our nation's symbolic identity

83. One need only note his contribution to the Judicial Conference of the United States to discern his commitment in this area. See, e.g., [1978] DIR. AD., OFFICE U.S. COURTS ANN. REP. 1, at 1-36.
84. Chief Justice Burger's efforts to upgrade the quality of the trial bar are common public knowledge.
85. A natural inference, one that has been drawn by some commentators, is that Brennan himself gave the authors the Nixon decision, (supra, note 72) material. On "60 Minutes" Mike Wallace said: "William Brennan will be referred to as the Deep Throat of the Supreme Court. Does he know that you have it?" Armstrong replied: "I think we'd rather not answer that."
Now Justice Brennan is well known for his strong belief that the private discussions of the Court should remain just that: private. I think the chance that he gave the Nixon record to Woodward and Armstrong is just about zero. My guess is that he has never met either of them and refused to speak with them even on the telephone. If I am right, Armstrong's answer to Wallace was an attempt to let viewers believe Brennan was a source when he was not. Does the code of investigative journalism really forbid the modest decency of an honest answer to such a question?
Lewis, supra note 30, at 5, 6.
86. In a letter written on December 16, 1786, by Thomas Jefferson while in Paris as our Minister to France, to James Madison, who only one year earlier had been the midwife for Jefferson's "Virginia Bill for Religious Liberty" in that State's legislature, one finds the following statement:
The Virginia act for religious freedom has been received with infinite approbation in Europe & propogated with enthusiasm. I do not mean by the governments, but by the individuals which compose them. It has been translated into French & Italian, has been sent to most of the courts of Europe, & has been the best evidence to the falsehood of those reports which stated us to be in anarchy. It is inserted in the new Encyclopedie, & is appearing in most of the publications respecting America. In fact it is comfortable to see the standard of reason at length erected, after so many ages during which the human mind has been held in vassalage by kings, priests & nobles: and it is honorable for us to have produced the first legislature who had the courage
with this most important human or civil right is the proper source of deep satisfaction on the part of the American people. When its continuation is in doubt because of a clear threat to the national security, few will argue that recognition of its importance does not constitute a significant factor in the resolve of the American people to promptly and adequately meet the challenge. In this manner, religious freedom remains one of those liberties that are at the sinew of our national security.

Given the importance of religious freedom, one is tempted to ask authors Woodward and Armstrong, "Was it not through the voice of the Chief Justice that the Court announced the standards that up to this very day implement our Free Exercise of Religion?" To this query, they would have to answer, "Yes, Burger is the same individual who, writing for a unanimous court, has presented to the American people what will most probably prove to be the touchstone for the future enjoyment of our very important right of the exercise of religious freedom, a measurement that will apply for at least our generation, and most possibly for a century." This being answered, we may properly follow up with a second question: "Was it not beneath the signature of the same Chief Justice that the Supreme Court (at long last) recognized the basic political motivations behind the founding fathers' insistence that our rejection of any official or state religion be placed in our organic law?" To this query they would also have to answer, "Yes, it was Burger who wrote the opinion protecting the two basic objectives of the Framers, namely, the avoidance of an impermissible degree of entanglement between Church and State and, equally important, insulation against any resulting political divisions along religious lines and the excesses that they inevitably produce among the body politic."

It is not contended that Woodward and Armstrong did not know of Chief Justice Burger's magnificent contributions to our enjoyment of religious freedom. It is not suggested, for example, that they were ignorant of his cases interfacing the public purse and the
to declare that the reason of man may be trusted with the formation of his own opinions.


87. See notes 65-66 supra & text thereto.


89. U.S. CONST., amend. 1.

vital principle of religious disestablishment, nor is it suggested that the authors did not know about the excesses during the Thirty Years War or about the Tudors hanging, mutilations and butchering Catholic priests. It is not suggested they did not know that after the revocation of the Edict of Nantes, French Protestant women were "prey to the lust" of Louis XIV's troops, and Huguenot leaders were tortured, broken on the wheel, and quartered. It is not suggested that the authors did not know the contrasting fact that from the early history of the Jamestown Colony, near the dawn of the seventeenth century, freedom of conscience firmly took root in the fertile soil of America.

In drawing attention to such matters, it is not suggested that Woodward and Armstrong were ignorant of such historical facts; rather, it is merely indicated that with respect to this one particular area (and many others that could be cited), if the authors were aware of this information, they apparently failed to properly factor it into their evaluation of the Chief Justice. It is further submitted that this failure is but the most egregious example of the general infection that disqualifies this volume from any serious political, literary, or historical acclaim.

Reflecting upon this fact, one cannot avoid recognizing the inextricable union between unbiased reporting and responsible journalism. The religion cases cited above, as well as others that one may fairly pose, merely help illuminate the authors' bias towards the Chief Justice. Moreover, when they deprecate his opinion in the Nixon Tapes case (which, after all, he did write for a unanimous Court), they render obvious the fact that their hostility, at bottom, virtually denies them, and thus their well-meaning, yet uninformed reader, any sense of balance or perspective.

Evaluating the entire volume, one is often pressed to the conclu-

93. C. Petire, Earlier Diplomatic History 1492-1713, 196 (1949).
94. See, e.g., Morison, supra note 24, at 50.
97. See text to notes 65 & 66 supra.
98. See generally, Bernstein, supra note 34, at 13.
sion that rather than experiencing fair comment, the authors have undertaken a vendetta, the very antithesis of fairness. Journalistic skill and reputation should be put to better use.

CONCLUSIONS

One cannot deny that there is a little bit of the prima donna in most lawyers; clearly the profession does not usually attract introverted types. Indeed, the level of mental narcissism obtaining among some financially successful trial attorneys, some law professors, and a few judges, seems at times to soar into outer space. Lawyers, like most people, willingly embrace self-importance, for it is the strongest balm for the insecurity that, to varying degrees, always seems to reside in the human psyche. One is not surprised, therefore, that many of the justices who have served on the Supreme Court of the United States consider themselves "as the keeper of the Holy Grail." After all, they are only nine in number in a nation with a population well in excess of two hundred million.

This is not to agree with such attitudes. The principle articulated at the outset of this writing remains inviolable: The security of our freedoms rests in ourselves, in our constant vigil as a people, and in our rejection of any sentiment of idolatry. Yet, within this context, one may still view such judicial attitudes in their proper perspective. Given the Court's role as the hegemonic institution of our constitutional system of government, one should not be too surprised if the limitations of human nature now and then affect one of the Justices in a most particular way. Indeed, this possibility is enhanced by their prestige and permanency in power, advantages that the founding fathers so wisely concluded must be granted if the Court is to fulfill its expected commission as "that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decision."

Upon reflection, one must conclude that individual "ego trips" on the part of some of the Justices is a meager price indeed for the dual benefits of stability and change — of "ordered liberty" — that we Americans enjoy as a direct and on-going result of the work of the Court. That tribunal is, after all, the most powerful judicial body in the world. It also constitutes the nucleus of our

100. THE FEDERALIST No. 78 (A. Hamilton).
101. THE FEDERALIST No. 82 (A. Hamilton).
most remarkable constitutional system. Ours is a system that on the highest jurisprudential level reflects that same paradox of stability and change built into the common law from which it evolved, that same common law that continues to be the soil in which the work of the Court flourishes. Unfortunately, informed foreigners are often more aware of these facts than too many of our allegedly “educated” fellow citizens.

That authors Woodward and Armstrong seem to lack a comprehension of this overall perspective is sad. That they undertook this project appears to be in sharp contrast to the recent service that Mr. Woodward performed for both the principle and the reality of American democracy in the Watergate era. Given the courage, the dogged perseverance and the professional confidence he brought to that noble accomplishment, one is at a loss to logically accommodate two such performances by the same individual.

In the end, we are left with the book and its impact with respect to the Supreme Court. Leaving aside the important issue of “fair” or “biased” treatment of the Chief Justice, or any Justice of the Court, it is submitted that the American people deserve better from such highly respected members of the “fourth estate.” Predictably, history will demand no less.

Former Justice Goldberg is reported to have concluded that the Court that survived Dred Scott will survive *The Brethren.* As for the American people, history indicates that they possess a deep trust in the probity and proven utility of our constitutional system. This volume will no doubt have some unfair and inconvenient impact on that confidence. However, happily its influence appears to have been meager, spotty, and fleeting. The faith of the American people in the Court remains intact, a tribute to the resilience of the system penned two centuries ago by the intellectual establishment of a frontier society, one that was located at the outer fringe of western, and self-proclaimed “civilized,” world.

All this being said, one should admit the book has some merit. Perhaps Chicago Law School’s Philip Kurland best characterized where that merit lies with the following conclusion: “This book is

102. See note 6 supra.
103. See also, Lewis, supra note 30, at 6.
104. It is suggested that the publication of *The Brethren* holds an important warning: “[If] such a book were more than a passing phenomenon, if it were to be repeated every few years, then I think the internal confidence that enables the Court to perform its formidable role in American society would be seriously affected.” Id.
not criticism, it is only muckraking. It will afford base indulgence to the naive, and rouse the prurient interest of the sophisticated, political voyeur.\textsuperscript{105} At that Harvard conference last December 13th, author Woodward reacted to a near deluge of similar criticism by declaring, “But you have to see what we were wrestling with — the alternative was not to do [the book].”\textsuperscript{106} One can only respond that the alternative was not as horrendous as he may have then believed, as at least one member of the Court has most recently suggested.\textsuperscript{107}

Perhaps the entire experience only proves that even the most ambitious and aggressive individuals cannot seek out new Watergates but, rather, must wait for them to occur. Both vigilance and patience seem to be what is required. Without them, any similar effort is almost certainly also destined to “break down the barriers between those seemingly inviolate forms,” fiction and non-

\begin{itemize}
\item \textsuperscript{105} Kurland, \textit{supra} note 17, at \textsuperscript{16}.
\item \textsuperscript{106} Tarduno, \textit{supra} note 42, at 4.
\item \textsuperscript{107} On May 5, 1980, the Associated Press reported a most illuminating postscript in the nation’s newspapers:

In an unusual and occasionally harsh rebuttal to media criticism of the nation’s high court, Supreme Court Justice Lewis F. Powell yesterday denied there is any discord or lack of proper leadership on the court. Charges that the Court “lacks strong leadership and has no consistent judicial or ideological philosophy” are “nonsense,” written by critics who “simply do not understand the responsibilities either of the Supreme Court or of the chief justice,” Powell said.

“The members of this court vote independently,” he continued. “This is the sworn duty of each justice.”

He also suggested that critics who find the court to be without a central approach to constitutional issues are the same ones who used to complain about the expected domination of Chief Justice Warren E. Burger and three other appointees of former President Richard M. Nixon.

Powell said, “In the early years of what is called the Burger Court, one often read that the new justices would vote consistently as a conservative (Nixon) bloc to dismantle the great decisions” of the court under Chief Justice Earl Warren.

“Now that this woeful expectation has not been realized, the criticism is that we are leaderless and unpredictable,” Powell said.

His speech is the first detailed public response by a member of the nine-member court since last fall’s publication of \textit{The Brethren}, a best-selling book that examined the inner workings of the court. Powell made no direct reference to the book. But he did mention newspaper and magazine articles that have described discord among the justices. “The nine justices are portrayed as fighting and feuding with each other,” said Powell. “This is a wholly inaccurate picture of the relationships at the court.”

There have been “fascinating examples of personal animosity” on the court, but they all involved former members, Powell said.

“The media’s erroneous perception of discord on the court perhaps is based on a failure to distinguish between personal and professional disagreement,” he said.
fiction.\textsuperscript{108}

One can only conclude that, evaluating all factors, \textit{The Brethren} represents willingness to burn a most valuable barn to roast a most inconsequential pig.

\textsuperscript{108} See Kakutani, "Do Facts and Fiction Mix?" N.Y. Times, Jan. 27, 1980 § 7 (Book Review) at 3, where \textit{The Brethren} is listed among current "best sellers" that "obscure the distinctions between the old categories," and where the author, a reporter by profession, also cites the Woodward and Armstrong volume as one where "the labels ['fact' and 'fiction'] seem almost arbitrary [. . . being] part conjecture, non-fiction. This conclusion is substantiated at page 29 with many of the criticisms discussed above.

For example, George Kannar, a staff counsel of the American Civil Liberties Union, wrote in the \textit{Columbia Journalism Review} that they had created "a new subgenre: fictionalized analysis." He said "such an easily discredited effort as \textit{The Brethren} may only succeed in shrouding the retrogressive Burger Court — and the legal profession generally — in more obscurantist rhetoric than ever."

Lewis' reply, \textit{supra} note 57, at 52.
THE PRESS, THE PUBLIC, AND THE AMERICAN TRADITION*

Allen Sultan**

On June 26, 1857, Abraham Lincoln addressed his "fellow citizens" in the City of Springfield, Illinois. His speech was motivated by one given two weeks earlier in that same City by the then United States Senator from Illinois, Stephen A. Douglas, an oration relating to, *inter alia*, the then recent and ominous *Dred Scott* decision1 by the United States Supreme Court. After indicating his "respect for the judicial department of government," and thus for the rule of law,2 Lincoln supported his call for constitutional change—either by amendment or subsequent contrary decision—with the following statement:

Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, not to acquiesce in it as a precedent.

But when, as it is true to find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled

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* The Editors of this Journal have been both prompt and most responsible in approving publication of this response on very short notice, thereby satisfying my desire that it appear immediately after my previous article and at approximately the same time as Professor Saphire’s Book Review in the University of Texas Law Review.

** Professor of Law, University of Dayton School of Law.

2. ABRAHAM LINCOLN, His SPEECHES AND WRITING (R. Blaser ed. 1962) 355:

   We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for, the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution.
When he spoke those words, "old Abe" was functioning not only as an advocate but also as an educator, informing the general public of his view of the justifications for implementing the processes of change within our governmental system. In this respect Lincoln the politician served the same function as a teacher, a judge, or a journalist; all are educators whether or not they choose to embrace that role. For it is a role that is indigenous to their freely selected professional activity. The educational impact of individuals in these professions is not only the product of what they choose to say or write, but also very often what they do not say—be the omission the result of incompetence, insecurity, devious design or simple lethargy. The effect also necessarily varies with the merits of what is said and the nature of the audience, as well as other circumstances of the expression. However, as long as a "profession" is more than a position that assumes a certain level of technical ability, as long as it is more than a guarantee of a certain minimum amount of income, as long as it is a position with a responsibility to the public, those who don the cloaks of these particular professions will find themselves providing the public with information, and thus education. This is true whether or not it is decorous to label any group of them, as does Professor Saphire, "the elite cadre of (generally) academic scholars and commentators whose tenure and prestige largely depend upon how effective they can be in convincing each other that their respective views of the Court, its problems and its doctrine are innovative and brilliant."

To state this is no more than stating the axiomatic proposition that we always have an abundance of "public persons" in the United States, individuals, including journalists, who attempt to influence public events by their at times very successful appeal to
portions of—if not the entire—general population. Consider the following examples:

Item: This response is being written during the 1980 presidential campaign, with newspapers “endorsing” candidates, a practice that traces back to the intensely partisan press of both colonial times and the early days of the republic.  

Item: When the Framers conditioned ratification of our Constitution on “conventions in nine states,” they purposefully bypassed the state legislative bodies that they knew would not be eager to subject their then sovereign authority to the supremacy of Federal laws. They thereby intended the focus of the merits of their plan of national government to be debates surrounding the election of the members of the various ratifying conventions, individuals who they commanded would have to be “expressly chosen by the people.”

True to this general design, the battle for ratification enticed individuals from many walks of life in one great national debate. The debate also happened to adduce the Federalist papers, that collection of political tracts which remain the most significant American contribution to the discipline of political theory.

Item: In the speech referred to at the beginning of this response, Mr. Lincoln was condemning the institution of slavery as a fundamental violation of the principle of equality. Ever a romantic about the goals or “mission” of the United States, the future President characterized the ongoing implementation of our national values or precepts (using equality as the then appropriate example) in the following manner:

I think the authors of that notable instrument [the Declaration of Independence] intended to include all men; but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in “certain inalienable rights, among which are life, liberty, the the pursuit of happiness.” This they said, and this [they] meant. They did not mean to assert the

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10. U.S. Const. art. 6, cl. 2.
11. C. Rossiter, 1787: The Grand Convention at 170 (1966) (emphasis added). This was the fourteenth of fifteen points in the “Virginia Plan,” drafted by James Madison, that became the blueprint or general outline of the Constitution.
12. Id. at 274-96; R. A. Rutland, The Ordeal of the Constitution (1965).
13. S. Morison, supra note 7, at 312.
obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which could be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere. The assertion that "all men are created equal" was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant when such should reappear in this fair land and commence their vocation they should find left for them at least one hard nut to crack.14

Item: When the proposal for American membership in the League of Nations was arrested by Senator Henry Cabot Lodge and his "round-robin," the plan's architect, President Woodrow Wilson, undertook a national speaking campaign, saying, among other things, that if the United States did not join the League, we would have to fight another World War in approximately twenty years.15

The Declaration of Independence is not a simplistic document. It contains many relatively sophisticated points of history, political theory, and western philosophy. Yet Jefferson, writing for the Founding Fathers, did not address it to any "elite cadre." He did not even address it to the King and his political operatives. Rather, he proclaimed, "let facts be submitted to a candid world."16 Similarly, in all of the instances or items cited above, the public persons choosing to mold political decisions did not direct their views to any intellectual "cadre" of "elite" individuals. They, of necessity, addressed their remarks to the general public. For it is the ultimate source of power in our (or any) truly democratic society.17

14. Abraham Lincoln, His Speeches and Writings, supra note 2, at 360-61.
15. S. Morison, supra note 7, at 882.
This is not to say that the intricacies of the Constitution, or of the Federalist Papers, or of any of the subjects cited above, are necessarily easy to comprehend. Rather, it is to say that from the outset of our political existence (whether one sets the time in the colonial days with the Declaration or at the adoption of the Constitution), the unimpeachable premise of our American system is that the general population is both willing and able to make the large decisions that effect their future—if they are given as full and complete an accounting of the available information as it is possible to obtain. In one sense, this is merely a function of our basic Jeffersonian tenet, as characterized by his principal biographer, that “both the progress and security of society are contingent on the dissemination of knowledge,” such knowledge being the subject of free discussion on the part of the American people, who will always possess the necessary liberty of the mind. 18

As the colleague of Professor Saphire for some years now, I feel confident that he will agree with all that has been stated so far; that both of us look to the Constitution as the mother-lode of our remarkable system of government, and as the source of the abundance of liberties we all enjoy every day we live under its umbrella. Similarly, we both agree on the importance of public respect for the institution of the United States Supreme Court. In the words of his review, the Court’s “effectiveness and very legitimacy most depends upon public understanding, acceptance and respect.” 19

Professor Saphire and I part company, however, on what we respectively deem to be the necessary minimum standard or norm of press activity in reporting the activities of the United States Supreme Court, on what quality of reporting is necessary to most effectively realize that “public understanding, acceptance and respect” that is one of the few essentials of the enjoyment and protection of the rule of law in our political society.

Comparing our differing standards, 20 it is clear from their plain

18. D. MALONE, supra note 8, at 159.
20. My standard, framed in the context of a book, is: Does the volume serve the public interest in that it engenders the proper degree of respect (or lack of it) for the individual or institution of government that is the object of journalistic inquiry and evaluation? Id. In text following notes 7 and 29, and quoted in Professor Saphire's text following note 83. Professor Saphire's test, contained in note 91, states as follows:
Does the volume represent a sustained effort, to the maximum depth possible, given
reading and from Professor Saphire's interpretation of each that my standard places a greater degree of both effort and responsibility on the shoulders of the press. I do not agree with him, however, that my standard is either "unrealistic" or "unfair." Rather, I hold to the view expressed throughout my article, that of all public persons attempting to influence events, the media have proven to be second to none in both their claim of the right to do so, and, from colonial times, the personal dangers they are willing to accept in the pursuit of their recognized, vital responsibilities. I also reaffirm that their militant posture, praised in my article, is not only historically justified: its continued existence and utilization is organic to our political system. If these reasons are not sufficient to demand the greatest possible effort from the media, I can offer none better. Rather, I can only express the view that they, too, are a function of our Jeffersonain heritage.

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During the morning of one of the days in March, 1787, the days leading up to the Constitutional Convention, when the delegates were still arriving in Philadelphia, some of those already present in the Convention Hall were engaged in informal discussions regarding what would be the most desirable policies to pursue once the Convention got underway. When some suggested that less than complete reform of the Articles of Confederation would be more politically popular back home and thus conducive to acceptance by the people, Gouvernour Morris of Pennsylvania wisely recorded for history the response of George Washington to that proposed "practical" strategy. According to Morris, Washington said:

"It is too probable that no plan we propose will be adopted. Per-

the resources available and the nature of the matter in question, to discover and report information hitherto unavailable to the public, unavailable either because the persons or institutions involved have made a conscious effort at secrecy or because the obscurity, diffusion or difficulty in managing the material has either inhibited or precluded reporting?

22. Professor Saphire expresses the judgments at notes 70 and 91.
24. See Sultan's text to notes 7-9.
25. Jefferson's famous statement on this subject, quoted in D. Malone, supra note 8, at 158, champions the importance of the public's ability to utilize its services, "were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them."
haps another dreadful conflict is to be sustained. If to please the
people, we offer what we ourselves disapprove, how can we after-
wards defend our work? Let us raise a standard [banner] to which
the wise and the honest can repair [congregate]. The event is in the
hand of God.26

One may disagree with Washington’s policies, first as the almost
completely silent President of the Convention and later as first
President of the republic. Few, however, will disagree with the
claim that he at all times attempted to hold to this high standard
of public policy, and by doing so set the tone with which to mea-
sure our future political life—a tone that continues to condemn
events like the Watergate incident. In my view, our efforts to live
up to this standard have produced some of our greatest national
accomplishments. The Marshall Plan following World War II27 and
the Civil Rights “Revolution” of the nineteen-sixties are just two
examples that come to mind. I further submit that, at the very
least, one should first attempt to realize this standard before it is
unfortunately deemed to be inapplicable or “impossible” of
achievement—cynics to the contrary notwithstanding.

Attempts to apply this standard to the reporting of Supreme
Court activity by the media did not begin after publication of The
Brethren. They go back at least three decades. Mr. Justice Felix
Frankfurter, who “saw himself as professor with the entire nation
as his class,”28 was one of our national leaders who was very con-
cerned with public perceptions of Supreme Court decisions.29 His
efforts in this regard can best be exemplified by the following se-
quence of events, as narrated by his biographer:

Frankfurter’s concern for public understanding of the Supreme
Court took him into a long running fight with the New York Times.
The press, Frankfurter believed, had a semipublic function and a
semipublic responsibility. The Times, as the one documentary pa-
per in the nation, should, he thought, furnish its readers the kind of

26. Quoted in Ferrand, The Framing of The Constitution of The United States 66
(1913) (emphasis added).
27. S. Morison, supra note 7, at 1057.
29. In fact half a century ago he wrote:
The evolution of our constitutional law is the work of the initiate . . . But its ulti-
mate sway depends upon its acceptance by the thought of the nation. The meaning
of the Supreme Court decisions ought not therefore to be shrouded in esoteric mystery.
It ought to be possible to make clear to lay understanding the exact scope of constitu-
tional doctrines that underlie decisions . . . .

Id.
competence in its reporting of the Supreme Court that it furnished in other fields. It should, Frankfurter was fond of saying, cover the Supreme Court at least as well as the World Series. Beginning in 1933, Frankfurter barraged Arthur Hays Sulzberger, publisher of the Times, with letters in which he was outspokenly critical of its failings—and equally outspokenly congratulatory of its triumphs. Finally, in the mid-1950's, Frankfurter was instrumental in changing Times Supreme Court reportage. Sulzberger and Frankfurter lunched in Washington, and a young reporter and Pulitzer Prize winner named Anthony Lewis was sent to Harvard Law School for a year, then assigned to cover the Supreme Court. The Times expanded and deepened its Court coverage; a significant by-product of this development was the effect on other prominent newspapers which, encouraged by the Times, sought to improve their reporting of Court news and bring it up to World Series levels. 80

In our increasingly specialized world the media has usually made significant progress in improving its general expertise. No longer are sports reporters the only ones who are expected to understand the intricacies of their assigned subject area. Science, business, travel, the arts, real estate—even cooking—have all experienced not only reporters, but even editors possessing the knowledge necessary for fulfilling their responsibility of properly and fully informing the public. Given the importance of the law in general, and our constitutional system in particular, I am puzzled by an attitude that, on the one hand recognizes the importance of public understanding “of how the Court works,” 81 and on the other hand proposes a standard that could be interpreted to demand less than the best possible effort in this regard. To me it represents a norm or measure clearly in opposition to that striving for excellence that has been part of our constitutional tradition since, at least, the days of the Constitutional Convention. Thus, Professor Saphire’s approach belies, at the very least, the efforts as exemplified by Felix Frankfurter to apply that standard of striving for excellence—the spirit of Washington’s statement—to coverage of the activities of the Court by the press, a responsibility that Professor Saphire readily admits is vital to the maintenance of the rule of law in our democratic system of government.

Equally disconcerting with the general thrust of Professor Saphire’s position are many of the ancillary arguments made in

30. Id. (emphasis added).
31. Saphire’s text following note 19.
support of that thesis. At a time when two of the major television networks employ individuals trained in the law to report on the activities of the United States Supreme Court, I reject the proposition that such training on the part of journalists, specifically including Mr. Anthony Lewis, places them in some type of specialized group, \(^{32}\) thereby discounting any effect they hopefully may have on improving overall standards of reporting on legal developments. Similarly, I reject the suggestion that there be an automatic (or even presumptive) acceptance of any standard that journalists may impose upon themselves. \(^{33}\) To do so provides those journalists with a bootstrap-type of immunity from objective evaluation, as well as from that socially necessary minimum level of performance.

I also reject Professor Saphire’s assertion on the inevitability of the need for oversimplification, for overdramatization, or both. \(^{34}\) What about the option of adopting the more exacting standard, the one that will tend to do justice to the subject by greater effort and a more restrained mode of expression? There is also his troubling suggestion that can be interpreted to equate journalism with literary licence. \(^{35}\) If this proposition is accepted, how do we protect the public from fiction derived from and thus dressed up in the garb of fact?

Finally, should Professor Saphire’s overall posture be rooted (even in part) in an attitude that the general public is incapable of understanding a higher quality of journalism—that superior reporting may be too intricate for the average citizen to digest \(^{36}\)—I feel that such a position is deserving of both immediate and complete disapprobation. It constitutes nothing less than rank intellectual elitism and, as indicated above, the rejection of such intellectual elitism is part of our American tradition. From the Founding Fathers, through President Lincoln, through Felix Frankfurter’s more recent efforts, to Franklin Roosevelt’s “Fireside Chats,” we have experienced consistent recognition on the part of our most outstanding leaders, that the American people are capable of passing upon the wisdom of the acts of their government—including

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32. Id. at note 116 and text thereto and at note 117.
33. Id. following note 52; id. following note 73.
34. Id. at note 64.
35. Id. following note 54.
36. Id. text following note 124 where he states that, “the complexity and sophistication of analysis of professional literature on the Court may be beyond the capacity of many to absorb.”
those of their judges. The only necessary condition, one we have seen clearly suggested in the Jefferson quotation above, is that the people must be informed of the meaning and significance of those actions by a competent and energetic press. My position, simply stated, is that the members of the media are increasingly recognizing that their professional responsibility requires that they place technical events, including Supreme Court activity, in language that is understandable to the average citizen, and that Professor Saphire's position not only fails to recognize this fact, but denies its overall necessity and salutary value. It may not always be possible for the media to so describe events, but that fact alone is no reason to embrace an overall standard that abandons any responsibility to undertake the effort.

CONCLUSIONS

In rejecting the unacceptable for the clearly possible and more desirable standard, I have attempted to address what I deem to be the basic issue of public policy that divides Professor Saphire and myself. Constraints of both time and space do not permit me to respond to all of the allegations, "interpretations" and conclusions contained in my colleague's Book Review. I am content to leave these and other matters to the reflection and evaluation of the

37. See D. MALONE, supra at note 25.
38. Nor does Professor Saphire's view (found at his note 124) that the public does not have easy access to legal literature compromise my position. Rather, should that statement be true, it further supports my proposition regarding the responsibility of the media, presumptively possessing such access, to utilize that availability in their reporting on the nature and status of arguing legal developments.

I also question Professor Saphire's basic proposition that the public lacks readily available information on how the Supreme Court functions as an institution (See his note 4 and the text following note 25).

39. See the information directly preceding my note 1 supra.
40. For example, Professor Saphire states at the end of note 6: Professor Sultan concludes that the authors "concocted a classic... 'hatchet job'" on Burger, Sultan, supra, note 2, at 10 (footnote omitted) thus attributing the same kind of motives to them that he accuses them of improperly attributing to the Justices. His use of the word "concocting" connotes an intentional and malicious strategy of vilification. To the extent he does not personally know either author nor interviewed them about the matter, it may be that his assumptions reflect his own set of biases. (Emphasis added)

I need not go any further than my desk dictionary (WEBSTER'S NEW COLLEGIATE DICTIONARY 234 (1975)) to find that the word "concocting" means first, "to prepare by combining crude materials," and only secondly to "devise" or "fabricate". Requesting the very same benefit of good faith attribution that Professor Saphire declares "we must" grant the authors of The Brethren (at his text following note 73), I ask if any fair reading of my entire article, or my particular use of the term "concocting" that he refers to, can lead to the conclusion that
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reader, trusting in his or her ability to decide on the merits of such claims.

In addressing the general issue of public policy that divides me from my colleague, I am merely stating that I do not believe the American public is willing to abandon a standard of accurate and responsible journalism that it deems essential for a proper understanding of the work of the Supreme Court. Nor do I believe that...
the American people, as a group, are ready to agree with any possible suggestion, elitist in nature, that vulgar curiosity is the only way—or even an acceptable way—of guaranteeing that reporting on the activities of the Court will be of interest to them or their fellow citizens. Finally, I reject the view that our society is clearly committed to the proposition that any news is always better than no news, even if it be slurring or sensationalized. The quality of our civilization may leave many things wanting, but it has developed to the degree necessary to reject that insalubrious proposal.

Rather than crude gimmickry to appeal to an assumed group of intellectually deprived citizens, I trust that most readers clearly share my faith in the overall political intelligence and simple common sense of our body politic.\textsuperscript{42}

\textsuperscript{42} I am indebted for these latter conclusions to the insightful and candid comments of my wife, Elizabeth Sultan, who assisted me by evaluating Professor Saphire's offerings from the viewpoint of an informed, lay individual.
A behavioral syndrome known as "hyperkinesis" afflicts many school-age children. Although the uncertainties inherent in this syndrome contraindicate any method of treatment which might risk adverse side effects, methylphenidate treatment is frequently prescribed for many of these children. Today increasing numbers of researchers are recommending an alternative form of treatment: special education for the specific learning disabilities often exhibited by the hyperkinetic child. This paper explores the medical considerations favoring special education rather than methylphenidate treatment and the hyperkinetic child's corresponding legal rights.

I. Hyperkinesis: Medical Aspects

A number of children exhibit a behavioral syndrome manifested by hyperactivity, distractibility, impulsivity and cognitive and learning disabilities.\(^1\) Usually appearing during early childhood,\(^2\) the syndrome is much more common in boys than in girls\(^3\) and tends to afflict children of normal to above-average intelligence.\(^4\) A

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number of the symptoms often disappear by adolescence, and the syndrome will frequently respond favorably to amphetamine treatment. The syndrome has been variously described as "hyperkinesis," "hyperactivity" or "minimal brain dysfunction." The synonymous use of these terms has resulted in much obfuscation. "Hyperkinesis" and "hyperactivity" mean the same thing: excessive motor activity. The term "minimal brain dysfunction" refers to a behavioral syndrome, thus this label is disfavored by many experts because it presumably implies an organic etiology. Researchers, however, can discern few, if any, differ-

5. Cantwell, The Hyperactive Child Syndrome, supra note 1, at 10; Millichap, Minimal Brain Dysfunction, supra note 1, at 4-5; Laufer & Denhoff, The Hyperkinetic Syndrome, supra note 2, at 464.


8. See generally The Hyperactive Child: Diagnosis, Management, Current Research (D. Cantwell ed. 1975); Stewart, Pitts, Craig & Dieruf, The Hyperactive Child Syndrome, supra note 4.


10. Many researchers use the terms synonymously. See, e.g., Cantwell, The Hyperactive Child Syndrome, supra note 1, at 3-4; Millichap, Minimal Brain Dysfunction, supra note 1, at 4; Wender, Speculations Concerning a Possible Biochemical Basis of Minimal Brain Dysfunction, Learning Disabilities and Related Disorders: Facts and Current Issues 13 (J. Millichap ed. 1977) [hereinafter cited as A Biochemical Basis]; Schain, Etiology and Early Manifestations of MBD, Learning Disabilities and Related Disorders: Facts and Current Issues 25 (J. Millichap ed. 1977) [hereinafter cited as Etiology]; Piepho, Gourley & Hill, Minimal Brain Dysfunction, supra note 1, at 500.


12. Millichap, Minimal Brain Dysfunction, supra note 1, at 3; Piepho, Gourley & Hill, Minimal Brain Dysfunction, supra note 1, at 500; Haller & Axelrod, Minimal Brain Dysfunction, supra note 4, at 1319; Wender, A Biochemical Basis, supra note 10, at 13.

ences among the three syndromes. Selecting one of these terms to describe the syndrome would promote clarity in analysis and facilitate comparison of studies. For purposes of this paper, the previously described behavioral syndrome will be denominated "hyperkinesis."

The hyperkinetic syndrome is rather difficult to diagnose reliably. It is frequently accompanied by "soft" neurologic signs, minor neurologic abnormalities not associated with any neurologic pathology. Some of the soft signs manifested by hyperkinetic children include dysdiadochokinesia, synkinesia, dyspraxia, dysgraphia, graphanesthesia, fine choreiform movements, and a changing Babinski reflex. Soft-neurologic signs serve a limited diagnostic purpose, however, because the signs are not always present in hyperkinetic children and are sometimes found in normal children.

14. See note 10 supra & accompanying text.
15. Cantwell, The Hyperactive Child Syndrome, supra note 1, at 3.
18. Cantwell, Diagnostic Evaluation, supra note 17, at 43; Millichap, Minimal Brain Dysfunction, supra note 1, at 6.
20. Dysdiadochokinesia is the impairment of the ability to alternatively flex and extend a limb. STEDMAN'S ILLUSTRATED MEDICAL DICTIONARY 430 (23d ed. 1976).
21. Synkinesia is involuntary muscular movement following voluntary muscular movement. Id. at 1392.
22. Dyspraxia is the impairment of function or painful function of any organ. Id. at 434.
23. Dygraphia is difficulty in writing, commonly known as writer's cramp. Id. at 431.
24. Graphanesthesia is the inability to recognize symbols traced on the skin. Id. at 402.
25. Choreiform movements are variable spasmodic involuntary movements of the limbs and facial muscles. Id. at 272-73.
26. The Babinski reflex is an extension of the first toe instead of the normal flexion reflex when plantar stimulation is administered. Id. at 1283. See Millichap, Minimal Brain Dysfunction, supra note 1, at 6-7; Piepho, Gourley & Hill, Minimal Brain Dysfunction, supra note 1, at 502; Haller & Axelrod, Minimal Brain Dysfunction in Children, supra note 9, at 12.
27. Kornetsky,Minimal Brain Dysfunction and Drugs, supra note 11, at 455; Schmitt, The MBD Myth, supra note 13, at 1314.
28. Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 455; Schmitt, The MBD Myth, supra note 13, at 1314; Cantwell, Diagnostic Evaluation, supra note 17, at
children. Soft signs often indicate mere neurologic immaturity. Furthermore, soft neurologic signs are rather unreliable because they vary and are not consistently reproducible. They do not indicate any structural abnormality.

The electroencephalogram (EEG) is of little use in evaluating or predicting hyperkinesis, because no specific EEG pattern is exclusively associated with hyperkinesis. Not only do normal children produce abnormal EEGs, but also only a fraction of hyperkinetic children have abnormal ones. Moreover, experts often interpret the same EEG differently.

Some physicians simply diagnose those children who respond favorably to stimulant drug treatment as hyperkinetic. This diagnostic technique can be misleading, since the improvement in behavior may result from a placebo effect. Stimulant drugs do not

44. Haller & Axelrod, Minimal Brain Dysfunction, supra note 4, at 1320; Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 455; Schmitt, The MBD Myth, supra note 13, at 1314.


31. Schain, Etiology, supra note 10, at 30; Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 455; Schmitt, The MBD Myth, supra note 13, at 1314.

32. See notes 18 and 19 supra & accompanying text.

33. The electroencephalogram is an instrument which measures brain waves. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 732 (1966).

34. Laufer & Denhoff, The Hyperkinetic Syndrome, supra note 2, at 469; Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 456; Schmitt, The MBD Myth, supra note 13, at 1314.

35. Cantwell, Diagnostic Evaluation, supra note 17, at 44. Furthermore the patterns of EEG abnormality in hyperkinetic children do not correlate with neurologic findings. Schmitt, The MBD Myth, supra note 13, at 1314.

36. Laufer & Denhoff, The Hyperkinetic Syndrome, supra note 2, at 464; Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 455; Schmitt, The MBD Myth, supra note 13, at 1314.

37. Experts variously estimate the percentage as ranging from 30-50%. Laufer & Denhoff, The Hyperkinetic Syndrome, supra note 2, at 469; Kornetsky, Minimal Brain Dysfunction, supra note 11, at 455; Schmitt, The MBD Myth, supra note 13, at 1314. One researcher has estimated the proportion to be as high as 88%. Millichap, Minimal Brain Dysfunction, supra note 1, at 7-8.


ameliorate the symptoms of all hyperkinetic children, and children with other behavioral disorders may also show a positive response when treated with stimulants.

Present understanding indicates that a number of different etiological factors might lead to the development of hyperkinesis during early childhood. Although difficulties in pregnancy or during birth are sometimes associated with hyperkinesis, hyperkinesis is not conclusively related to prenatal or perinatal complications. Lead ingestion or certain dietary deficiencies may account for some cases of hyperkinesis. Researches have suggested that hyperkinesis is caused by diencephalic dysfunction. Still other researchers postulate that the central nervous systems of hyperkinetic children are hyperaroused, while their behavior is hyperaroused. Some cases indicate a genetic etiology. Since hyperkinetic children respond favorably to amphetamine treatment, it has been suggested that a particular biochemical lesion is responsible for hyperkinetic behavior.

41. Fish, Hyperactive Children, supra note 6, at 110; Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 462-63; Wells, The Right to Choose, supra note 16, at 591.
42. Fish, Hyperactive Children, supra note 6, at 110-11; Schmitt, The MBD Myth, supra note 13, at 1315.
44. Haller & Axelrod, Minimal Brain Dysfunction, supra note 4, at 1320; Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 458.
45. Piepho, Gourley & Hill, Minimal Brain Dysfunction, supra note 1, at 500; Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 458.
46. Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 458.
47. Id. at 459.
48. Laufer & Denhoff, The Hyperkinetic Syndrome, supra note 2, at 467. The diencephalon, part of the reticular activating system, monitors impulses from the sensory receptors which then become amplified at higher levels of the brain. When impaired, the diencephalon fails to screen out irrelevant stimuli; consequently, the cortex is "flooded" with more stimuli than it can adequately process. Researchers theorize that structural impairment of the brain stem or diencephalon or an underdeveloped cortex was responsible for hyperkinetic behavior. Grinsson & Singer, Hyperkinetic Children, supra note 7, at 534-35.
49. Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 461.
50. Id. at 459-60; Cantwell, The Hyperactive Child Syndrome, supra note 1, at 11. The evidence supporting a genetic etiology consists of: (a) the pronounced clustering of hyperkinesis in families; (b) the high rate of psychopathology in parents of hyperkinetic children; (c) the frequent occurrence of hyperkinesis in adopted children whose natural parents had severe pathologic disturbances. See P. Wender, Minimal Brain Dysfunction in Children 40-43 (1971).
51. See notes 57-69 supra & accompanying text.
52. Wender, A Biochemical Basis, supra note 10, at 18. However, favorable response to amphetamine treatment is not dispositive proof that a biochemical lesion is responsible for
can clearly account for all cases of hyperkinesis.\textsuperscript{53} Furthermore, hyperkinesis is not always organically caused;\textsuperscript{64} it can be caused psychogenically,\textsuperscript{65} and environmental factors are significant in producing hyperkinetic behavior.\textsuperscript{66}

Bradley first noted in 1937 that amphetamines have the "paradoxical effect" of alleviating hyperactive behavior in hyperkinetic children.\textsuperscript{57} Dextroamphetamine\textsuperscript{68} was the agent of choice for treating hyperkinesis until the late 1960's\textsuperscript{69} when methylphenidate\textsuperscript{60} became prescribed more often because it was accompanied by a lower incidence of side effects.\textsuperscript{61} Today methylphenidate remains the agent of choice in treating hyperkinesis.\textsuperscript{62}

The precise mechanism of amphetamine action in hyperkinetic children is unclear.\textsuperscript{63} Researchers who attribute hyperkinesis to diencephalon dysfunction\textsuperscript{64} theorize that amphetamines stimulate the diencephalon's inhibitory function in a manner that does not "flood" the cortex with irrelevant stimuli.\textsuperscript{65} Those who adhere to the hypoarousal theory\textsuperscript{66} believe that drug treatment merely stimulates the hypoaroused central nervous system of the hyperkinetic child.\textsuperscript{67} Some experts believe that the "paradoxical effect"\textsuperscript{68} of amphetamines is instead the normal effect of stimulant drugs: the focusing of attention.\textsuperscript{69}

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hyperkinetic behavior. It is unclear whether the treatment reverses the primary abnormality or some other abnormality in the causal sequence. Wender, The Minimal Brain Dysfunction Syndrome in Children, 165 J. NERV. MENT. DIS. 50, 55 (1972).

53. Stewart, Pitts, Craig\ & Dieruf, The Hyperactive Child Syndrome, supra note 4, at 867; Grinspoon\ & Singer, Hyperkinetic Children, supra note 7, at 516; Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 459.

54. Clements, Minimal Brain Dysfunction in Children, supra note 9, at 9-10.

55. Schmitt, The MBD Myth, supra note 13, at 1316; Bond\ & Rae, Hyperactive Children, supra note 43, at 968.


59. Id. at 498.

60. Id. at 498-99.

61. Piepho, Gourley\ & Hill, Minimal Brain Dysfunction, supra note 1, at 502.

62. Millichap, Medications, supra note 6, at 111.

63. Grinspoon\ & Singer, Hyperkinetic Children, supra note 7, at 534-36.

64. See note 48 supra \& accompanying text.

65. Grinspoon\ & Singer, Hyperkinetic Children, supra note 7, at 535.

66. See note 49 supra \& accompanying text.

67. Kornetsky, Minimal Brain Dysfunction and Drugs, supra note 11, at 461-62.

68. See note 57 supra \& accompanying text.

Methylphenidate will help a hyperkinetic child by decreasing his hyperactivity, distractibility, and restlessness, while increasing his attention span, thereby enhancing the child’s ability to learn. Nevertheless, methylphenidate use may be accompanied by unpleasant side effects; some children may experience nausea, dizziness, palpitations, and skin rash. Although methylphenidate may cause loss of appetite and suppression of height and weight growth, the child will usually grow in spurts until he attains normal growth levels when the medication is discontinued. Insomnia and cardiovascular disorders such as increased diastolic blood pressure or tachycardia can result from prolonged methylphenidate use. Methylphenidate may inhibit hepatic drug metabolism and the half-lives of certain drugs. It may also interact with the anticonvulsant drugs.

Physicians should be cautious when prescribing methylphenidate for hyperkinetic children. Few researchers have studied the long-term effects of the stimulant drug treatment of hyperkinetic children. Furthermore, many of the long-term studies that have been conducted lack proper experimental design. Many health professionals are concerned with the possibility that persons treated with methylphenidate during childhood may abuse stimulant drugs as adults. Hyperkinetic children have been reported to build tol-
ances to stimulant drugs; however, stimulant drug treatment does not cause drug abuse in later life. 

Due to the lack of complete efficacy and the risks inherent in prescribing methylphenidate, a number of alternative treatments have been developed. Some researchers have treated hyperkinesis through perceptual-motor or sensor-motor training programs that employ training exercises designed to improve the hyperkinetic child's motor, perceptual, or sensory skills. The programs are grounded on the assumption that training accelerates the maturation of the hyperkinetic child's underdeveloped motor, perceptual, and sensory skills, which are necessary components of higher order learning.

Hyperkinesis has also been treated by modifying the child's diet, and megavitamin therapy has been used with some success. The Fiengold diet, which assumes that artificial food additives are a major cause of hyperkinesis, eliminates food colors and natural salicylates from the child's diet. Researchers generally report a reduction in hyperkinetic symptoms in children treated with the Fiengold diet.

Other researchers have used behavior modification techniques to

80. Laufer & Denhoff, The Hyperkinetic Syndrome, supra note 2, at 472.
81. Id.; Piepho, Gourley & Hill, Minimal Brain Dysfunction, supra note 1, at 503; Millichap, Medications, supra note 6, at 115; Wells, The Right to Choose, supra note 16, at 595.
83. Panel Discussion, Other Remedies, supra note 82, at 156-58.
84. Id. at 156. The programs use a number of different training exercises.
85. Id. at 157. Proponents of these programs believe that learning disabilities should be dealt with by focusing on the underlying perceptual motor ability rather than the specific disability.
86. Id. at 158-62.
87. Id. at 155.
88. Id. at 158. A salicylate is a type of salt found in a variety of foods.
89. Id. at 158-62. More research is required in the area of diet therapy.
control hyperkinetic behavior.90 Behaviorists view the problem of hyperkinesis as a lack of stimulus control.91 Stimulus controlled behavior consists of certain actions emitted in response to a particular stimulus as a result of past reinforcement or punishment.92 Hyperkinetic behavior is conceptualized as behavior which is not under stimulus control, i.e., situationally inappropriate behavior.93 According to the behavioral scientist, hyperkinetic behavior is acquired because: (1) the child may never have been taught to act in an appropriate manner in response to a particular stimulus; (2) the child may have been taught to act in an appropriate manner in response to a particular stimulus; or (3) the child’s hyperkinetic behavior is maintained by negative reinforcement.94

A behavioral approach to hyperkinesis involves five steps: (1) identification and definition of the behaviors which the therapist desires to establish or modify; (2) evaluation of the behaviors to be established or modified in the environment in which they occur; (3) identification of reinforcers to be used as motivation to change behavior; (4) establishment of a system to measure changes in behavior; and (5) identification of the persons who will be responsible for effectuating the desired changes in behavior.95 Although it requires more resources than methylphenidate treatment, behavior modification may be a more desirable therapeutic modality for the treatment of hyperkinesis, because it does not involve the possibility of adverse side effects which may accompany prolonged methylphenidate use.96

II. The Hyperkinetic Child’s Right To An Education

Several treatment modalities are available for dealing with the

90. Haller & Axelrod, Minimal Brain Dysfunction, supra note 4, at 1323; Grinspoon & Singer, Hyperkinetic Children, supra note 7, at 548-49; Bond & Rae, Hyperactive Children, supra note 43, at 969; Simmons, Behavioral Management, supra note 82, at 129-42; Cantwell, Therapeutic Modalities, supra note 82, at 181-82; Willis & Lovaas, A Behavioral Approach, supra note 82, at 119-37; Panel Discussion, Other Remedies, supra note 82, at 166-67.
91. Willis & Lovaas, A Behavioral Approach, supra note 82, at 121-23.
92. Id. at 121.
93. Id.
94. Id. at 121-23. The deficiency in stimulus control is often characterized as a deficiency in attention.
95. Simmons, Behavioral Management, supra note 82, at 131-33.
96. Id. at 129; Grinspoon & Singer, Hyperkinetic Children, supra note 7, at 548-49; Bond & Rae, Hyperactive Children, supra note 43, at 969; Willis & Lovaas, A Behavioral Approach, supra note 82, at 120. More research is needed in this area. Cantwell, Therapeutic Modalities, supra note 82, at 182.
problem of hyperkinesis, such as methylphenidate treatment, diet therapy, and behavior modification programs. With some form of treatment, a hyperkinetic child may be capable of performing in a regular classroom, and several legal theories which provide the hyperkinetic child with an opportunity for an education have been developed in recent years.

A. Constitutional Approach

Early cases dealing with handicapped children\(^97\) held that the child could be expelled without due process.\(^98\) Other cases held that in spite of the fact that the state provided a free public education system, a school could refuse to educate a handicapped child.\(^99\) *Brown v. Board of Education,\(^100\)* which dealt with the question of racial discrimination in public schools, established an important principle that lower federal courts have applied to the education of handicapped children. In *Brown* the Supreme Court held that when a state has undertaken to provide children with an opportunity for an education, the opportunity must be provided on an equal basis.

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\(^101\)

Every state has enacted some form of compulsory attendance law which requires children to attend state-approved schools.\(^102\) Applying the *Brown* principle of equal educational opportunity to the education of handicapped children, several lower courts have required local school districts to provide handicapped children with

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97. For purposes of this discussion, the term "handicapped children" will be used to refer to hyperkinetic children.
100. 347 U.S. 483 (1954).
101. *Id.* at 493. One commentator makes a cogent observation in the context of the education of handicapped children: While this statement [separate educational facilities are inherently unequal] was made with regard to race, the evidence on which it was made applies with great force to separate educational facilities on any basis where one group is regarded as superior and another group is inferior.
the same opportunity for an education that the school provides for nonhandicapped children.\textsuperscript{103}

Some states include the right to an education among the fundamental rights guaranteed by their constitution;\textsuperscript{104} however, \textit{San Antonio Independent School District v. Rodriguez}\textsuperscript{105} established that the federal Constitution does not guarantee education as a fundamental right. In \textit{Rodriguez} the Supreme Court rejected an equal protection challenge to the Texas public education finance system under which local property taxes provided revenues, resulting in different per-pupil expenditures among the various school districts.\textsuperscript{106} Refusing to apply a strict scrutiny test because neither a fundamental right nor a suspect class was involved,\textsuperscript{107} the Court found that the Texas system was rationally related to the legitimate state interest in providing a basic education to every child in the state while preserving local control over each district's schools.\textsuperscript{108} Where a state has already undertaken to provide free public education, \textit{Rodriguez} left open the question of whether the state's failure to provide a minimally adequate education would deny a child an equal educational opportunity in violation of the fourteenth amendment.\textsuperscript{109}

Despite the uncertainty regarding the rights of handicapped children engendered by the Supreme Court's decision in \textit{Rodriguez}, many legal theories are available to support the proposition that public schools must provide handicapped children with an appropriate education or training. Several courts have answered the question left undecided in \textit{Rodriguez} by holding that when a state has undertaken to provide free public education, the equal protection clause affords handicapped children the right to a minimum level of education.\textsuperscript{110} Some courts have reached this result using a

\begin{itemize}
\item \textsuperscript{104} Comment, \textit{The Handicapped Child Has a Right to an Appropriate Education}, 55 Neb. L. Rev. 637, 646 n.29 (1976).
\item \textsuperscript{105} 411 U.S. 1 (1973).
\item \textsuperscript{106} \textit{Id.} at 6-16.
\item \textsuperscript{107} \textit{Id.} at 40.
\item \textsuperscript{108} \textit{Id.} at 44-55.
\item \textsuperscript{109} \textit{Id.} at 6-16.
\end{itemize}
strict scrutiny test, denoting handicapped children as a suspect class, while other courts have reached the same result applying a rational basis test. Some courts have interpreted statutes which effectively exclude handicapped children from public schools to require notice and a hearing before a child is either excluded from the public education system or assigned to a different level of education or training within the system. A more extreme argument may be made that


Under the strict scrutiny test, the court applies close, exacting analysis and will uphold the classification only if it supports a compelling state interest and the classification is necessary to promote that interest. See, e.g., Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 15 (1976); Tussman & TenBroeck, The Equal Protection of the Laws, 37 CAL. L. REV. 341, 353-56 (1949). Only rarely will a court uphold a classification when applying the strict scrutiny test. For example, the Supreme Court has only upheld explicit racial classifications in two cases, Korematus v. United States, 323 U.S. 214 (1944) and Hirabayashi v. United States, 320 U.S. 81 (1943). These decisions have been widely criticized. See, e.g., Rostow, The Japanese-American Cases—A Disaster, THE SOVEREIGN PREROGATIVE 193 (1962); Dembitz, Racial Discrimination and the Military Judgment, 45 COLUM. L. REV. 175 (1945); Freeman, Genesis, Exodus and Leviticus—Genealogy, Evacuation, and Law, 28 CORN. L. Q. 414 (1943); But see Warren, The Bill of Rights and the Military, THE GREAT RIGHTS 89, 101-02 (Cahn, ed., 1963). The strict scrutiny test has been described too often as "strict in theory and fatal in fact." Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972).


The minimal rationality test requires the court to require whether there is any conceivable basis to uphold the classification. See, e.g., L. Tribe, AMERICAN CONSTITUTIONAL LAW 996 (1978); Tussman & TenBroeck, supra note 111, at 348-51. Mills and Pennsylvania Association for Retarded Children represent the exception rather than the rule, because a court will nearly always uphold the classification when applying the minimum rationality test. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (upholding mandatory retirement for state policemen under mere rationality test); New Orleans v. Dukes, 427 U.S. 297 (1976) (mere rationality test used to validate ordinance barring all hot-dog vendors from the French Quarter except those who have been there more than 8 years); McDonald v. Board of Elec. Comm'rs, 394 U.S. 802 (1969) (rationality test used to validate denial of absentee ballots to inmates awaiting trial); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing law upheld under general reasonableness test); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (minimum rationality test used to uphold state law requiring apprenticeship for harbor pilots). For a rare case invalidating a statute under the minimum rationality test see O'Brien v. Skinner, 414 U.S. 524 (1974) (invalidating state law permitting only nonresident inmates to vote by absentee ballot).

when free public education is made available as a matter of right, the due process clause prohibits a state from arbitrarily denying that right to handicapped children.\textsuperscript{114} Many of these cases were decided before \textit{Rodriguez}. Nevertheless, the constitutional reasoning underlying these cases was not vitiated by that decision, because it rests on due process grounds, while \textit{Rodriguez} was based on the equal protection clause.

In \textit{Frederick v. Thomas}\textsuperscript{115} the district court found another constitutional basis for the handicapped child’s right to an education. \textit{Frederick} held that a child has an absolute right, derived from a confluence of the first, ninth, and fourteenth amendments, to a minimum level of education.\textsuperscript{116} Finally, the argument that public schools must provide handicapped children with an education may be advanced on state constitutional grounds.\textsuperscript{117}

\textbf{B. Rehabilitation Act of 1973}

The Rehabilitation Act of 1973 encompasses the education of hyperkinetic children. The Act originally defined a “handicapped individual” in broad terms as a person with a physical or mental impairment which constitutes a substantial handicap to his ability to work, or which substantially limits his “major life activities.”\textsuperscript{118} In 1978, Congress added another requirement: the person must be reasonably expected to enhance his employability as a result of the vocational rehabilitation services provided under the act.\textsuperscript{119}

Although the primary purpose of the Act is to deliver vocational rehabilitation services to otherwise employable handicapped persons,\textsuperscript{120} the Act is not limited in its application to handicapped

\begin{footnotes}


\textsuperscript{116} Id. at 835, n.4.

\textsuperscript{117} See Comment, supra note 104, & accompanying text.

\textsuperscript{118} Pub. L. No. 93-112, § 7, 87 Stat. 359, 29 U.S.C. § 706 (6) (1973). For purposes of this discussion, it is assumed that the Act’s definition of a handicapped individual would include a hyperkinetic child.


\textsuperscript{120} Congress originally declared that the purpose of the Act was to provide “vocational rehabilitation services to handicapped individuals... so that they may prepare for and engage in gainful employment.” Pub. L. No. 93-112, § 2, 87 Stat. 357, 29 U.S.C. § 701(1)
\end{footnotes}
persons of working age. The original congressional declaration of purpose expressed an intent to prepare handicapped individuals for gainful employment, thereby suggesting that the Act would make some allowance for the early identification, education, and training of handicapped children. While the education of handicapped children is not expressly covered in the Act, the regulations promulgated under the Act provide for the education of handicapped children.

The regulations require recipients of federal funds for educational programs to identify the handicapped individuals within their jurisdiction and to provide them with an "appropriate" education. An "appropriate" education is defined as an education designed to meet the individual educational needs of the handicapped child, and the regulations require that handicapped children be evaluated on a regular basis to determine their needs for special education services. The regulatory scheme also provides for the delivery of nonacademic services, such as counseling and extracurricular activities, as well as mainstreaming and certain


121. Id.
122. Id.
123. See 45 C.F.R. §§ 84.31-84.39 (1979).

As the court in Rowley v. Board of Education, No. 79 Civ. 2139 (S.D.N.Y. Oct. 16, 1979) (slip op.), points out, there are several ways in which an "appropriate" education may be defined. In Rowley the district court wrote:

An 'appropriate education' could mean an 'adequate' education—that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An 'appropriate education' could also mean one which enables the handicapped child to achieve his or her full potential. Between those two extremes, however, is a standard which I conclude is more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. (slip op.) (emphasis added).

126. 45 C.F.R. § 84.35 (1979).
127. 45 C.F.R. § 84.37 (1979).
128. 45 C.F.R. § 84.34 (1979). See the discussion of mainstreaming under the Education
The regulations implementing the Rehabilitation Act provide for an administrative enforcement scheme identical to the enforcement scheme for Title VI of the Civil Rights Act of 1964. Most courts which have addressed the question have held that a private cause of action may be brought under § 504 of the Rehabilitation Act of 1973. Most of the cases ruling in favor of a private right of action, however, were decided before the adoption of the implementing regulations which established the administrative enforcement plan. The cases decided after the adoption of the regulations are split on the question of whether a private right of action exists and, if so, whether administrative remedies must be exhausted before a private action is filed.

45 C.F.R. § 84.46 (1979) provides that the same enforcement scheme shall be followed for the Rehabilitation Act as for Title VI.

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be-excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 

There are four factors to take into consideration in determining whether a cause of action should be implied under § 504: (1) whether the statute was enacted to protect the special class of which the plaintiff is a member; (2) whether the legislative intent indicates that Congress intended to create a private action; (3) whether a private action would be consistent with the legislative scheme; and (4) whether the legislation concerns a matter that has traditionally been a concern of state law. 

There are four factors to take into consideration in determining whether a cause of action should be implied under § 504: (1) whether the statute was enacted to protect the special class of which the plaintiff is a member; (2) whether the legislative intent indicates that Congress intended to create a private action; (3) whether a private action would be consistent with the legislative scheme; and (4) whether the legislation concerns a matter that has traditionally been a concern of state law.
The Supreme Court recently addressed a similar issue involving Title IX of the Education Amendments of 1972 in *Cannon v. University of Chicago.* The administrative enforcement scheme for Title IX is similar to the enforcement mechanism for the Rehabilitation Act of 1973. In *Cannon* the Supreme Court held that Title IX contained an implied private cause of action which could be filed without first exhausting the administrative remedies. *Cannon* is therefore persuasive authority for the proposition that a private right of action may be brought under § 504 of the Rehabilitation Act without a prior exhaustion of administrative remedies. However, this type of lawsuit may be limited to an action for enforcement of the statute, excluding any recovery for damages.

C. The Education for All Handicapped Children Act of 1975

A proper education for a hyperkinetic child may be secured through the Education for All Handicapped Children Act of 1975. The Act applies to “handicapped children” which encompasses children with “specific learning disabilities.” The term “specific learning disabilities” includes children with minimal brain dysfunction, another name for hyperkinesis.

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135. Title IX was intended to be enforced in a manner similar to the administrative enforcement scheme for Title VI, and the Title VI enforcement scheme also applies to the Rehabilitation Act of 1973. See 45 C.F.R. § 84.61 (1979); Miener v. Missouri, No. 79-1050 C(2) (E.D. Mo. 1980) (slip op.).
137. In Miener v. Missouri, No. 79-1050 C(2) (E.D. Mo. 1980) (slip op.), the district court, analogizing to *Cannon*, held that an implied private cause of action exists under the Rehabilitation Act of 1973, and a plaintiff may file suit without first exhausting his administrative remedies.
138. Compare Miener v. Missouri, No. 79-1050 C(2) (E.D. Mo. 1980) (slip op.) (ruling that the plaintiff may sue to enforce the statute but may not recover damages) with Patton v. Dumpson, No. 75 Civ. 4922 (S.D.N.Y. 1980) (slip op.) (holding that the plaintiff may recover damages in an action under § 504).
Congress passed the Act in response to the need of several million handicapped children for special educational services. The Act grants handicapped children the broad due process rights recognized by lower federal court decisions which established a handicapped child's constitutional entitlement to an education. Under the Act, the educational needs of handicapped children are dealt with on an individual basis by courts and administrative hearing officers with broad powers to authorize "appropriate" educational services.

The Act provides extensive annual appropriations to facilitate the delivery of educational services by the states to handicapped children. In order to qualify for the receipt of federal funds, a state must provide a free "appropriate" education to all handicapped children between the ages of three and twenty-one. A state may satisfy its obligation to provide an appropriate education by developing an "individualized education program" for each child. An individualized educational program is a plan, developed by the child's parents, teacher, and a school administrator, which outlines the specific educational services with which the child will be provided. By avoiding specific requirements for the educational programs, the Act ensures that each child's educational needs will be accommodated in a flexible manner. At the same time, the Act relies heavily on the ability of a child's parents, teacher, and school administrator to develop a suitable plan for the child's education.

121a.5(b)(9) (1979).

142. The term "minimal brain dysfunction" is often treated synonymously with the term "hyperkinesis." See notes 10, 15 supra & accompanying text.


The Act requires schools to "mainstream" handicapped children.\(^{150}\) Current educational theory maintains that "mainstreaming," which involves the integration of handicapped children into the regular classroom as much as possible, benefits handicapped children more than separate special education classes.\(^{151}\) The regulations implementing the mainstreaming provision require schools to provide a continuum of alternative placements for the children, ranging from regular classes, special classes, special schools, home instruction, to institutional instruction.\(^{152}\) Whenever a handicapped child is placed in a regular classroom, the school must provide supplementary services, such as a resource room or auxiliary instruction.\(^{153}\) A school must take several factors into account when placing a handicapped child in the school system. The placement decision must be based on the child's individualized educational program.\(^{154}\) The child must be placed as close to home as possible\(^ {155}\) and, when consistent with the child's educational program, in the same school in which the child would have been placed but for his handicap.\(^{156}\) When the placement decision is made, the potentially harmful effects of the decision on the child must be taken into account.\(^{157}\) The placement decision is subject to annual review.\(^{158}\) Finally, the regulations provide that teachers and administrators must be informed of the mainstreaming requirement and, where required, supplied with the technical assistance and training necessary to implement mainstreaming.\(^{159}\)

The Act contains several procedural safeguards to ensure that the rights of handicapped children are protected. The parents of a handicapped child may appeal any identification, evaluation, or placement decision and any other matter relating to the provision


\(^{156}\) 45 C.F.R. § 121a.552(c) (1979).

\(^{157}\) 45 C.F.R. § 121a.552(d) (1979).


\(^{159}\) 45 C.F.R. § 121a.555 (1979).
of a free appropriate education for their child.\footnote{160} The parents have a right to an impartial due process hearing by an independent hearing officer.\footnote{161} This initial hearing may take place before the local educational organization or before the state agency. A decision by the local organization may be appealed to the state agency.\footnote{162} Any party aggrieved by a state administrative decision may file a civil action in state or federal court.\footnote{163} The court may hear additional evidence and review the record below, thus providing the parties with a \textit{de novo} review.\footnote{164} The court is empowered to grant any relief it deems appropriate.\footnote{165}

\textbf{D. Developmentally Disabled Assistance and Bill of Rights Act of 1975}

Parents of a hyperkinetic child may ensure that their child receives a proper education through the Developmentally Disabled Assistance and Bill of Rights Act of 1975.\footnote{166} The Act applies to developmentally disabled individuals, which includes persons suffering from an "impairment of general intellectual functioning or adaptive behavior" similar to mental retardation.\footnote{167} The Act provides federal funds to states for providing services to the developmentally disabled.

In order to receive federal funds, states must devise and implement a plan for the provision of services to developmentally disabled persons.\footnote{168} The state plan must provide for the early screening, diagnosis, and evaluation of developmentally disabled persons.\footnote{169} Hyperkinetic children frequently manifest "soft" neurological signs or minor neurological abnormalities. See notes 17-30 \textit{supra} & accompanying text. It is assumed, for purposes of this discussion, that the Act's definition of a developmentally disabled individual would encompass a hyperkinetic child.\footnote{169}

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\begin{itemize}
  \item \footnote{160}{20 U.S.C. § 1415(b)(1)(E) (1976).}
  \item \footnote{161}{20 U.S.C. § 1415(b)(2) (1976).}
  \item \footnote{162}{20 U.S.C. § 1415(c) (1976). The parties to the hearing are entitled to have counsel present at the hearing, to present evidence and cross-examine witnesses, to obtain a record of the proceedings and written findings of fact and decisions. 20 U.S.C. § 1415(d) (1976). The Act does not provide whether the review on the state level is a \textit{de novo} or a limited review. See \textit{Note, supra} note 144, at 1107.}
  \item \footnote{164}{20 U.S.C. § 1415(e)(2) (1976).}
  \item \footnote{165}{Id.}
  \item \footnote{167}{42 U.S.C. § 6001(7)(A)(ii) (1977). Hyperkinetic children frequently manifest "soft" neurological signs or minor neurological abnormalities. See notes 17-30 \textit{supra} & accompanying text. It is assumed, for purposes of this discussion, that the Act's definition of a developmentally disabled individual would encompass a hyperkinetic child.}
  \item \footnote{168}{42 U.S.C. § 6063(a) (1977).}
\end{itemize}
children. The state must implement an habilitation plan for each developmentally disabled person within the state. The habilitation plan, which is developed jointly by the child, his parents, and an administrator, must specify the specific services to be provided by the state. These services may include treatment, personal care, training, and educational services. The Act also requires that the state establish an independent agency to advocate the rights of persons with developmental disabilities.

Perhaps the most significant feature of the Act, as applied to hyperkinetic children, is its prohibition of the use of "chemical restraints." The Act provides for a cut-off of federal funds to institutions which use "chemical restraints" in the following manner: (1) in excessive doses; (2) as a means of punishment; (3) as a substitute for habilitation; or (4) in doses that tend to interfere with the services or treatment provided by the state. Nowhere does the Act define the term "chemical restraints;" however, the term would ostensibly apply to drugs used as a substitute for other forms of treatment, and this definition would include the treatment of hyperkinetic children with methylphenidate. Under the Act, a school may face a cut-off of federal funds if it treats a hyperkinetic child with methylphenidate instead of providing an alternative form of treatment. Every school should examine its policies for dealing with hyperkinetic children to determine whether the school policy provides for methylphenidate treatment and, if so, whether methylphenidate is used in such a way that it would be considered a "chemical restraint." Finally, the lower federal courts have held that the Act contains an implied private cause of action.

173. 42 U.S.C. § 6012 (1977). The state agency must be empowered to pursue any "legal, administrative, and other appropriate remedies" to protect the rights of developmentally disabled individuals. Id. See also 45 C.F.R. § 1386.70 (1979). The state agency is not required to demonstrate injury to itself in order to assert standing to sue under the Act. Goldstein v. Coughlin, 83 F.R.D. 613 (W.D.N.Y. 1979).
175. See notes 70-78 supra & accompanying text.
176. See, e.g., Naughton v. Bevilacqua, 458 F. Supp. 610 (D.R.I. 1978), aff'd, 605 F.2d 586 (1st Cir. 1979) (suit by schizophrenic child and his parents claiming that his treatment with Prolixin, a tranquilizer, violated his rights under the Developmentally Disabled Assistance and Bill of Rights Act).
Conclusion

The hyperkinetic child stands on a different footing from other handicapped children. Hyperkinesis may impair the child's ability to function in a regular classroom, but this condition may be alleviated by using one of the several different forms of available treatment.

Federal law provides that hyperkinetic children have a right to an education and to treatment. The federal statutory scheme relies heavily on the parents of a hyperkinetic child to develop a plan for his education and treatment. It is essential, therefore, that parents of a hyperkinetic child be kept informed of the available medical treatment alternatives and educational alternatives, as well as the various federal laws, which are designed to enhance their child's ability to learn.

Cf. United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979) and United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976), aff'd, 563 F.2d 1121 (4th Cir. 1977) (both holding that the United States lacks standing to sue under the Developmentally Disabled Assistance and Bill of Rights Act).
A FURTHER LOOK AT JAGO V. PAPP: SOME COMMENTS ON THE FOURTH, FIFTH AND SIXTH AMENDMENTS

Jan Paul Koch*

In May of 1978, Mr. Steve Wolnitzek, an attorney for the Kentucky Fraternal Order of Police, wrote an article entitled Know Your Miranda: Number Two for the official state police publication Knight Beat. Mr. Wolnitzek stated:

[T]he United States Supreme Court has become aware of the public demand for a revision of Miranda. However, as of November 7, 1977, the public demand is still falling on deaf ears. The court in Gago v. Papp [sic] once again had an opportunity to restrict the Miranda Doctrine. Nevertheless, it upheld a lower court finding that "state police had violated a murder defendant's constitutional rights by continuing interrogation despite his request for counsel." Once again, we have an example where technicalities not guilt or innocence can determine whether one is convicted or set free.*

Mr. Wolnitzak was, of course, writing about the decision of Jago v. Papp. Although the case was unreported, the Supreme Court's denial of certiorari received national news coverage since the case involved the rape and murder of nine-year-old Roxie Ann Keathley. This article attempts to clarify the so-called "technicalities" of the Papp decision.

The decision in Papp reflects on rights and liberties lying at the core of the fourth, fifth and sixth amendments and, indeed, at

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1. Wolnitzek, Know Your Miranda: Number Two, 4 Knight Beat 23 (Number 2, May, 1978).
2. Id. (Emphasis added).
3. 559 F.2d 1220 (6th Cir. 1977) (affirming, without opinion, the unreported decision of the district court) cert. denied, 434 U.S. 943 (1977).
4. The case was appealed after Mr. Papp's pro se habeas petition was granted by the Southern District of Ohio. The Sixth Circuit appointed Ovid C. Lewis, Dean of the Salmon P. Chase College of Law of Northern Kentucky University, as counsel. Dean Lewis was assisted by this author and another student, Michael Kennedy. Mr. Wolnitzak's aforementioned quotation came from a news announcement made November 7, 1977.
5. U.S. CONST. amend. IV:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
6. U.S. CONST. amend. V:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or
the very foundation of our constitutional jurisprudence. The State of Ohio, in its petition for certiorari, argued that Stone v. Powell should be extended to include claimed violations of fifth and sixth amendment rights. This argument was highly questionable since it failed to take into account the existence of different types of exclusionary rules and thus was doomed from the outset. If the distinc-

naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

7. U.S. Const. amend. VI:

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

8. 428 U.S. 465 (1976). Stone v. Powell held that where the state affords "an opportunity for full and fair litigation of a fourth amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. at 482 (footnote omitted). The court reasoned that the judicially created fourth amendment prophylactic rule was formulated as a deterrent. Therefore, the availability of federal habeas would not effectively deter illegal searches and seizures. The societal costs hence outweighed the additional, but universal effect of granting habeas corpus relief. See 428 U.S. at 485-95.

9. In all fairness, the commentators also fail to make this distinction. Compare Bacigal, Some Observations and Proposals on the Nature of the Fourth Amendment, 46 Geo. Wash. L. Rev. 529 (1978) with Gilday, The Exclusionary Rule: Down and Almost Out, 4 N. Ky. L. Rev. 1 (1977). It is this author's contention that only by keeping the types of exclusionary rules in mind can a workable model be formulated. Thus Bacigal's model is myopic, and Professor Gilday, in his article, makes the same error that Justice Blackmun has perpetuated ever since Justice Brennan wrote Wong Sun v. United States, 371 U.S. 471 (1963). How can Justice Brennan's assertion that "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion" Id. at 485, be reconciled with the true rule that "the exclusionary rule . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth." Brown v. Illinois, 422 U.S. 590, 601 (1975). Thus the fifth amendment's proscription is absolute whereas the fourth amendment is couched in terms of reasonableness. Consequently the Court noted in United States v. U.S. Coin & Currency, 401 U.S. 715 (1971) that the right not to incriminate oneself is absolutely protected, while the fourth amendment exclusionary rule is a prophylactic rule meant to deter unlawful police conduct. See, e.g., United States v. Ceccolini, 435 U.S. 268 (1978). However, where "core" fifth amendment rights are violated "statements obtained . . . cannot be used in any way against a defendant at his trial." Mincey v. Arizona, 437 U.S. 385, 402 (1978). This exclusionary rule was not adopted for its prophylactic effect; "the exclusion of such statements is based essentially on their lack of reliability." Stone v. Powell, 428 U.S. 465, 497 (1976) (Burger, C.J., concurring). Therefore, where "core" rights are concerned the fifth amendment exclusionary rule is an implementing rule.
JAGO v. PAPP

A central purpose of the prohibition . . . is to bar the prosecution [from] another opportunity to supply evidence which it failed to muster in the first proceeding.” Swisher v. Brady, 438 U.S. 204, 215-16 (1978) (citing Burks v. United States, 437 U.S. 1, 11 (1978)) Cf. Justice Marshall’s dissent: “These rules are designed . . . to protect an accused from the
The difficulty encountered in determining the scope of these amendments is illustrated by Brown v. Illinois, discussed above. While this author does not dispute the end result of Brown, the Court, by applying the standard enunciated in Wong Sun v. United States, a fourth amendment exclusionary rule case, to the case only added to the constitutional confusion. In Brown the police "illegality . . . had a quality of purposefulness" and the conduct was "calculated to cause surprise, fright, and confusion." In light of the implementing rule of Miranda v. Arizona and in light of the fact that the fourth amendment exclusionary rule "serves interests and policies that are distinct from those it serves under the Fifth," the egregious police misconduct present in Brown should have mandated a per se rule of exclusion of Brown's statements, rather than the remand for reconsideration ordered by the Court.

Unfortunately the lines between the fourth, fifth and sixth amendments are not sufficiently delineated to prevent the juxtaposing of precedent under one amendment with a given case under another amendment. There is no better illustration of this juxtaposition than Brewer v. Williams, a case very similar to Jago v. Papp. The facts of Brewer merit discussion. On December 26,

governmental harassment and oppression that can so easily arise from the massed power of the State in confrontation with an individual." 438 U.S. at 221 (citing Green v. United States, 355 U.S. 184, 187 (1957)).

22. See note 9, supra.
23. 422 U.S. at 605.
24. Id.
27. See, e.g., Rochin v. California, 342 U.S. 165 (1952). Given the "purposefulness" which was calculated to cause surprise, fright, and confusion how can a judge, or anyone, truly tell whether a statement was "voluntary" based upon the "totality of the circumstances." Brown v. Illinois, 422 U.S. at 603-04. A per se test is the only manner in which to protect the rights at the core of the fifth amendment. Given this implicit duress, see, e.g., Orozco v. Texas, 394 U.S. 324 (1969), the statements should have been excluded not on a fourth amendment prophylactic rationale, but rather on the fifth amendment exclusionary basis i.e. "exclusion of such statements is based essentially on their lack of reliability. Stone v. Powell, 428 U.S. 465, at 497 (Burger, C.J., concurring). Nor should the exclusion depend upon counsel raising an involuntariness claim where the statements lack reliability.
28. See, e.g., Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) where a unanimous court relied upon fourth amendment precedent to shift a burden in a first amendment case. Justice Rehnquist found this fourth amendment precedent "instructive in formulating the test to be applied here." Id. at 286.
1968, Robert Williams, an escaped mental patient, was arrested for the abduction of ten-year-old Pamela Powers from a Des Moines, Iowa YMCA. Williams, on the advice of his Des Moines attorney, Henry McKnight, had given himself up to police in Davenport, Iowa. While Williams was in the custody of the Davenport police, McKnight by phone from Des Moines advised Williams not to make any statement until Williams had reached Des Moines. McKnight communicated this advice in the presence of the Des Moines police chief and one detective Leaming. The Des Moines police would not, however, permit McKnight to accompany Leaming during the transfer of Williams to Des Moines custody. McKnight was successful though in getting the police to agree that they would not question Williams until he had an opportunity to consult with McKnight in Des Moines.

Meanwhile Williams had consulted with Davenport attorney Thomas Kelly who also advised him to remain silent until he reached Des Moines and consulted with McKnight. After Detective Leaming arrived in Davenport and Williams had been given his Miranda warnings, Williams again consulted with Kelly. Kelly reminded Leaming of the agreement that Williams was not to be questioned until he had a chance to consult with McKnight in Des Moines. When Leaming expressed reservations, Kelly insisted upon fulfillment of the agreement. Kelly also requested that he be permitted to ride back to Des Moines with Williams but Leaming refused to permit this.

During the trip back to Des Moines, Williams reaffirmed several times that he did not want to make a statement until he arrived in Des Moines. Detective Leaming knew that Williams, besides being an escaped mental patient, was also deeply religious. On the trip from Davenport to Des Moines Leaming engaged Williams in talk about sundry topics, including religion in general, his religious training and Williams' religion. These statements were, by Leaming's own admission, calculated to obtain information as to the whereabouts of the girl. Finally, Leaming gave Williams the "Christian Burial Speech," reminding him that snow was predicted, that he was the only one who knew where the body was and that the body might not ever be found with the new snow. Leaming also stated that the parents should be entitled to a Christian burial for their little girl who was snatched away on Christmas Eve and murdered. It was also suggested to Williams that they should stop on the way to Des Moines and find the girl's body. When Wil-
Williams asked Leaming why he thought they would be passing the body, he replied falsely that he knew the body was in the vicinity of Mitchellville, near interstate 80. Leaming then refused to discuss the matter further, telling Williams to think about it as they drove. As a result of Leaming's actions, Williams subsequently led the detective to the body of Pamela Powers. 30

The district court found that Williams' right to counsel under the sixth amendment, 31 as well as his fifth amendment Miranda rights 32 had been violated. The court also found that the state did
not carry its burden of showing, by a preponderance of the evidence, the voluntariness of Williams' statements.\textsuperscript{33} The court granted Williams' writ of habeas corpus.\textsuperscript{34} The United States Court of Appeals for the Eighth Circuit affirmed the district court's determination\textsuperscript{35} relying on \textit{Miranda v. Arizona}\textsuperscript{36} and \textit{Johnson v. Zerbst}.\textsuperscript{37} The court noted:

A review of the record here, however, discloses no facts to support the conclusion of the state court that appellee had waived his constitutional rights other than that appellee had made incriminating statements. Although oral or written expression of waiver is not required, waiver of one's rights may not be presumed from a silent record. \textit{Miranda v. Arizona}, supra, 384 U.S. at 475; \textit{Carnley v. Cochran}, 369 U.S. 506, 516 (1962).\textsuperscript{38}

That both fifth and sixth amendment rights were inextricably bound up with the police misconduct at issue in \textit{Brewer} is clear from the conclusion and synopsis of the Eighth Circuit. Relying upon the standard enunciated in \textit{Johnson v. Zerbst},\textsuperscript{39} the court held that Williams' "constitutional rights had been violated in that he was denied the right to counsel and that he had not voluntarily, intelligently and effectively waived his rights."\textsuperscript{40}

It is very important, however, to emphasize one particular point at this juncture: Williams was not subjected to a "core" right violation of the fifth amendment. In other words, Williams was not subjected to overt physical coercion, but merely to "subtle interrogation."\textsuperscript{41}

When \textit{Brewer v. Williams}\textsuperscript{42} reached the Supreme Court, that

\textsuperscript{33.} Id. at 183.
\textsuperscript{34.} Id. at 186.
\textsuperscript{35.} Williams v. Brewer, 509 F.2d 227, 234 (8th Cir. 1974).
\textsuperscript{37.} 304 U.S. 458, 464 (1938) cited in 509 F.2d at 232, 234. \textit{Johnson} of course concerns the standard of knowing and intelligent waiver of constitutional rights.
\textsuperscript{38.} 509 F.2d at 233 (emphasis added).
\textsuperscript{39.} 304 U.S. 458, 464 (1938).
\textsuperscript{40.} Williams v. Brewer, 509 F.2d at 234.
\textsuperscript{41.} \textit{Id}. This distinction is inartfully drawn in Justice Powell's concurrence in \textit{Brown v. Illinois}, 422 U.S. at 606, 612. Justice Powell relies upon \textit{Michigan v. Tucker}, 417 U.S. 433 (1974), a technical Miranda violation, in that Tucker was given Miranda warnings but not told of the right to appointed counsel if he could not afford retained counsel. If \textit{Brown} is truly a fourth amendment violation, reliance upon a fifth amendment case wherein there appeared a technical Miranda violation appears truly misplaced. See notes 9, 27, \textit{supra}.
\textsuperscript{42.} 430 U.S. 387 (1977). The heinousness of the crime undoubtedly figured into the logic used in that decision. Although it nowhere appears in the reconstructed logic of the Supreme Court opinion, the court of appeals noted that a medical examiner found positive
Court noted that, while the district court and the court of appeals relied on two grounds for granting the writ, "We have concluded that only one of them need be considered here." While it appears clear that Williams was intentionally deprived of his fifth amendment Miranda rights, as well as his sixth amendment right to counsel, and therefore, the implementing proscription of Miranda should have been triggered, the Court did not invoke the fifth amendment implementing rule. The Court stated:

There is no need to review in this case the doctrine of Miranda v. Arizona, a doctrine designed to secure the constitutional privilege against compulsory self-incrimination, Michigan v. Tucker, 417 U.S. 433, 438-439. It is equally unnecessary to evaluate the ruling of the District Court that Williams' self-incriminating statements were, indeed, involuntarily made. Cf. Spano v. New York, 360 U.S. 315. For it is clear that the judgment before us must in any event be affirmed upon the ground that Williams was deprived of a different constitutional right—the right to the assistance of counsel.

Mr. Justice Stewart's citation to Spano v. New York is indeed curious. It would appear that the type of police tactic used against Williams was the very conduct that the Miranda implementing rule was designed to combat. As such, the fifth amendment exclusionary rule should have been utilized. Yet it appears that the Court viewed the "subtle interrogation" of Williams as evidence of seminal fluid in the mouth, rectum and vagina of the child. Death was by suffocation. 509 F.2d at 237 n. 3 (Webster, J., dissenting). In a conversation with Professor Robert Bartels, who was appointed by the Supreme Court to represent Williams, two other interesting facts appeared. At the YMCA, one janitor was found with a bloody towel. He disappeared, never to be heard from since that day. Secondly, the semen traces contained no sperm, yet Williams is not sterile. The state refused to allow Professor Bartels to represent Williams on retrial. Neither of these two facts were brought up at the second trial (for "tactical" reasons with which Professor Bartels disagreed). Williams was subsequently reconvicted. See Kamisar, supra, note 31.

43. 430 U.S. at 397.
44. Id. at 397-98.
46. It appears that Spano was on "all fours" with the Williams case. The Court noted in Spano: "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Id. at 320-21 (Emphasis added).
47. The aforementioned quotation of note 44 takes on added significance in light of the true facts of the case. See note 42, supra.
only a "technical Miranda violation"49 and as such found that it would not fully trigger Miranda's fifth amendment implementing rule. The Court concluded:

Although we do not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned. The pressures on state executive and judicial officers . . . are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.50

The Court's "resolute loyalty"51 to these guarantees is questionable. Here we are faced with intentional police misconduct which flies in the face of Miranda. The Miranda exclusionary rule, as a "core right" fifth amendment implementing rule, protects against this very misconduct. Given Williams mental capacity, how can any court have the expertise to tell whether Williams acted in a "voluntary" manner? It was the egregious nature of the crime, as well as the unique facts presented, that allowed Justice Stewart to include a fifth amendment core right violation in a sixth amendment precedent.52

No doubt Justice Stewart harkened back to the fifth and sixth amendment interrelationships enunciated in Hoffa v. United States53 and saw in Brewer v. Williams an answer to the question left open in Hoffa. The Hoffa court noted: "Even upon the premise that the same strict standard of excludability should apply under the Sixth Amendment—a question we need not decide . . . ."54

Now the question is answered. Rather than formulating a sixth amendment core right implementing rule,55 much needed in light of the intentional misconduct evidenced by the police, the Court formulated a prophylactic rule. In other words, the rule formulated, rather than implementing core sixth amendment rights, is

50. 430 U.S. at 406 (Emphasis added).
51. Spano v. New York, 360 U.S. 315 (1959), Rochin v. California, 342 U.S. 165 (1952) and Mincey v. Arizona, 437 U.S. 385 (1978) all indicate that there was no resolute loyalty to the Constitution.
52. The misconduct is all the more egregious in light of the facts presented in note 42, supra.
54. Id. at 309.
55. Assuming, aequuendo, the core right fifth amendment implementing rule of Miranda need not apply.
easily circumvented on a "fruit of the poisonous tree" attenuation basis. Once again the reasoning of a fourth amendment precedent is juxtaposed upon a decision involving another amendment. Thus, under a fourth amendment attenuation theory, the Court answered the Hoffa query:

While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim’s body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had the incriminating statements not been elicited from Williams.\(^{56}\)

Does this not put the cart before the constitutional horse? Is not the point of implementing rules, such as Miranda's exclusionary rule, that the core rights may not be effectuated, and can be irretrievably lost, unless such an implementing rule is fashioned?\(^{57}\) The result, however, is not surprising from a court which, beginning in 1974, converted the Miranda implementing rule into a mere "prophylactic standard."\(^{58}\)

I now turn to the case of Jago v. Papp.\(^{59}\) Chief Justice Burger's dissent notwithstanding, an analysis of that case will illustrate that Miranda must be regarded as an implementing rule and that the Court should have answered the Hoffa query by fashioning a sixth amendment implementing rule. I also will attempt to show the inapplicability of extending, as the Chief Justice would do,\(^{60}\) Stone v. Powell\(^{61}\) to fifth and sixth amendment core right violations.


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57. Under this doctrine the Court has even fashioned a rule of "anticipatory habeas corpus" so that rights will not be irretrievably lost. See Ex parte Royall, 117 U.S. 241 (1886) affirmed in Boske v. Comingore, 177 U.S. 459 (1900). Under this doctrine, exhaustion on the state side is not required, as is normally required in habeas corpus. As an aside, it should be noted that Pamela Powers' body was admitted against Williams upon retrial. In my conversation with Professor Bartels he indicated that at the suppression hearing, upon remand, the chief of police coincidentally testified that the body ultimately "would have been discovered" because all officers had explicit instructions to check all ditches and culverts.
60. See 430 U.S. at 428-29 (Burger, C.J., dissenting).
while collecting pop bottles in her neighborhood in Lorain, Ohio. Timothy Papp resided in this neighborhood and was seen with Roxie Ann shortly before her disappearance. On March 13, 1973, in connection with their investigation of the disappearance of the little girl, the police transported Papp to the Lorain County sheriff's office around 11:30 P.M. There, he was questioned by Detective Zieba, in the presence of Detectives Mahoney and Penrod. Papp was partially advised of his Miranda rights. Zieba advised Papp in the following manner: That if he were involved, he shouldn't talk to them, but had to have an attorney present; if he were involved and didn't want to answer questions, he didn't have to; it was his privilege to talk with them and answer questions without an attorney; anything he said could be used against him, but sometimes for him; if he got tired and wanted to stop, all he had to do was tell them, and they would stop questioning him. The questioning revealed that for four days earlier Papp had been drinking and without sleep. Detective Zieba referred frequently to this fact in his statements to Papp that he had been under a lot of stress at the time, and therefore, was not really responsible during that time. At several points during the interrogation Papp was asked if he needed a lawyer. The response was that if he was involved he should call an attorney, but if he wasn't he didn't need to.

During the interrogation, Detective Zieba questioned Papp about a trunk. Papp stated that he had transported the trunk to his mother's home on the morning of March 13, 1973, but when his

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62. Record, at 83-89, 106, State v. Papp, No. 2180 (C.P. Lorain County, 1973). [Hereinafter cited as TR.] Citation to the actual transcript must be made since the decision is not reported on either the federal or the state level.
63. TR at 31.
64. TR at 337.
65. TR at 337.
66. The state contended he was fully advised. However, on appeal to the Sixth Circuit, the State requested that certain tapes be admitted on a remand. Due to the egregious crime the Sixth Circuit remanded for a hearing, even though the state waived the admission of the tapes at the original habeas hearing. The taped conversations were played March 30, 1977 for the Southern District of Ohio.
67. Transcript of the remand hearing at pages 18-19. This transcript was included as the Appendix to Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, 434 U.S. 943. [Hereinafter cited as RA.]
68. RA at 21-22.
69. RA at 21-22.
70. RA at 18, 19, 30, 31.
mother did not answer the door, he took the trunk and left it behind a nearby grocery store. Papp denied any knowledge of the whereabouts of Roxie Ann Keathley and at 1:00 or 1:30 A.M. the questioning ceased and Papp was taken home.\footnote{TR at 338-42, 362-65. At the conclusion of the interrogation Papp took the police to the grocery but no trunk was found.}

Between March 13, 1973 and March 21, 1973, Detective Zieba had several more conversations with Papp relative to the missing girl. At no time during this period did Papp indicate any knowledge of her whereabouts.\footnote{TR at 342. At one point Papp agreed to take a polygraph test if the police would help him find his child. His wife had left him and taken their son. During this period of time Papp initiated the discussions with the police. These conversations were redirected, however, by the detectives, into interrogation as to the whereabouts of Roxie Ann. TR at 60.}

On March 21, 1973 Papp was arrested when his mother-in-law filed a complaint charging him with making harassing phone calls. Although Papp was concerned that his wife and son had left him and desired to speak with Detective Zieba as to their location, interrogation centered on the disappearance of Roxie Ann Keathley. Detectives Zieba, Mahoney, Bulger and Penrod questioned Papp from approximately 4:30 P.M. to 9:30 P.M. No \textit{Miranda} warnings were given.\footnote{TR at 366. At this point Papp indicated he would not now take the polygraph test since the police were not cooperating with him in locating his wife and child. The detectives asked him to reconsider, stressing that he could not live with the girl's spirit going about her school yard, and in fact that the spirit has been seen by some of her schoolmates. RA at 43.}

During this interrogation, the detectives emphasized the notion that Papp was not really responsible, but rather that his wife and mother were.\footnote{RA at 44. The district court noted that contrary to trial testimony (at the original habeas hearing) that Papp was continually told that he wouldn't be considered responsible under all these circumstances. RA at 44.}

Several times during this interrogation Papp stated, "I am tired of this," "I have had it up to here. Forget it," "Please stop right here" and "You are infuriating me";\footnote{RA at 39, 54.} but the questioning continued. There was evidence that Papp was handcuffed during at least part of the interrogation.\footnote{It appears that this was the only conviction on Papp's record at this time.}

On March 21, 1973 Papp plead no contest on the harassing complaint and was sentenced to ten days in the county jail.\footnote{It appears that this was the only conviction on Papp's record at this time.}

On March 23, 1973 Papp again requested to talk to Detective Zieba about his wife and child. Again no \textit{Miranda} warnings were
given and Detective Zieba eventually shifted the conversation to
the disappearance of Roxie Ann.\textsuperscript{78} Detectives
Mahoney, Penrod and Bulger were present. The interrogation
began around 6:00 P.M.\textsuperscript{79}

On two occasions during this interrogation Papp asked for an
attorney. One was not provided and questioning continued.\textsuperscript{80} Papp
further stated “I don’t want to talk to you . . . .”\textsuperscript{81} After the sec-
ond request Papp was told that it was up to him to get an attorney
and that he would need money to do it. He was told that the court
would give him one when he was before the court. The detectives
also said that the state would call his parents or anyone that would
get him a lawyer, but that the state was going ahead.\textsuperscript{82} After his
request for counsel Papp remained silent for five minutes while
Zieba continued questioning.\textsuperscript{83}

After approximately two hours of questioning, Papp “broke
down, went berserk, slammed his fist down on one of [the] folding
chairs, tried to hit the tape recorder and hit his head against the
wall and [claimed] he was going to kill somebody: [he had to be
handcuffed] and he really went into hysterics.”\textsuperscript{84} While in this hys-
terical state Papp yelled “I didn’t mean to . . . .” This was imme-
diately followed by detectives saying “Don’t hurt your hand” and
Detective Zieba ordering “Walk it off.”\textsuperscript{85} During this March 23,
1973 interrogation Papp was taking medication for bleeding ul-
cers.\textsuperscript{86} Additionally the detectives twice gave him tranquilizers\textsuperscript{87}
and he was also given various amounts of wine on four occasions.\textsuperscript{88}
The amount was almost two full bottles.\textsuperscript{89} One of the bottles was
to be used as evidence in another case.\textsuperscript{90} At one point in the inter-

\begin{footnotesize}
\textsuperscript{78} TR at 372; RA at 52.
\textsuperscript{79} TR at 372.
\textsuperscript{80} RA at 64, 78.
\textsuperscript{81} RA at 67.
\textsuperscript{82} RA at 78.
\textsuperscript{83} RA at 68.
\textsuperscript{84} TR at 345. The tapes clearly evidence the fact that the police did not attempt to
restrain Papp, but rather allowed him to hit his head upon the wall.
\textsuperscript{85} RA at 71. Detective Zieba testified that Papp yelled “man, I am sorry, I didn’t mean
to hurt the little girl.” TR at 347. However the tapes, at the remand hearing, clearly indi-
cates that he was not talking about a rape-murder. Instead, it appears he was speaking of
hitting and damaging the taperecorder upon which the tapes were being made. RA at 71.
\textsuperscript{86} TR at 418-19.
\textsuperscript{87} RA at 69.
\textsuperscript{88} TR at 354; RA at 87.
\textsuperscript{89} RA at 87.
\textsuperscript{90} Id.
\end{footnotesize}
During this interrogation Papp broke down and told the detectives that the girl's body would not be found in the trunk, but that he would lead them to the trunk and to the girl's body. The detectives insisted that he draw them a map. Papp did this but the detectives returned unable to find the body. When they returned, they asked Papp if he would mind accompanying them, and he took them to the body. Papp later drew a map showing the place where the trunk was ultimately located. At the same time he denied knowledge of the death of the girl.

Papp was formally charged with murder and rape of Roxie Ann Keathley on March 26, 1973. He later attempted to implicate one Jose Mendiola, continuing to deny any knowledge of the girl's death. Experts testified, at trial, that blood and hair samples found in the trunk matched the blood and hair of the girl. On October 18, 1973 Papp was found guilty, by a jury, upon pleas of not guilty and not guilty by reason of insanity.

On June 12, 1974 the Ohio Court of Appeals affirmed in an unreported decision. A further appeal to the Supreme Court of Ohio was dismissed, in an unreported order, on November 22, 1974, for lack of a substantial constitutional question.

On February 26, 1976 the District Court for the Southern District of Ohio granted Papp's pro se habeas petition, in an unreported order. The Sixth Circuit remanded for Supplementation on March 8, 1977. Judge Timothy S. Hogan conducted the remand hearing, and in a Memo and Certification certified "that, in its opinion, no grounds based on the tapes exist for the reconsideration of the opinion and judgment heretofore entered." On June 14, 1977 the Sixth Circuit Court of Appeals ordered that the District Court decision be modified to incorporate footnote 12 of

In its "Petition For A Writ Of Certiorari" the State of Ohio argued: "The doctrine of Stone v. Powell . . . should be extended to limit federal habeas corpus review of fifth and sixth amendment claims where . . . there was an opportunity for a full and fair hearing of all claims in the state courts." Citing Stone v. Powell and speaking to deterrence of police misconduct, the state argued that there is "'no additional contribution, if any, of the consideration of Fourth Amendment claims in collateral review.' . . . The same rational applies in a Fourth, Fifth and Sixth Amendment context."

However, the very facts of the case belie this assertion. By deliberately flaunting the well known dictates of Miranda, the detectives violated Papp's core constitutional right, the privilege against self-incrimination. The facts of the case conclusively show that this type of treatment would have been unconstitutional twenty-five years prior to its occurrence:

A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questioning under

101. Order in Case No. 76-1402.
106. Indeed, contra to the argument and findings of the Supreme Court in Brewer v. Williams, 430 U.S. 387 (1977) Petitioner Jago could not of even remotely contend that Papp's statements were voluntary. Stated succinctly (A) inadequate Miranda warnings were given (B) ten days elapsed until the final interrogation and no further warnings were given (C) twice Papp asked and was refused a lawyer (D) Papp was administered tranquilizers, wine on four occasions, and he was taking medication for bleeding ulcers (E) some of the wine was evidence in another case and (F) Papp undoubtedly was exhibiting effects of debilitating strain, loss of composure, and breakdown. Compare Miranda v. Arizona, 384 U.S. at 446.
such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary . . . . The very relentlessness of such interrogation implies it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right.107

Not only do the facts indicate that glaring and intentional violations of Miranda were manifest, but also that there was police action of shocking dimension, both physical and psychological, which coerced incriminating statements from Papp against his will. In fact, if a confession was made108 it would have been inadmissible almost a century ago. In 1897 the Supreme Court approved a statement that a confession is admissible only if “free and voluntary: that is [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . .”109

The state’s “full and fair hearing” argument was similarly without merit. Papp was convicted October 18, 1973, and the conviction was affirmed by the Ohio Court of Appeals on June 12, 1974. On February 26, 1976 the Southern District of Ohio granted Papp’s pro se habeas petition. The Sixth Circuit Court of Appeals remanded for supplementation on March 8, 1977.110 It was not until the remand hearing and the May 6, 1977 supplementation of the record111 that a court anywhere in the nation took cognizance of the tapes of the March 23, 1973 interrogation.112 This action occurred after the State of Ohio waived its admission of the tapes at Papp’s pro se habeas evidentiary hearing. Yet Ohio still contended: “Nor could it be argued that the Lorain County Sheriff’s Office attempted to conceal the nature of the interrogation with the Respondent [Papp] when, in fact, the entire March 23, 1973 conversation was recorded and submitted to the State Court for review.”113

108. See note 85, supra.
110. See notes 96-99, supra.
111. See note 100, supra.
112. Indeed, the very motivation for this article is that these decisions are nowhere reported. Only counsel of record has any knowledge that this police misconduct ever occurred. Yet in Brewer v. Williams, Iowa argued: “Today’s better trained criminal justice personnel are demonstrating maturity and responsibility and the system as a whole can be trusted . . . to protect individual liberties . . . .” Brewer v. Williams, Petition for Writ of Certiorari at 13, 430 U.S. 387 (1977).
Nowhere in the Ohio Court of Appeals unreported decision does it appear that this statement is true. Indeed, the Court of Appeals stated: "At no time did Papp insist on a lawyer or even request that one be obtained for him . . . ." In light of this part of the Ohio Court of Appeals decision, the State of Ohio's aforementioned assertion can at best be called a base canard. If these tapes had been heard by any court, why was it necessary to waive the admission of them at Papp's first pro se evidentiary hearing.

The state's argument missed the mark, for the purpose of the fourth amendment exclusionary rule is to deter future police misconduct. The rule is imposed as preventive medicine only. The Court has long recognized its "primary justification" as truly a judicially created prophylactic rule:

The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-Mapp decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any "[r]eparation comes too late." Instead, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ."

However, the fifth amendment's core rights are indeed personal constitutional liberties and guarantees. They are not judicially created, but constitutionally mandated. The decisions of the Supreme Court have consistently made this clear that:

[C]onvictions following the admission into evidence of confessions which are involuntary . . . cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system — a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth . . . . To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitu-

114. Id. app. at 12.
116. Id. at 486 (citations omitted). Compare the "technical Miranda violation" at issue in Michigan v. Tucker, 417 U.S. 433, 438, (1974). Given this technical violation, the police can be seen to have "departed only from the prophylactic standards laid down by this Court in Miranda. . . ." Id. at 446. However, where core rights are at issue the implementing role of Miranda becomes all the more paramount.
tional principle of excluding confessions that are not voluntary does not rest on this consideration.117

Thus, it is clear that *Jago v. Papp* concerned not a mere "technical violation" as was at issue in *Michigan v. Tucker*.118 At issue in *Papp* were core constitutional rights, explicitly commanded by the Constitution, and intentionally trod upon by the State of Ohio. In the *Tucker* opinion, Justice Rehnquist noted:

Although respondent’s sole complaint is that the police failed to advise him that he would be given free counsel if unable to afford counsel himself, he did not, and does not now, base his arguments for relief on a right to counsel under the Sixth and Fourteenth Amendments. . . . We do not have a situation such as that presented in *Escobedo v. Illinois*, 378 U.S. 478 (1964), where the policemen interrogating the suspect had refused his repeated requests to see his lawyer. . . .119

The facts and the fifth and sixth amendment core right violations in the *Papp* case are exactly the violations which give rise to "[t]his insistence upon putting the government to the task of proving guilt by means other than inquisition. . . ."120 It must be remembered that Papp drank evidence from another case. Therefore the police either let a guilty person go free or manufactured evidence in another person’s case. It would appear that avoidance of this type of abuse was the underpinning of the fifth and sixth amendments, for these are "historical abuses which are quite familiar."121 Society’s abhorrence of the use of illegally manufactured evidence or illegally extracted confessions necessarily rests upon "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."122

When the police become criminals, as when they intentionally deprive individuals of civil rights,123 fundamental rights of vital importance to the values of our society are at stake. Thus, where core right violations occur, as they did in *Jago v. Papp*,124 the inap-

119. *Id.* at 438.
121. *Id.*
124. This author also believes that a core right violation occurred in Brewer v. Williams,
plicability of extending *Stone v. Powell* is readily apparent. The Supreme Court has held that "the primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned."\(^{128}\) Indeed, "[v]indication of due process is precisely its historic office."\(^{126}\) "The primary justification given by the Supreme Court for . . . habeas . . . is that it provides quasi-appellate review . . . forcing trial and appellate courts in both federal and state systems to toe the constitutional mark."\(^{127}\)

Of course there are those who believe an exclusionary rule is an exclusionary rule is an exclusionary rule.\(^{128}\) Yet where core violations of the fifth and sixth amendments are at issue, clearly federal habeas should remain unimpaired.\(^{129}\) Indeed, a clear implementation rule, not an easily circumvented prophylaxis, reduces the amount of habeas litigation. This is not, however, the reason for an implementing rule. The reason is that police all too often demonstrate "that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'"\(^{130}\)

Thus an extension of *Stone v. Powell* to the fifth and sixth amendments is inapplicable where core rights are in issue, for

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129. This author agrees with Mr. Justice Marshall in his concurrence with the plurality in *Brewer v. Williams*: "In this case, there can be no doubt that Detective Learning consciously and knowingly set out to violate Williams' Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination, as Learning himself understood those rights." 430 U.S. at 407.

130. *Brewer v. Williams*, 430 U.S. at 408 (Marshall, J., concurring) (citing *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960)). Determining that an adjudicated mental patient has given a "voluntary" statement appears absurd to this author. Nonetheless, where fifth and sixth amendment core rights are at issue, an implementing rule places the burden where it must, in all fairness, be placed. For as Justice Marshall noted in Brewer: "Learning knowingly isolated Williams from the protection of his lawyers and during that period he intentionally 'persuaded' him to give incriminating evidence. It is this intentional police misconduct — not good police practice — that this Court rightly condemns. . . . If Williams is to go free . . . it will hardly be because he deserves it. It will be because Detective Learning, knowing full well that he risked reversal of Williams' conviction, intentionally denied Williams the right of every American under the Sixth Amendment to have the protective shield of a lawyer between himself and the awesome power of the State." 430 U.S. at 408-09 (Marshall, J., concurring) *Cf.* *Mincey v. Arizona*, 437 U.S. 385 (1978). See note 112, supra, for the opinion of the Attorney General of Iowa on this point.
"[s]urely no fair minded person will contend that those who have been deprived of liberty without due process of law ought nevertheless languish in prision."  

131 Although the line is never an easy one to draw, where intentional police misconduct or shocking and brutal psychological and physical duress, coercion and compulsion exist, courts should fashion implementing rules. As such, courts should refrain from viewing the conduct as mere technical violations of prophylactic rules. The fifth and sixth amendments, couched in absolute terms, demand no less. Such violations go to the heart of due process of law.  

This was tangentially recognized in Stone v. Powell: "If a suspect's will has been overborne, a cloud hangs over his custodial admissions; the exclusion of such statements is based essentially on their lack of reliability."  

When it can be demonstrated that facts are in dispute and core rights, not simply prophylactic rules, are involved, an extension of Stone v. Powell is inappropriate. The Constitution demands no less. Further, to deny access to federal habeas corpus at the

135. "More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and to the officers that implement them, to incorporate Fourth [Fifth and Sixth] Amendments ideals into their value system." Stone v. Powell, 428 U.S. 465, 492 (1976) (Emphasis added).
136. Indeed, disputed facts make the societal costs with regard to collateral review minimal. Disputed facts indicate the truth finding process may well have been diverted. The utility of the writ is thus seen, and the balance weighs in favor of not extending Stone v. Powell to core right violations. This viability of the Great Writ of Habeas Corpus has been known for 300 years. See Sources of Our Liberties, 189-90 (R. Perry and J. Cooper eds. 1959). In an Address to the People of Quebec in October of 1774, one of the great rights set forth by the colonists, in an attempt to persuade the French Canadians to join them, was "Liberty of the person," protected by the writ of habeas corpus. JOURNAL OF THE CONTINENTAL CONGRESS, 1774-89, 108 (G. Wash. 1904). The writ is truly "the great bulwark of the British Constitution." 4 W. BLACKSTONE, COMMENTARIES 438, quoted by Hamilton in The Federalist, No. 84, 535 (Lodge's ed., 1888).

As an aside, it is to be noted that Papp, like Williams, has been reconvicted. This author is presently preparing his Petition for Writ of Certiorari for filing in the United States Supreme Court. If the Petition is denied, the "Great Writ" of habeas corpus will provide collateral review. The admonition of Judge Traynor comes to mind:

[If all state courts had taken the initiative . . . there would have been less need for the United States Supreme Court to become involved. . . . [T]he highest court in the land was moved to act, for better or for worse, only after others failed to turn their minds to the problems that cried for remedy. Address by the Hon. Roger Traynor, 47th Annual Meeting, The American Law Institute Proceedings, 1970.]
threshold, in the case of a direct fifth or sixth amendment issue, would violate the spirit and sense of justice which has given the writ its viability for centuries.

The very fact that the Ohio Supreme Court denied Papp's second appeal, upon the ground that there is no substantial constitutional claim in issue, supports the conclusion that "habeas corpus is the single advantage which our government has over that of other countries." J. Boswell Life of Johnson, 404 (Oxford ed. 1953). The small percentage of cases wherein certiorari is granted reinforces this conclusion.
COMMENTS

EYEWITNESS IDENTIFICATION EVIDENCE: FLAWS AND DEFENSES

I. Introduction

During the year 1913, Herbert T. Andrews was employed as a cashier for a large Boston store. Mr. Andrews had just returned home on the first day of November and was about to have his supper when there was a knock on the door. It was a police officer who informed Andrews that he was wanted at headquarters. Andrews had inadvertently overdrawn his checking account and was arrested as a result of his carelessness. Although Andrews was cleared of overdrawing his account in that particular criminal action, his problem with the police was just beginning.

Around the time of Andrews' arrest, there had been a flood of bad checks in the Boston area. The police, after arresting Andrews on the initial charge, believed he was responsible for the other dishonored checks. A grand jury returned an indictment against Andrews covering forty-three counts of passing bad checks.

Mr. Andrews had his day in court. Seventeen witnesses, men and women, took the stand and identified Andrews as the man who passed bad checks to them. Several of these witnesses were positive he was the man. Andrews could only deny his guilt. He was convicted and sentenced to fourteen months in jail.

After Andrews was incarcerated, bad checks, similar to those upon which Andrews' conviction was based, continued to be circulated in the Boston area. When this fact came to the attention of police, it became evident someone other than Andrews was circulating the bad checks. Earle Barnes was subsequently arrested, and he admitted passing a number of checks upon which Andrews' conviction was based.

Shortly after Barnes' arrest, Barnes and Andrews appeared together in the courtroom of the judge who had sentenced Andrews. Andrews was freed, and Barnes was shortly thereafter convicted. The prosecutor wrote about this case some ten years later. He had observed the two men standing together in the courtroom that day. He stated:

1. E. Borchard, Convicting the Innocent 1-6 (1932).
As the two men stood at the bar I wondered how so many persons could have sworn that the innocent man was the one that had cashed the bad checks. The two men were as dissimilar in appearance as could be. There was several inches difference in height and there wasn’t a similarity about them.

In 1975 there was an attempted holdup at a house in Washington, D.C. A man pulled a gun on an elderly woman but fled before receiving any property. As the man ran down the steps from the woman’s house, he was confronted with the woman’s stepson. He shot and killed the stepson.

Five months later the police came back to the woman and told her they may have found the man who killed her stepson. The police showed the woman a series of photographs, and she picked out a picture of Bradford Brown. “That’s him,” she said, “I’d never forget that face as long as I live.” Bradford Brown had a police record; however, during the night of the murder, he had a legitimate alibi.

On the word of this one witness, the elderly woman, Brown was convicted of murder and sentenced to prison for eighteen years. Brown was later released from prison only because the police received a tip that another man had committed the crime. The real killer was Richard Harris, who was subsequently convicted and sentenced to the minimum term of four years, less time than the innocent man had already served. This time the police were sure they had the killer, for Richard Harris confessed.

During the winter of 1978, a robber held up six shops in the area of Wilmington, Delaware, brandishing a chrome plated revolver. Police had a composite picture of the bandit drawn, and after looking at the composite, someone mentioned it resembled a Catholic Priest, Father Bernard Pagano. After Father Pagano’s picture appeared in the newspaper identifying him as a suspect, seven eyewitnesses became convinced he was the robber. Father Pagano was brought to trial.

One Delaware state police officer stated that he had never seen so many people as absolutely positive about an identification as

2. Id. at 5.
3. Case taken from segment of Prime Time Saturday, aired February 16, 1980, on NBC-TV.
4. Id.
5. See United States v. Telfaire, 469 F.2d 552, 554 (D.C. Cir. 1972) (discussing the one witness rule).
they were of Father Pagano. Father Pagano's trial was aborted, however, only after the state rested its case, and the real robber, Ronald Clouser, suffering from a guilty conscience, confessed.

The cases above are merely illustrations of the miscarriages of justice which can result when eyewitness identification evidence is relied upon too heavily in criminal prosecutions. Eyewitness testimony is evidence of a precarious nature. Numerous instances involving miscarriages of justice resulting from reliance on eyewitness identification testimony have been documented. 7

Some remedial measures have been instituted by the courts in an effort to correct suggestive police procedures which are likely to result in misidentification. 8 However, a vexing problem is faced by a defense attorney representing an accused when the Constitutional defenses as delineated in case law are not applicable to the case at hand. Although the Constitutional defenses are mentioned, this article focuses on the nature of the problem in cases involving eyewitness identification and some possible measures a defense attorney might consider in representing an accused when this type of evidence will be used against him at trial.

II. The Nature of The Problem

The victim sits in the witness box, points her finger at the defendant and says, "That's him, that's the man! I will never forget his face as long as I live!" The prosecutor stands and smugly announces, "May the record reflect that the witness is pointing to the defendant, Mr. John J. Smith." This is an impressive scenario, at least in front of the jury. The man has been positively identified.

The fact is the man has been identified. The question is: Has the right man been identified? 9 Eyewitness identification may be


9. Scientific investigation has shown that a witness expressing a high degree of confidence is less likely to be correct than a witness who makes an identification but is less positive.
fraught with two basic types of error. The first, which has received the most attention, is identification of the wrong person as the criminal. Second, there may be a failure to identify the right person. Either type of mistake is unfortunate, because one error forces an innocent man to jail, the other error sets a guilty man free.

Contrary to popular belief, the human mind does not function like a tape recorder, capable of recording events as a machine and then playing them back accurately months later. Yet juries tend to give tremendous weight to what they perceive as the in-court face-to-face confrontation and identification of the defendant by the witness. Any witness who makes an identification in court, no matter how dubious, has a great impact on the decision of the jury. In fact, the in-court identification will often eliminate the doubts of even the most skeptical juror. This has been proven in cases where overwhelming proof of a defendant's innocence has been ignored in favor of identification by an eyewitness which was of itself questionable.

Scientific research and practical experience has shown that many variables exist which have an effect on the ability of an individual to enter a courtroom and make an accurate eyewitness identification. An examination of these variables and the manner in which they affect the accuracy of an eyewitness identification is necessary.

A. Stress

A witness to a violent crime is usually cast into his role suddenly and unexpectedly. It is a common misconception that this type of situation sharpens an individual's perceptual capabilities. Typically, when a person is the victim of a crime in which his safety or the safety of others about him is threatened, he undergoes a physi-
ological change known as the "general adaption syndrome." The first stage of this change is characterized by the increase in flow of adrenalin, which causes an increase in the witness' heart rate, breathing rate, and blood pressure. When a witness is under a physical and emotional state such as this the reliability of his subsequent identification is reduced. Scientific studies have verified that stress reduces perceptual ability. This may be due to the reason that people in a highly anxious state do not pay attention to the details of their environment, and thus they may miss some information crucial to an accurate performance in identifying the culprit.

B. Physical Characteristics of the Witness

An examination of the physical characteristics of the witness is necessary. A witness' age, sex, and general physical condition should be taken into account in the determination of the value to be given his testimony. The testimony of a child should be scrutinized with particularity. Children are easily lead by the questioner and tend to give answers which are in agreement with him. Conversely, a person may be too old, sick, or tired to have perceived the situation clearly upon which he is basing his testimony. The possibility that color-blindness, deafness, or other physical handicaps unknown to the witness may have affected his perception must also be considered. Finally, determine whether the witness was under the influence of alcohol or drugs at the time he witnessed the event. These substances may not only affect perception but cause hallucinations.

16. Id. at 184-85.
17. United States v. Smith, 563 F.2d 1361 (1977) (Extreme fright experienced by the witness during the ordeal might lessen the value of the witness' later selection of the accused); see Katz & Reid, supra note 7, at 184-85. But see P. Wall, supra note 7, at 16-17.
18. Levine & Tapp, supra note 10, at 1079-99; E. Loftus, supra note 7, at 155.
19. E. Loftus, supra note 7, at 155.
21. Id. One writer has suggested that a defense attorney be aware of the possibility that a juvenile may be fantasizing rather than testifying when on the stand. See Eyewitness Identification 18 Proof of Facts 2d § 5 (1979); A. Amsterdam, B. Segal & M. Miller, Trial Manual 3 for the Defense of Criminal Cases § 377 (1977).
22. Buckhout, supra note 11, at 25; M. Houts, supra note 7, at 33.
23. F. Bailey & H. Rothblatt, supra note 20, at § 82.
24. Katz & Reid, supra note 7, at 187.
C. Length of Observation Period

Scientific research has documented the fact that shorter viewing times produce less reliable identification and recall. Conversely, the more time a person has to look at a face, the more features can be used for the recognition of that face.

D. Significance of the Event

If an event is insignificant to a witness at the time the event is observed, the witness will generally have difficulty accurately recalling the occurrence. Insignificant events do not become engraved into the memory for accurate recall.

E. Quality of Observation

Quality of observation relates to conditions as they existed at the scene during the time period in which the observation was made. Illumination must be considered in the evaluation of an eyewitness' report. Was the scene brightly or dimly illuminated? Night vision and day vision are dramatically different. If a witness had just stepped from a brightly illuminated area into an area of darkness, his eyes need a period of time for adjustment.

Also, a determination must be made as to how close the witness stood to the scene observed and whether the view was obstructed during that time. A witness may have been present at the scene but still be unable to see what was occurring.

F. Prior Expectations and Bias of Observer

Prior experience, personal needs, and expectations of an observer act to distort an individual's perception of an emotional event. This distortion reduces the reliability of a subsequent identification.

One situation in which bias is more likely to result in misidentification is that involving a cross-racial identification. Several scientific studies have shown that individuals are able to identify members of their own race better than members of a different race.
race.30

G. Time Lag

Even if an individual accurately perceived an event as it occurred, as time passes the accuracy of memory diminishes. This phenomenon is particularly true when retention of a visual image is involved. The memory of a visual image begins to fade minutes from the time of its initial perception.31 There is evidence that the longer the time lag between seeing a criminal and attempting to identify him, the poorer accuracy will be in identification.32 When an identification is made several days or weeks after an event in which a suspect was seen only momentarily, suspicion should arise as to whether the identification is accurate.33

III. Considerations For Defense

A. Pretrial Identification Procedures

In United States v. Wade,34 the Supreme Court recognized that a major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. The danger that a witness is making an identification based on prosecution or police suggestion, intentional or unintentional, increases whenever the witness' opportunity for observation was insubstantial.35

Police often use photographs of one's face to obtain a pretrial identification of a suspect. Obtaining identification by photographs is especially hazardous, because photographs exclude a multitude of characteristics commonly relied on in making an identification.36 Views of the whole body or from varying angles, or individual mannerisms and gestures are excluded by such photographic identifica-

30. See United States v. Telfaire, 469 F.2d at 559 (Bazelon, concurring); Eyewitness News, 8 STUDENT LAWYER 6, 8-9 (Feb. 1980), reporting a study conducted by Florida State University psychologist Dr. John Brigham which found that eyewitness accounts are wrong as much as half of the time, and the reliability is reduced even more when a cross racial identification is involved.
31. Woocher, supra note 7, at 982.
34. 388 U.S. at 228. See P. Wall, supra note 7, at 26.
35. 388 U.S. at 229.
36. Woocher, supra note 7, at 987.
tions. In Simmons v. United States,\textsuperscript{37} the Supreme Court held eyewitness identification at trial following a pretrial identification by photography will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Another method of pretrial identification used by police is the line-up. A line-up involves the display, to the victim or eyewitness of a crime, of a number of people similar in appearance from which the witness is to pick the suspect.\textsuperscript{38} If a line-up is fair, a person who did not witness the crime but who has read a brief description of the culprit, should identify the suspect in a line-up of n persons with only a 1/n probability.\textsuperscript{39} However, police techniques employed in line-up procedures may often be suggestive and result in misidentification.

In United States v. Wade, the Court stated that "[t]he lineup is most often used, as in the present case, to crystallize the witness' identification of the defendant for future reference."\textsuperscript{40} Irrespective of the police pretrial identification used, the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification."\textsuperscript{41} Identification evidence obtained under highly suggestive circumstances violates due process and should be excluded at trial.\textsuperscript{42}

**B. Defense Tactics**

Brief mention has been made of the Constitutional aspects of suggestive identification procedures; however, counsel still has the task of defending a case when Constitutional defenses are not an issue. Assuming eyewitness testimony is to be an important factor in the state's case, counsel should begin preparing a defense well

\begin{itemize}
\item \textsuperscript{37} 390 U.S. 377, 384 (1968).
\item \textsuperscript{38} Cunningham & Tyrell, supra note 7, at 567 n.11.
\item \textsuperscript{39} E. Loftus, supra note 7, at 145-46.
\item \textsuperscript{40} 388 U.S. at 240.
\item \textsuperscript{41} Simmons v. United States, 390 U.S. 377, 384 (1968). In another case involving the issue of irreparable misidentification created by suggestive pretrial confrontation, Stovall v. Denno, 388 U.S. 293, 301-02 (1967), the Court held that the defendant could claim that "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." The totality of the circumstances determines whether irreparable misidentification has occurred.
\item \textsuperscript{42} 388 U.S. at 218; See N. Sobel, EYE-WITNESS IDENTIFICATION 16-20 (1972). See also Kirby v. Illinois, 406 U.S. 682, 691 (1972); Identification Procedures, CRIMINAL DEFENSE TECHNIQUES § 2.07 [2] (R. Cipes ed. 1979) (Factors to consider in determining whether confrontation violated due process).
\end{itemize}
before trial.

The factors which affect the accuracy of an identification: stress, physical characteristics of the witness, length of observation period, significance of the event, quality of observation, prior expectations and bias of observer, and time lag were discussed above. Attention should be directed to those factors during pretrial preparation, because if there is any weakness in the state's identification evidence, the weakness will generally be in one or more of those areas.

An example of the practical application of any weakness counsel may discover in one of the basic factors delineated above may best be shown by the following: Abraham Lincoln was defending an individual accused of murder in what came to be known as the famous moonlight case. The key witness claimed to have seen the crime committed and described the occurrence with minute exactness. Although the witness was a considerable distance from the participants, he claimed he had observed the event well enough to even give a description of the pistol used. When asked about the difficulty of making such an observation at night the witness claimed he watched by bright moonlight. Lincoln then produced an almanac and proved that on the night in question the moon did not rise until several hours after the man had been killed. The case

43. P. Wall, supra note 7, at 90-130 mentioned a list of "danger signals" which must be analyzed in determining whether the identification evidence is reliable. These danger signals which when analyzed may prove useful in gathering evidence for impeachment of testimony at trial by an eyewitness are as follows:

1. The witness originally stated that he would be unable to identify anyone.
2. The identifying witness knew the defendant prior to the crime, but made no accusation against him when questioned by the police.
3. A serious discrepancy exists between the identifying witness' original description of the perpetrator of the crime and the actual description of the defendant.
4. Before identifying the defendant at the trial, the witness erroneously identified some other person.
5. Other witnesses to the crime fail to identify the defendant.
6. Prior to trial, the witness sees the defendant but fails to identify him.
7. Before the crime was committed, the witness had a very limited opportunity to see the defendant.
8. The witness and the person identified are of different racial groups.
9. During his original observation of the perpetrator of the crime, the witness was unaware that a crime situation was involved.
10. A considerable period of time elapsed between the witness' view of the criminal and his identification of the defendant.
11. The crime was committed by a number of persons.
12. The witness fails to make a positive trial identification.

was won.

Abraham Lincoln successfully challenged the quality of observation. In fact, Abraham Lincoln proved the impossibility of observation. Whether a witness could have seen what he said he saw can be determined from an almanac only on the rare occasion. In most instances a visit to the scene of the incident will be necessary. The visit to the scene should be undertaken as soon after the incident as possible and during the same hour of the day or night. One writer visited the scene of a murder during the same hour of the night as the incident. He discovered that a witness had identified a man he said he saw 120 feet away, standing in a doorway, in almost total darkness. Another writer discovered that the witness would have needed x-ray vision to see what he said he saw. His testimony had him seeing through an opaque wall.

Although a visit to the scene will seldom prove an observation was impossible, other more subtle discoveries may help show conditions were unfavorable for identification purposes. Notice the intensity and direction of lighting and areas of shadow or darkness at the scene.

Also, note whether anything could have been moved or distracted the observer's view of the scene. Frequently the witness will not have had an unobstructed view of the scene, because the suspect may have moved around interceding objects; or objects may have been moved between the witness and his line of vision of the scene. If anything at the scene has not changed since the incident, but is subject to change, get photographs.

Next, an interview with the witness may be appropriate. If the witness is also the victim, be prepared for a degree of hostility. Also, be prepared to protect yourself from any accusations the individual may later fabricate. Take along a credible third party to the interview, and try to get a written, or tape recorded statement from the witness.

Have the witness describe in detail all he can remember. Ask him how he felt during the incident. Was he nervous or frightened? Was he concerned with finding a route of escape? If the

46. M. Houts, From Evidence to Proof 32 (1956); E. Margolin, id. at 613.
47. See generally Annot., 78 A.L.R.2d 185, 187 (1959) (Regarding the admissibility of experimental evidence to show visibility or line of vision).
crime involved a gun, ask him what the gun looked like. How big was the gun? What color was the gun? How long did he stare at the gun? One phenomenon which occurs often in crimes involving a gun is that of weapon focus. When this occurs the weapon captures a good deal of the victim’s attention, resulting in, among other things, an impaired ability to recall other details of the event and the assailant.49 The more detail the witness can give regarding the gun, the less time he spent looking at the assailant.

Fundamental observations should be made of the witness during the pretrial interview. A discrete check of the witness’ eyesight, hearing, and capability of estimating time elapsed may be both possible, and appropriate, if the interview is conducted properly.50 Observation should be made of the witness’ mannerisms and physical condition for signs of poor health or drug usage.

Sometimes a witness who is a victim of a crime experiences a psychological need for revenge which leads him to identify any suspect, even though he is incapable of an accurate identification.51 Although determining whether this has occurred in the case at hand may be difficult, appropriate questions directed to the witness could provide some valuable insight as to whether the possibility exists.

C. Trial

After the pretrial phase of investigation is complete and the trial date has arrived, attention should be directed to the selection of a jury. Education of the jury as to the unreliability of eyewitness identification should begin with the voir dire. A suggested set of questions designed to cope with the eyewitness identification issue follows:

1. In weighing the identification of the defendant, will you consider the witness’s capacity for memory, for observation, his familiarity with the defendant and any bias or prejudice he may have toward the accused?
2. Will you also consider the amount of time that the witness had to observe the defendant?
3. Do you recognize from your daily experiences the frailty of mental observation?

50. F. Bailey & H. Rothblatt, supra note 20, at § 95.
4. During the experiences of your personal life, have you ever mistakenly confused a stranger for a person whom you knew well?

5. Do you agree that the identity of the defendant as the person who committed the crime must be shown with such certainty as to eliminate any possibility of error?

The jury has been prepared after voir dire and after the unreliability of eyewitness testimony is re-emphasized in the opening statement.

Eventually the time will arrive when the eyewitness takes the stand and identifies the defendant, that dramatic scenario discussed previously, where the witness points his finger and states, "That's the man!" After the in-court identification has occurred, counsel will soon begin his cross-examination of the witness. Counsel should point out in a vivid manner that the in-court identification which just took place was worthless. The witness pointed out the defendant because the latter was seated at counsel table and had been sitting there even before the witness took the stand. It is only natural that the witness would pick the defendant, for nobody else in the courtroom is on trial.

Next, any weakness in the witness' testimony should be revealed, as well as any conflicts in the testimony of different prosecution witnesses. Conditions which were unfavorable to an accurate identification, and which existed at the time the observation was made, should be the focus of concentrated effort.

Conditions relating to the length of the observation should be discussed during cross-examination if favorable to the defendant. Research has shown that people tend to estimate time by the amount of activity occurring. During a quick paced crime, there may be a flurry of activity which makes the time span seem longer to the witness than it was in reality. The witness may have testified on direct examination that he saw the robber for one or two minutes when actually the event lasted only a few short seconds. One effective tactic in cross-examining on this subject is to define the time period of the event, then break it down into segments by what was observed, in effect steadily whittling the period down to

54. Id.
56. Id.
a second or two during which the face and other features of the culprit were observed without distraction.\textsuperscript{67}

If during the pretrial interview any statements made by the witness indicated the weapon focus phenomenon had taken place, this evidence should be brought to the attention of the jury. If possible, get a concession from the witness that he was under a great deal of stress at the time; that he was more concerned with doing what the robber said than trying to remember him, and that he was in a totally excited state. Show the jury the observation was made under conditions likely to result in identification inaccuracy and that this is what happened earlier in the courtroom when the defendant was identified. The witness might think the defendant was the culprit. Maybe the culprit even resembled the defendant, but an accurate identification under the circumstances is impossible.

Finally, one effective method of rebutting eyewitness identification testimony is to attack as suggestive the pretrial identification procedure. If the accused does not conform to the original description given to police, that fact should be particularly emphasized. The circumstances surrounding the initial identification conducted by police should be examined. Any discrepancies or irregularities which will undermine the credibility of the witness and diminish the effectiveness of his testimony in the eyes of the jury must be exposed.\textsuperscript{58}

Closing argument provides counsel with his last opportunity to emphasize and repeat the concept that eyewitness identification testimony is unreliable. Every weakness found in the state’s identification evidence should be again brought before the jury. Consider the areas delineated above: stress, physical characteristics of the witness, length of observation period, significance of the event, quality of observation, prior expectations and bias of observer, time lag, and any other weakness in the state’s case which would affect the reliability of the identification.\textsuperscript{59}

Mistaken identifications innocently made are commonplace. Almost everyone has been mistaken for someone else at one time or another. The loss of liberty is a serious consequence of identifica-

\textsuperscript{57} Eyewitness Identification, Proof of Facts 2d \S 3.

\textsuperscript{58} F. Bailey & H. Rothblatt, supra note 53. See supra note 43 for some possible areas of cross-examination. Any of the danger signals are potential issues bearing on the credibility of the eyewitness testimony.

\textsuperscript{59} See Stein, Closing Argument \S 462 (1978).
tion, too serious for mistakes, and this must be instilled in the jurors' minds.

Timothy E. Eble
KENTUCKY'S POWER OF EMINENT DOMAIN

On May 1, 1979, the Supreme Court of the Commonwealth of Kentucky struck down as unconstitutional those provisions of the Local Industrial Authority Act which granted a city or other governmental units the unconstitutional right to condemn private property which was to be conveyed by the local industrial authority for private development. The exercise of eminent domain for this purpose was disallowed for lack of a "public use." A public use is constitutionally necessary for the valid exercise of eminent domain. The term public use, however, has been subjected to varying interpretations.

The state of the law in regard to the power of eminent domain in Kentucky involves two competing concerns. One such concern is the right of the private citizen to hold and utilize property as he sees fit. The second concern is the right and the necessity for a vehicle by which the state can acquire property for the common good and welfare for all citizens in the state. The result of these competing concerns is a provision in the federal and most state constitutions providing that private property cannot be taken or damaged for public use without the making of just compensation. Such provisions have been interpreted for the most part to mean not only that just compensation must be paid to the private owner

1. Ky. Rev. Stat. § 152.920 provides as follows:
   The acquisition of any lands for the purpose of developing industrial sites, parks, and subdivisions is hereby declared to be a public and governmental function, exercised for a public purpose, and a matter of public necessity, and such lands and other property, easements and privileges acquired in the manner and for the purposes enumerated in K.R.S. 152.810 to K.R.S. 152.830 shall and are hereby declared to be acquired and used for public and governmental purposes and as a matter of public necessity.

3. Id.
5. Ky. Const. §§ 13 & 242; U.S. Const. amend. V.
when his land is taken by the state, but that the state in fact has no power to take land of a private individual unless the use for which the land is taken is a public use. Thus the phrase “public use” assumes a crucial importance in determining the rights of individuals vis a vis the state. It is the interpretation of this phrase, or more precisely the lack of interpretation by the courts, that has sparked the controversy and confusion that still lingers after countless opportunities for precise resolution.

What is a public use? Predictably the courts of the various jurisdictions that have interpreted the term have differed on its exact meaning. In fact the task of providing a precise definition of the term public use as related to the power of eminent domain has generally been conceded as incapable of precise definition. Basically, however, the definitions of the term that have evolved from the various jurisdictions can be grouped into two categories.

The first category is the so-called “narrow view” of the term public use. The advocates of this view interpret the words public use to mean “use by the public.”

[T]o make a use public a duty must devolve upon the person or corporation seeking to take property by right of eminent domain to furnish the public with the use intended, and the public must be entitled, as of right, to use or enjoy the property taken. The term implies the “use of many” or “by the public”. . . . [T]he use may be limited to the inhabitants of a small or restricted locality, but the use must be in common and not for a particular individual. Determination of the question involves an inquiry into particular facts and is resolved by consideration of the extent of the right of the public to its use and not by the extent to which that right is or may be exercised.

The second category is the so-called “broad view” of the term public use. This view adheres to the concept that the land taken does not have to be used by the public to constitute a public use. Rather the term public use is thought to mean public advantage.

[A]nything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state (or which leads to the growth of towns and the creation of new resources for the em-

7. See Chesapeake Stone Co. v. Mouland, 126 Ky. 565, 104 S.W. 762, 764 (1907).
9. Id.
10. Id. at § 7.2[2].
ployment of capital and labor), manifestly contributes to the general welfare and the prosperity of the whole community constitutes a public use.\textsuperscript{11}

The difference between these two views is apparent. Under the strict view the powers of the body possessing the power of eminent domain are more restricted in that eminent domain can only be exercised on property that will be used by the public. Such a requirement prevents the body possessing the power of eminent domain from acquiring land that will ultimately be conveyed to a private person or entity. The broad view relaxes the public use requirement to the extent that the power can be exercised to the degree that there is a public benefit. This view allows the power of eminent domain to be exercised in a wider range of circumstances; there need not be a use by the public. Pursuant to the latter view, the fact that a private person or entity would ultimately gain control of the condemned lands would not in and of itself be determinative; but it may be a factor in any assessment of the public benefit.

The question that arises, therefore, is which view does the Commonwealth follow. At first glance the present case seems to answer that Kentucky adheres to the strict view. "[F]inding of "public purpose" does not satisfy the requirement of a finding of "public use". . . . [G]overnment cannot use the power of eminent domain in order to act as land brokers for private interests."\textsuperscript{12} In reaching this decision the court cited Chesapeake Stone Company \textit{v.} Moreland,\textsuperscript{13} a decision which crystalized Kentucky's adoption of the strict view on the term public use.

\[T\]he public must have some right to use and enjoy the property taken, as distinguished from the absolute control of the individual. In other words an individual, for his own use and benefit unless it be necessary to enable him to perform some public service, cannot take the private property of another, however needful or convenient to him the use might be.\textsuperscript{14}

The controlling question to such a determination was stated as follows: "Have the public the right to its [the property's] use upon the same terms as the person at whose instance the way was es-

\begin{itemize}
\item \textsuperscript{11} \textit{Id}.
\item \textsuperscript{12} City of Owensboro \textit{v.} McCormick, 581 S.W.2d 3, 7 (Ky. 1979).
\item \textsuperscript{13} 126 Ky. 656, 104 S.W. 762 (1907).
\item \textsuperscript{14} \textit{Id.} 126 Ky. at 656, 104 S.W. at 765.
\end{itemize}
tablished?" If dominion over the property can be established so the public is prohibited from its use, then it is a private use and the power of eminent domain cannot be invoked. Under such a theory of public use, the statutory provisions of the Kentucky Local Industrial Authority Act were bound to fall "to the extent that it grant[ed] a city or other governmental unit the unconditional right to condemn private property which [would] be conveyed ... for private development ... ." The strict view of public use would clearly not permit this contemplated use.

The Commonwealth, however, has not in all cases been consistent in its adherence to the strict view. Particularly in its interpretation of slum or blight clearance powers, the court has adopted a view that smacks of the broader public benefit theory. In Spahn v. Stewart, the court upheld the constitutionality of provisions in the slum clearance statutes which gave municipal housing commissions the authority to use the power of eminent domain for the removal or eradication of slums despite the fact that the land condemned would ultimately be rented to private individuals for their exclusive use. The court in Spahn noted that the rule enunciated in Chesapeake Stone Company v. Moreland was extended by the court in Carter v. Griffith. The court in Spahn then quoted with approval from Carter:

Nor is it necessary that the entire state should directly enjoy or participate in an improvement of this nature in order to constitute a 'public use'. . . . In the broad and comprehensive view that has been taken of the rights growing out of these constitutional provisions, everything which tends to enlarge the resources and promote the productive power of any considerable number of inhabitants of a section of the states contributes, either directly or indirectly, to the general welfare and the prosperity of the whole community, and therefore to the public.

The court in Spahn also noted in every case "where eminent do-

15. Id.
17. City of Owensboro, 581 S.W.2d at 7-8.
18. 268 Ky. 97, 103 S.W.2d 651 (1937).
21. 126 Ky. 656, 104 S.W. 762 (1907).
22. 179 Ky. 164, 200 S.W. 369 (1918).
23. Spahn v. Stewart, 268 Ky. 97, 107, 103 S.W.2d 651, 656 (1937), (quoting Wilson & Co. v. Compton Bond & Mortgage Co., 103 Ark. 452, 146 S.W. 110, 112 (1912)).
main is exercised private interests will be benefitted, but the existence of this fact will not be allowed to defeat the benefits that will accrue to the public."24 Through these words the Spahn court seemed to adopt the "public benefit" theory as sufficient to constitute a public use. Indeed the court commented that the essential purpose of the legislation was not to benefit a particular class but to safeguard the entire public from the menace of slums.25 As a result the public benefit the people as a whole would derive from the use of the power of eminent domain was thought sufficient to satisfy the requirement of a public use. Clearly the focus on the "use by the public" under the strict view was not an element central to the court's concern.

This philosophy was reiterated by the court of appeals in Miller v. City of Louisville.26 Miller involved an attack on the amended versions of the urban redevelopment statutes27 which provided for the acquisition of private property which was termed "blighted" as defined by statute.28 Such property was then to be leased or sold to certain individuals. Despite the fact that individuals would ultimately gain the use of the condemned property for their own exclusive benefit, the court concluded that the primary purpose of the legislation was elimination of blight thus constituting a public benefit or public use and that subsequent sale or lease to private individuals does not alter that objective.

As a consequence of the urban renewal cases, it would appear that the court, after relying extensively on the public benefit theory, had finally come to equate public benefit as public use. However, the holding in the present case clearly rejects this notion. But does it? The court in the case at hand states that the government cannot use the power of eminent domain in order to act as land broker for private interests.29 Yet the main vice that the court found with the Kentucky Local Industrial Authority Act30 was not that the lands ended up in the hands of private concerns (surely this was a concern) but that the Act provided for the acquisition of

25. Id. 268 Ky. 97, 109, 103 S.W.2d 651, 657 (1937).
29. City of Owensboro, 581 S.W.2d at 5.
“any lands.”

Indeed the court held that the Act was unconstitutional to the extent that it grants a governmental unit the unconditional right to condemn private property which is to be conveyed by the local industrial development authority for private development for industrial or commercial purposes. However, the court left no doubt that when property lies within a blighted area, eminent domain can be exercised to acquire the property to eliminate the blight by developing such property even if it ultimately goes through sale to an individual. Such constitutes a public use. This puts the court in a rather anomalous position of rejecting the “Public benefit equals public use” theory in the present circumstances but at the same time sanctioning the use of eminent domain for urban renewal which is upheld under the public benefit theory. What the court seems to imply is that the use of eminent domain to acquire productive or non-blighted land does not constitute a public benefit. The public as a whole does not obtain any benefit in the eradication and acquisition of non-blighted land, but the public in general does benefit when land which is blighted and constitutes a menace to the health, safety, and welfare, is condemned. The benefit is sufficient to constitute a public use, despite the fact that the land will not be used by the public. Under this approach the court does not focus on the subsequent use of the land but instead focuses on the immediate benefit which accrues pursuant to the Act’s central purpose. In short, the major difference between the use of eminent domain under the urban renewal statutes and the Kentucky Local Industrial Development Act is that under urban renewal statutes the acquisition and development of blighted land serves an immediate public benefit/public use. In whose hands the land ultimately settles is incidental to the statute’s central purpose. On the other hand, the acquisition of productive land (which the Industrial Development Act implicitly permits) can serve no public benefit. The Act’s central thrust focuses on whose hands the land ultimately rests. Any public benefit that arises is dependent on the land’s subsequent use. The court believed that this was an incidental

32. City of Owensboro, 581 S.W.2d at 6.
benefit, but it did not warrant discrimination by the state in favor of one use against another.

Cases from other jurisdictions indicate that Kentucky is in the majority with regard to this particular issue. Industrial development via the use of eminent domain is thought, by and large, to be the exercise of a governmental power for a purely private use. Even jurisdictions which apply the "public benefit equals public use" rationale are inclined to view the resulting benefit that issues from incoming industry, i.e. employment and broadened tax base, as an incidental benefit. The major purpose of such Acts is usually thought to be the direct benefit to industry.

The only context which assures the constitutionality of an Industrial Development Act appears to be a provision restricting the lands which can be acquired to wild, undeveloped, blighted, or slum areas as defined by statute. The eradication of these areas constitutes a public use.

A notable exception and a prime example of the outer limits of the public use doctrine would appear to be Prince George's County v. Collington Crossroads, Inc. In this case the Maryland Court of Appeals upheld the constitutionality of land condemnations for industrial, commercial purposes wherein the land would ultimately


35. KY. REV. STAT. § 99.340(1) provides as follows:

"Slum area" means an area in which there is a predominance of buildings or improvements which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, sanitation, or open spaces, high density of population and overcrowding, or any combination of such factors, are unsafe or unfit to occupy, are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, injuriously affect the entire area, and constitute a menace to the public health, safety and welfare. A slum area may include lands, structures, or improvements, the acquisition of which is necessary in order to assure the proper clearance and redevelopment of the entire area and to prevent the spread or recurrence of slum conditions thereby protecting the public health, safety, and welfare.

KY. REV. STAT. § 99.340(2) provides as follows:

"Blighted area" means an area (other than a slum area as defined in this section) where by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, submergence of lots by water or other unsanitary or unsafe conditions, deterioration of site improvements, diversity of ownership, tax delinquency, defective or unusual conditions of title, improper subdivision or obsolete platting, or any combination of such reasons, development of such blighted area (which may include some incidental buildings or improvements) into predominantly housing uses is being prevented.

be conveyed to various industries for their exclusive use. The court found a public use by the very fact that the industries would provide needed employment and general economic benefit. The court concluded under our cases projects reasonably designed to benefit the general public by significantly enhancing the economic growth of the state or its subdivisions are public uses at least where the exercise of the power of condemnation provides an impetus which private industry cannot provide.

DAVID SCHWETSCHENAU
In 1966 the Kentucky case of *Honeycutt v. Commonwealth* upheld the competence of radar evidence in a speeding prosecution. At that time police radar devices had not benefited from the recent advances in microelectronic computer technology. Units incorporating the advances have now been deployed and are in use on Kentucky roads. The fallability of the new devices requires guidelines for usage beyond those given in *Honeycutt*. This comment discusses the operation of police radar, describes potential errors, and proposes two further guidelines.

I. Principles and Devices

Police traffic radar employs the fundamental physical phenomenon discovered by Christian Johann Doppler in 1842. According to Doppler, electromagnetic radiation of a known frequency appears to a receiver to be "expanded" or "compressed" in wavelength depending, respectively, on whether the transmitter of the radiation is approaching or receding from the receiver. The amount of compression or expansion varies directly with the speed of approach or recession; this expansion or compression is the Doppler shift. Judicial notice was taken in *Honeycutt* of the reliability of the Doppler shift as a measuring device.

Police radar currently employs the Doppler shift in two types of receiver to measure vehicle speed; one is called a true Doppler receiver, the other a Phase Locked Loop (PLL) receiver. The trans-

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1. 408 S.W.2d 421 (Ky. 1966).
3. Wavelength and frequency are components of a waveform which are inversely proportional. Wavelength is the measure of the distance between wavecrests or troughs. Frequency is the number of waves passing a point in a given time, measured in hertz (cycles or waves per second).
4. The familiar example of Doppler shift is the sound of a car or train horn. As the car or train approaches the observer, the sound of its horn seems to increase in pitch until it passes the observer, at which time it falls in pitch as it recedes.
   A wave transmitted at ten hertz from a stationary transmitter appears to a stationary receiver at a frequency of, for example, ten hertz. If the transmitter or receiver are moving relative to one another, the frequency changes. Assume a fixed receiver and an approaching transmitter; the ten wavelengths transmitted in one second have added to them one wavelength from the next second so that the apparent frequency is eleven hertz. The one wavelength difference is the Doppler shift attributable to the motion of the transmitter.
   The reader should not be confused by the term "transmitter." Whereas all police radars have an internal transmitter, when the beam is reflected the *reflection* becomes a second transmitter. For clarity this reflected beam is called an "echo."
5. 408 S.W.2d at 422.
mitter connected with both types is the same; it is the operation of the receiver that differs. True Doppler receivers find the speed of an object by measuring the actual Doppler shift of the echo. Such devices require sophisticated receivers and strong return signals; as a result they are relatively more expensive and have a shorter range than PLL type receivers. PLL receivers employ the Doppler effect without actually measuring it. Speed is displayed digitally or on a meter, with most units also providing an audible tone corresponding to the received signal. Some older units produce a record on graph paper. The advantage of PLL receivers is their longer range and faster operation.

Police radar usually operates in a stationary mode, but many newer models also operate while moving. Moving radar simply subtracts the reference speed of the patrol car from the total closing speed that the receiver sees. Both true Doppler and PLL receivers are used in mobile radar with PLL in the majority.

The range of police radar varies according to terrain, height above ground, transmitter power, atmospheric conditions, and

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Aquilera, "as far as has been determined, . . . is the first time that any court has been presented so much testimony and so many exhibits from so many highly qualified experts . . . ." Amended order granting motions to suppress and/or exclude, Id. at 1. Judge Nesbitt, upon hearing two thousand pages of testimony, ruled that police radar devices as they presently are used do not meet the test of reasonable scientific certainty, and he suppressed radar evidence in the 80 cases consolidated in Aquilera. Id. at 4.

The testimony cited in this comment was given by the first two defense witnesses, Dr. William Stern of Scarsdale, N.Y., and Andrew Soccio of Browns Mill, N.J. Dr. Stern is vice-President of Unigon Industries and an expert in microwave theory. Mr. Soccio operates an FCC licensed police radar repair and calibration shop, has substantial military and defense experience in signal processing, and is an expert in moving and stationary radars. Citation to Mr. Soccio's testimony begins with Record at 192.

7. A true Doppler receiver measures the frequency shift of the echo 5 times before displaying a reading. If any of the 5 is bad for any reason, the cycle begins again, continuing until there are 5 consecutive good readings. If it is a mobile unit, 5 readings each are required for both the target and the patrol car. Record at 216-17.

8. PLL devices count the reflected wavelengths in a period of time, reproduce the frequency, amplify the signal, and feed it into a processor. The processor scans a range of frequencies until it finds an amplified signal, then displays the corresponding speed. Id. at 224-25.

9. Id. at 217-18.

10. The antenna actually receives waves reflected from the target vehicle and from the road surface in front of the patrol car. Those from the ground indicate the speed of the patrol car, and they are subtracted from the signal received from the target. Id. at 192-97.

11. True Dopplers are used, for example, in the C.M.I. speedgun 1 and 2 and the Kustom Signals MR-7, 8, and 9. Id. at 216.
beam angle. Since transmission is at very high (microwave) frequency, the units operate on line of sight. The transmitter power determines the strength of the echo, thus the required sensitivity of the receiver. Blowing dust or rain will absorb and reflect some of the beam as it passes through and returns, weakening the echo and shortening the range. The beam angle determines the width of the beam at a given distance; a wider beam has less range.\textsuperscript{12}

II. The Margin of Error

Police radar is subject to multiple sources of error, both electronic and physical. While most errors result from faulty operation by police, harmonic error and overshoot are products of electronic design. Harmonics are integral multiples of a frequency, the error from which can be a doubling or tripling of true speed. Harmonic error can occur when the receiver is overloaded by the patrol car reference signal in mobile radar, the echo, or a signal from an outside source the harmonic of which falls in the frequency of the radar device. Harmonic error is rare, and filters exist which can reduce it further.\textsuperscript{13}

Overshoot is an electronic error unique to PLL receivers. It occurs when the receiver scans for a reflected signal, perceives one, but overshoots it. The device will remember the higher speed until it recycles to find the precise target speed. Usually the recycling is immediate, but if the unit is equipped with a feature called automatic locking, the higher speed is locked onto and displayed as the target speed. Overshoot produces errors as much as twenty to thirty percent but is easily avoided by longer (three second) obser-

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\textsuperscript{12} Beam width is determined by multiplying the tangent of the beam angle by the range. Manufacturers of radar units publish beam angles of their units, but a witness in Aquilera applied accepted formulae to certain units, and in each case the theoretical minimum beam angle was greater than the published claims. The larger the beam angle the larger the tangent, hence the wider the beam width. For instance, the M.P.H. K-55 is claimed to have a beam angle of 16° (Tan. 0.287), but Dr. Stern calculated a minimum angle of 21.6° (Tan. 0.396). He performed the same calculations on 3 other devices, the results of which follow (manufacturers’ claims are in parentheses): C.M.I. speedgun 8-21.5°, Tan. 0.393 (16°, Tan. 0.287); Decatur MV-715 - 19.9°, Tan. 362 (16°, Tan. 0.287); Kustom Signals KR - 11 - 12.6°, Tan. 0.224 (12°, Tan. 0.213). Record at 93-4. Tangents taken from table of natural trigonometric fuctions in CRC HANDBOOK OF CHEMISTRY AND PHYSICS (55th ed. 1979).

It is elementary physics that the power in a radio wave remains constant as the wave moves away from the transmitter and that this constant power spreads over the widening beam. Accordingly, the power at any given point is less the further that point is from the transmitter. Beam width is the distance over which the constant power is spread at a given range.

\textsuperscript{13} Such filters exist on the Decatur MV-715. Id. at 265-70.
vation and manual locking of the true speed. The automatic locking feature should never be used.

Radio frequency (RF) interference results when another source of electromagnetic radiation supplies the receiver with a signal. Paging system transmitters, airport surface detection radar, military and civilian aircraft radar, police radio transmission or an operating siren, or citizens band (CB) radio transmission can all give false, or "ghost," readings. Proper shielding of the radar unit, especially the antenna, from radio frequency interference will reduce the likelihood of error.

Most errors to which police radar is subject result from faulty installation and operation. Interior mounting "is a very dangerous procedure unless a number of precautions are taken." It is normal for some of the microwave transmission to "spill over" nearly perpendicular to the main beam, producing "side lobes." Reflection of side lobes from any moving object, trees, signs, and especially fans on heaters and air conditioners will produce a speed reading. The most obvious precaution is trial and error testing of each patrol car/radar combination to find any spurious reading produced by the mounting. Alternatively, external mounting of the antenna greatly increases reliability.

Another installation problem relates to power supply. A loose connection on the hold function supplied on some units to defeat

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14. Id. at 275.
16. Record at 248.
17. Cf. 47 C.F.R. § 15.307 (f) (1978) (k-band devices share the frequency allotted to these radars).
18. Record at 258.
19. Ignition noise must be close (100 - 150 ft.). Id. at 232.
20. Id. at 227-29.
21. Dr. Stern described an 82 M.P.H. reading on a stationary Decatur MV - 715 produced by whistling into a stationary CB transmitter 30 - 40 feet from the radar. Id. at 245.
22. Unshielded wire, such as the power lead, can become another antenna; filters or shielding are used to eliminate this source of interference. The Decatur MV-715 is especially subject to RF interference because of plastic, not metal, antenna shielding. Id. at 237, 240-41.
23. Id. at 66.
24. Side lobes are a product of the common single antenna design. Large dents (1-2 inches) in the antenna will substantially increase the energy directed into side lobes. Id. at 50-55.

In one test of the M.P.H. K-55, the device was directed through the windshield with no vehicles in the beam. The air conditioner fan produced a reading of 80 m.p.h. Id. at 67.
25. Id. at 91.
radar detection devices can produce transients in the circuitry, generating false displays.26 Transient error can be filtered out of the system, and trained personnel should be able to recognize and discount it.

Internal logic in police radar units reads only one target speed at a time; it is designed to read only the strongest reflected signal and cannot determine the direction of travel of the reflecting object. The strength of the echo is a function of the range of the target and its radar cross-section. Flat objects are more efficient reflectors than contoured ones, and generally, the larger the object the stronger the echo.27 Because radar units read only the strongest signal, a large object at greater range than a smaller one could be read by the device. It has been suggested that a car should be less than half the distance of a truck from the transmitter in order to insure that the right object is identified by the officer as the one whose speed is displayed.28

An error to which all police radar units are subject results when the direction of travel of the target is not directly towards the receiver, the usual condition. This error causes the device to show a reading lower than the true target speed.29 The cosine error could also result in a higher than actual speed reading in a mobile radar device, since the patrol car reference speed is calculated from the echo of nearby terrain. An echo from the roadside could yield a lower reference speed, resulting in a higher apparent target speed.30 This error should become pernicious only when the device is used in the automatic locking mode.

Operational techniques employed by individual police officers can produce incorrect readings. For example, if the antenna of stationary radar is moved while operating, a “panning” error results,

26. Transients occur in PLL receivers, especially the M.P.H. K-55; they can produce spurious readings of as much as 100 m.p.h. Id. at 282-84, 288.
27. Id. at 81, 105-06.
28. Id. at 205.
29. There is an angle formed by the direction of travel of the target and the line between the target and the receiver. The cosine of this angle indicates the amount of the cosine error. If the target is directly approaching the receiver, the angle is 0°, the cosine is 1, and there is no error, since the speed registered is the product of the true target speed and the cosine. For angles greater than 0°, the cosine becomes less than 1, therefore, the true target speed is greater than the indicated speed, with larger angles having smaller cosines and larger error. Kopper, The Scientific Reliability of Radar Speedmeters, 33 N.C. L. Rev. 343, 351 (1955).
causing the device to read the apparent speed of the landscape.\textsuperscript{31} 
"Batching" error occurs in mobile radar when the patrol car accelerates; the unit reads the closing speed immediately, but there is a delay of several seconds before it calculates the patrol car speed. As a result, it subtracts the older, lower patrol speed from the increased closing speed, giving a higher speed for the target vehicle.\textsuperscript{32}
When a moving radar device is passed by a large vehicle moving in the same direction, its patrol car reference speed may be taken from the vehicle instead of the ground producing a lower reference speed; this "shadowing" error produces a higher apparent target speed.\textsuperscript{33}

Misuse of operating features can cause incorrect readings. With a mobile unit operating in its pacing mode, the speed of the patrol car is displayed on the device; a speeding patrol car therefore produces a speeding reading on the device.\textsuperscript{34} Units are calibrated for accuracy by an internal frequency generator, either tuning fork or crystal, or by an external tuning fork. The calibration speed can be locked into the display to give an erroneous speed reading.\textsuperscript{35} Should the operator fail to clear the displayed speed of a prior violator, the earlier speed could be mistaken for a current reading.\textsuperscript{36}

\textbf{III. Proposals}

Whereas \textit{Honeycutt} takes judicial notice of the accuracy of the Doppler shift, "the accuracy of the most indisputable scientific theory is subject to its application in particular conditions."\textsuperscript{37} The following guidelines are offered to insure the reliability of radar evidence of speed; the last two did not appear in \textit{Honeycutt}:

\textbf{A.} The radar device must be in proper working condition when used. This may be proven by evidence that the device was calibrated according to the manufacturer's instructions and that its operation has been verified by driving a vehicle with a calibrated speedometer through the beam. Calibration and verification should occur both before and after usage.

\textbf{B.} The operator of the device has adequate training and expe-

32. Id. at 143.
33. Id. at 142-43.
34. Id. at 110.
35. Id. at 109-10.
36. Id. at 110. Admittedly, the errors described in this paragraph result from intentional or negligent manipulation by police.
37. State v. Hanson, 85 Wis.2d 233, 245, 270 N.W.2d 212, 213 (1978).
perience in the use of the particular instrument.\textsuperscript{38}

C. The device must have been operated properly.

D. Conditions of usage must have been such that the possibility of error is minimized.\textsuperscript{39}

E. The target vehicle must have been positively identified and an independent estimate of its speed made.\textsuperscript{40}

IV. Discussion

The testing requirement announced in Honeycutt, that the device be tested before use by both tuning fork and another car driven through the beam,\textsuperscript{41} was arguably impeached by the court in the sentences following the test. Citation in Honeycutt was made to a Connecticut case\textsuperscript{42} for the proposition that the tuning fork alone may be a sufficient test. It should be noted, however, that the Connecticut court was discussing calibration with three tuning forks, not one, in tests conducted both before and after the arrest.\textsuperscript{43}

The weight of authority accords with the strict testing requirement of Honeycutt. In a leading New Jersey case, the testing was found sufficient where both internal mechanisms were employed and patrol cars were driven through the beam.\textsuperscript{44} The New Jersey court recently revised the testing requirement to permit the use of multiple tuning forks instead of one fork plus a drive-through, but the tuning forks (and the speedometer of the car in the case of a test run) must be proven to be accurate.\textsuperscript{45} Ohio has found testing sufficient when a patrol car was driven through the beam.\textsuperscript{46} Minnesota requires radar devices to be tested either by calibrated tuning fork or test run by a vehicle with a calibrated speedometer.\textsuperscript{47} New York requires at least one test by an outside source.\textsuperscript{48}

\textsuperscript{38} Authorities agree that a minimum of 2-3 hours of classroom instruction in principles of radar and in specific units should suffice, coupled with sufficient field experience to enable the operator to recognize the various errors to which radar units are subject.

\textsuperscript{39} For instance, the reference speed of mobile units should be verified by the patrol car speedometer, and automatic locking should never be used.

\textsuperscript{40} In Honeycutt the officer did make an independent visual speed check. 408 S.W.2d at 423. Such a check obviously becomes more difficult at night or in heavy traffic.

\textsuperscript{41} Id.

\textsuperscript{42} State v. Tomanelli, 153 Conn. 365, 216 A.2d 625 (1966).

\textsuperscript{43} Id., 216 A.2d at 630.

\textsuperscript{44} State v. Dantonio, 18 N.J. 570, 115 A.2d 35, 40 (1955).


\textsuperscript{46} East Cleveland v. Ferell, 168 Ohio St. 298, 154 N.E.2d 630 (1958).

\textsuperscript{47} State v. Gerdes, 291 Minn. 353, 191 N.W.2d 428 (1971).

\textsuperscript{48} People v. Perlman, 89 Misc. 2d 973, 392 N.Y.S. 985 (Dist. Ct. 1977).
It is clear that sister courts agree on the necessity of accurate testing, but many go further and require the radar device to be tested either at the site of operation or after an arrest. Reasoning that the instruments are very delicate, Missouri will accept radar evidence of speed only when the device is tested at the site of and immediately before an arrest. Many other jurisdictions require, or at least approve, testing after an arrest; among them are Wisconsin, Delaware, Illinois, New York, and Virginia. The purpose of requiring calibration after arrest is to obviate any argument by a defendant that a device calibrated as accurate before an arrest was not accurate at the time of arrest.

The proposal that target vehicles be positively identified goes beyond *Honeycutt*. This necessity of identification arises from the internal operation of police radars. Because the devices process only one target speed, they select the speed of the target with the greatest radar cross-section, as explained earlier. The strongest signal is not necessarily received from the closest vehicle, as *Honeycutt* erroneously assumed. Although other courts have apparently agreed with the *Honeycutt* “first in line” rule, the scientifically inaccurate assumption is no more nearly correct for its repetition. It has been said that “[i]n the field of identification on the instrument is deaf, dumb and blind.” Ohio requires an independent identification of a speeding violation. Other courts use the independent estimate of speed to corroborate an improperly tested device. The facts that a properly tested and operated radar device detects a speeding vehicle and that one vehicle leads the pack does not inescapably lead to the conclusion that the leader is speeding. Therefore, the Kentucky court should discard the erroneous “first in line” rule adopted by the *Honeycutt* decision.

50. State v. Hanson, 85 Wis. 2d 233, 270 N.W.2d 212 (1978).
Conclusion

Police radar devices have changed since Honeycutt. Many new sources of error have been introduced, particularly with moving radar. The courts of Kentucky should adapt to the changes by recognizing the problems inherent in modern radar units and acting to eliminate errors.

J. Richard Clay
IN KENTUCKY, A LEASE VERSUS A SALE OF COAL IN PLACE

INTRODUCTION

With the growing importance of coal in the United States, antiquated mineral leases are being dusted off and vigorously examined with renewed enthusiasm. What is often found is neither pleasing nor anticipated. Because of subsequent assignments and confusing terms in the original lease and successive conveyancing instruments, the precise interest in the mineral rights can become clouded. The result may be that what was originally termed a lease is construed to be a sale. Whether this will occur is contingent upon two factors: First, whether the construction given a “lease” by the particular jurisdiction wherein the coal lies allows a termed lease to be considered a sale and secondly whether the terms of the lease meet the predetermined requirements of a sale.

The question of jurisdiction confronts a “landowner versus mineral owner” dichotomy; however, the reasons for the jurisdictional split are readily ascertainable. In those states where the extraction of coal is an abundant and important industry, an instrument labeled a lease can be construed as a sale of coal depending upon the terms of the instrument. More weight is thus given to the mineral owner since a sale would give him a fee simple title to the coal. Coal abundant states such as Kentucky, Pennsylvania and West Virginia follow this approach.\(^1\) On the other hand states in which coal mining is not a predominant industry hold that an instrument termed a lease is a lease and not a sale of coal in place.\(^2\) These divergent viewpoints are attributable to varying perspectives on whether to place the benefit of doubt with land or mineral owners which in turn revolves around how important coal mining is to a particular locality. Given that Kentucky’s heavy mining industry places it in a locality which accepts judicial construction of a lease into a sale of coal,\(^3\) the jurisdictional rationale is identified. Now, more importantly one must address the second requirement of whether the terms of a lease meet the certain predetermined re-w
quirements which result in a sale.

In Kentucky it is often difficult to determine whether an instrument conveys a lease or a sale. The problem is not remedied by mere denomination of the conveying instrument as either a lease or sale. In addition one must examine the particular granting and habendum clauses whose interpretation will control the ultimate categorization of the instrument. The specific factors used by Kentucky courts in making such a determination are concisely delineated in the Pennsylvania Rule\(^4\) and the \textit{Hummel v. McFadden} test\(^5\). This comment analyzes the applicability of these doctrines to instruments conveying mineral rights in Kentucky while also rationalizing them to provide an aid to those who draft the instruments. Before examining the doctrines and Kentucky case law, it is necessary to briefly discuss the affected interests in coal.

I. Possessory and Ownership Interests in Minerals

Generally speaking American law recognizes the existence of estates of ownership in minerals\(^6\) as well as the surface\(^7\) with a right

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6. The comparatively recent development of the sciences of geology and mineralogy, and the multiplication of mechanical devices for penetrating the earth's crust, have greatly changed the uses and the values of lands. Tracts that were absolutely valueless, so far as the surface was concerned, have come to be worth many times as much per acre as the best farming lands in the commonwealth, because of the rich deposits of coal, or iron, or oil, or gas known to underlie them at various depths. These deposits are sometimes found, however, beneath well-cultivated farms, so that the surface has a large market value apart from the value of the deposits of coal or other minerals under it. In such cases the owner is rarely able to utilize the lower stores of wealth to which he has title, by mining operations conducted by himself, and for this reason he sells them to some person or corporation to be mined and to be moved. So it often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another, giving to each purchaser a deed or conveyance in fee simple for his particular deposit or stratum, while he retains the surface for settlement and cultivation, precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers or strata becomes a subject of taxation, of incumbrance, levy, and sale, precisely like the surface, as against the owner of the surface, each of the several purchasers would have the right, without any express words of grant for that purpose, to go upon the surface to open a way by shaft, or drift, or well, to his underlying estate, and to occupy so much of the surface, beyond the limits of his shaft, drift, or well, as might be necessary to operate his estate, and to remove the product thereof. This is a right to be exercised with due regard to the owner of the surface, and its exercise will be restrained within proper limits by a court of equity, if this becomes necessary; but, subject to this limitation, it is a right growing out of the contract of sale, the position of the stratum sold, and the impossibility of reaching it in any other manner.

to surface support as a corollary to the latter. Different parties may own different estates in the same parcel of land. Separate mineral estates may be owned in fee simple subject to the burden of surface support in absence of an express waiver, and accordingly deeds conveying fee simple title to minerals operate as "sales of coal in place." In the latter a fee simple estate in coal is conveyed vesting title in a grantee before extraction of the coal from the earth. The grantee also has mining privileges until the coal is exhausted. Instruments conveying this type of interest are generally interpreted as an absolute conveyance and must meet the procedural formalities attendant to execution and recordation of deeds. Apart from sales of coal in place, it is axiomatic that coal interests may be conveyed in leases.

Coal leases are distinguishable from surface leases and even oil and gas leases. They are hybrid creatures, partly due to the nature of being outright conveyances of real property interests, contracts and true leases creating landlord-tenant relationships. Generally speaking, the interests granted in a "true lease" of coal are conveyed on the condition that the vendee extract the coal within a specified time, not necessarily until exhaustion. Furthermore, these interests are conveyed in such a manner that title to the minerals vests only after severance.

Over time, certain characteristics have become common to the modern coal lease. Its main function is to provide a means whereby the coal owner may sell the coal in place on a deferred
purchase money basis. The price he receives is usually greater than what he would obtain on an outright sale either in gross or by the acre, and usually is paid in the form of a royalty.\textsuperscript{14} As to the lessee, a lease secures him the privilege of marketing coal at a profit.\textsuperscript{15} Nevertheless, while the lessee has the privilege of extracting coal, ownership of the coal seam remains in the lessor.\textsuperscript{16}

In Kentucky an instrument purportedly conveying a lease of coal is often difficult to distinguish from a sale of coal in place. Again, this is because the conveying instruments may often omit or confuse the more conventional terms of sales and leases. Hastily drawn, ambiguous, and confusing instruments as well as contradictory reservations, covenants, and privileges may compel the courts to construe an instrument to be other than what it is designated. The terms, not the designation of an instrument, will determine whether it is a lease or a sale of coal in place.

Because many similarities exist between a lease and a sale of coal, the situation becomes even more confusing. For example, a lease and a sale of coal both give the vendee the exclusive right to mine and take title to the severed coal. Both may also be of the same duration, measured by the productive mining life of the coal seam. Neither a sale nor a lease will vary the amount of time needed to mine a coal seam, given the same rate of extraction. Further, a conveyance may purport to make an absolute sale of coal in place while at the same time reserving in the grantor a different kind of interest in production. Reserving rentals,\textsuperscript{17} royalties,\textsuperscript{18} im-

\textsuperscript{14} A royalty is Compensation for the use of property, usually copyrighted material or natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced. A payment which is made to an author or composer by an assignee, licensee or copyright holder in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent. Royalty is share of product or profit reserved by owner for permitting another to use the property. In its broadest aspect, it is share of profit reserved by owner for permitting another the use of property.\textsuperscript{18} BLACK'S LAW DICTIONARY 1195 (5th ed. 1979).

\textsuperscript{15} With respect to a lease, if market prices for coal are depressed, one does not mine and hence does not pay a production royalty. If prices increase one mines, sells at a profit, and pays the royalty.

\textsuperscript{16} 3 AM. LAW OF MINING § 16.1 (1980).

\textsuperscript{17} The words "rents" and "royalties" as used in coal leases are usually synonymous, and it has been held in numerous cases that a royalty is rent within the meaning of Statutes creating a landlord's lien and remedies for the enforcement thereof, such as distraint of the lessee's personal property located upon the leased premises. However, a coal lease may provide for a royalty, which is a fixed amount of money to be paid by
posing developmental obligations or forfeiture on the grantee may all evidence an active and continuing interest of the grantor in coal production so that the transaction in reality becomes a lease.\(^\text{10}\) Conversely an instrument which is entitled a lease, but which reserves neither royalties nor rentals to the grantor and which is to be effective for a term potentially equivalent to the productive life of the minerals will be denominated a fee conveyance or sale for a fixed or indeterminable period of time.\(^\text{20}\)

Great importance attaches to the characterization of a mineral instrument as a sale or lease even though the mining terms may not be affected. With a sale of coal in place, an action to enforce a lien as to the minerals would manifestly be one of local venue particular to the county where the minerals were located.\(^\text{21}\) If the instrument was deemed a lease, however, an action thereon becomes transitory, so that venue properly lies wherever the defendant can be found. Furthermore, a lease can be lost through non-use or abandonment, for the leasehold is burdened with an implied obligation to diligently mine.\(^\text{22}\) If that same instrument was construed to be a sale of coal in place, the grantee’s interest therein would not be subject to loss through abandonment or non-use.\(^\text{23}\) In a sale, there is no implied obligation to diligently mine.\(^\text{24}\) Although the characterization of a coal transfer by local law does not control the federal tax treatment,\(^\text{25}\) the parties to a transfer should be aware of the tax consequences of their actions. Generally, favorable tax

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the lessee to the lessor for each ton of coal mined or agreed to be mined, and may also contain a provision for a true rental for the use and occupation of the surface or of the underground passageways in connection with the transportation of other coal through the leased premises. In such a case, the two rental covenants are independent and the lessee’s duty to pay the minimum royalty may be discharged under a clause providing therefore, while his duty to pay rent on miners' houses remains unimpaired. 3 AM. LAW OF MINING § 16.56 (1980) (footnotes deleted).

18. See note 14 supra.
23. Duncan v. Mason, 239 Ky. 570, 39 S.W.2d 1006 (1931).
24. There is no obligation to diligently mine, although there may be some such implication in fact where the grantee's interest is created under circumstances that suggest developmental motivations in the transaction. Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co., 148 Ky. 82, 146 S.W. 438 (1912).
25. Burnet v. Harmel, 287 U.S. 103, 110 (1932); Bankers Pocahontas Coal Co. v. Burnet, 287 U.S. 308, 310-11; G.C.M. 22730, 1941-1 C.B. 214 (to provide a uniform scheme of taxation such a policy is necessary. Economic consequences to the transferor being the same, a distinction on the basis of when legal title passes under local law is unnecessary).
treatment is available to both the lessor and lessee of coal if structured to meet certain requirements. Finally, a vendee is deemed to be the taxpayer for ad valorem property tax purposes, while a leaseholder would not be so obligated.

It becomes evident that there are distinct advantages associated with a sale of coal: local venue, no loss through abandonment, no implied obligation to diligently mine, and favorable tax considerations. By allowing leases to be construed as sales in heavy coal mining states, the effect is to place such advantages with the miner rather than the land owner. To the contrary, those lighter mining states which will not recognize a lease to be a sale deny the miner these advantages.

II. TERMS TRANSFORMING LEASES INTO SALES OF COAL IN PLACE

While some jurisdictions refuse to imply absolute title in an instrument denominated as a lease, leases in Kentucky can and have readily been construed as sales of coal in place. Kentucky, like Pennsylvania and West Virginia, follows the Pennsylvania rule which states that a lease of coal in place with the right to mine and remove all of it for a stipulated royalty vests a fee in the lessee. While not specifically referring to the rule, judicial constructions in Kentucky have analyzed lease terms according to the factors considered by Pennsylvania courts.

The early Kentucky case of Kennedy v. Hicks illustrates this approach. In Kennedy, a lease to mine coal for a term of 99 years was bought by the vendee, Kennedy, for $200 cash in hand with $300 to be paid within six months after any party began quarrying,
mining, or drilling for minerals, oils, or other minerals. An action was filed by Hicks, the vendor, against Kennedy and the Stephen-son Stone Company, Kennedy's assignee, for the unpaid $300. Since venue determination revolves around the type of conveyance granted, the court in Kennedy needed to ascertain whether the conveyance from Hicks to Kennedy was a sale or a lease. The court thus established two criteria to be met for a sale to occur. First, the consideration paid to the grantor must not be dependent on the quality and quantity of the coal removed. Second, the grantee must be vested with the right to mine until all the coal in a specified tract is removed. The court further noted that "whether a lease such as the instant one is merely a lease of the land with the privilege of removing the minerals during a certain period or is in reality a sale of the land, is a question which is determined by the facts of each individual case and the laws of the particular jurisdiction." It was ultimately determined that the facts in Kennedy satisfied the conditions for the creation of a sale. The consideration

30. This lease was made this 20th day of October, 1903, by and between Joe Hicks and Rosie Hicks, his wife, of Hardin county, Kentucky, parties of the first part, and Will C. Kennedy of the county of Jefferson and state of Kentucky, party of the second part, witnesseth: That the parties of the first part in consideration of the stipulations and covenants thereinafter contained on the part of the said party of the second part, to be kept and performed has leased, demised and let unto the party of the second part, his heirs, executors, administrators and assigns for the sole, and only purpose of quarrying, drilling and digging for minerals and oils of any kind, the exclusive right to all that certain tract of land situated near Stephensburg in Hardin county, Kentucky, and bounded and described as follows: [Two tracts containing 125 and 3 acres, respectively.]

Said second party to have and to hold said premises for said purposes only for the term of 99 years from this date. In the consideration of said lease, the said second party hereby pays to the first party the sum of $200.00 cash in hand, the receipt is here acknowledged, and agrees and binds himself to pay said first party the further sum of $300.00 within six months after any party, company or corporation begins quarrying, mining or drilling for minerals, oils or other things in the neighborhood of said first party, said party of the first part to fully use and enjoy the said land for farming purposes except such part as shall be necessary for the purpose of drilling, quarrying, etc., and a right of way to and from place or places of operation. Said second party shall have the right to move or place all necessary buildings and machinery and to lay tracks on said land to assist in moving stones, etc. The unpaid $300 is payable at any time second party sees fit to begin work on said land to remove stone and said second party is to have the right to remove all machinery, buildings, etc., placed on said land by said second party.

Given under our hands the day and date above written.
Kennedy v. Hicks at 563, 203 S.W. at 319.
31. Id. at 564, 203 S.W. at 320.
32. Id.
33. Id.
paid by the grantee was not dependent on the quantity of minerals produced or whether any minerals at all were severed,\textsuperscript{34} and thus the first condition was fulfilled. The court further noted that “part of the consideration was paid in cash, the balance payable upon the happening of a contingency other than the removal of minerals and regardless of whether the minerals were ever removed; and there are no provisions for further payments of any kind either as rent or royalties.”\textsuperscript{35} Therefore, the consideration was such as to fix its character as a conveyance of real estate, a sale of the coal in place. The second condition was met in that the term of the lease was for 99 years, more than enough time for all the coal to be removed. In support of this, the court cited an earlier Pennsylvania case where a lease, almost identical in terms, was held to pass title to the minerals. In reaching its conclusion, the Kentucky court noted, “In that case the term was but 10 years . . . . In the lease before us the term is 99 years . . . .”\textsuperscript{36} Therefore, while the instrument in \textit{Kennedy} was labeled a lease, its satisfaction of the two conditions described above operated to vest a fee simple title to the coal in the grantee.

Subsequent Kentucky cases\textsuperscript{37} adhere to \textit{Kennedy} thus requiring fulfillment of these two conditions before a conversion of a lease into a sale of coal will be found. Some hypothetical situations help explain and expand the Kentucky court’s reasoning on its construction of a sale from a termed lease. The following are constructed situations which may occur by a lease of coal and the results which stem from them. A leases a seam of coal to B for $5,000 cash in hand plus 11\textcent per ton. This will satisfy the first condition demanded by \textit{Kennedy}, because the $5,000 cash is given up front and therefore independent of the amount or type of coal to be removed. The fact that an 11\textcent per ton royalty follows will not negate this from being a sale of coal in place. An advance recoupable royalty\textsuperscript{38} will also meet this requirement. In such an instance, A pays B $5,000 up front on the condition that A has a right to keep $5,000 on the first ton mined. The second condition in \textit{Kennedy}

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} See Bentley v. Pittsburgh Consolidation Coal Co., 311 S.W.2d 540 (Ky. 1958); Johnson v. Pittsburgh Consolidation Coal Co., 311 S.W.2d 537 (Ky. 1958).
\textsuperscript{38} An advance recoupable royalty is consideration paid prior to mining which is recoupable upon mining.
requires that all coal be mined. Where there are no restrictions on the time in which one can mine the coal, no problem arises. However, where such a time restriction does appear in the agreement, fulfillment of the condition depends on whether the time is reasonably sufficient to mine all the coal conveyed. The amount of time and coal must be measured. Hence, where A conveys to B for ten years a tract of land with an extremely large number of coal seams, there may not be enough time to mine all the coal. Where A conveys to B for ten years a tract with one small seam, there might be sufficient time.

Any analysis of Kentucky's use of the Pennsylvania rule necessitates use of the benchmark case, Smith v. Glen Alden Coal Co., 39 wherein the rule was originally stated. Smith held that a lease conveying coal in place for a stipulated royalty of $2,512.50 and "until such time as all the available and merchantable coal shall have been mined and removed" constituted a sale. 40 Smith reached the same result as did the earlier Kentucky case, Kennedy, the only difference being that Smith applied the concise Pennsylvania rule while Kennedy applied the rule in the form of a "two conditions" test. The first condition in Kennedy that the consideration "not be dependent on the quality, and quantity of coal removed" parallels and defines the Pennsylvania rule's demand for a "stipulated royalty." The second condition that the "lessee be vested with the right to mine until all the coal in the specified tract is removed" comports with the Pennsylvania rule's language, "with the right to mine and remove all of it." Under either the Pennsylvania rule or Kentucky reasoning, the effect will be identical given the same circumstances.

The Pennsylvania court stated as a corollary that with a sale of coal, no interest in the coal as real property remains in the vendor. The vendor's only interest becomes personal property, properly termed a possibility of reverter. 41 This is not a present or future estate but rather a possibility of having a future estate in that coal. 42

The courts' construction of a sale in both Kentucky and Pennsylvania evolved under different structured but equal criteria

40. Id. at 232.
reaching the same conclusion. In both states, the vendors ultimately lost the advantage of any estate in the coal to the vendees, even though they could still retain ownership in other distinct portions of the land, namely the surface and right to surface support. When both vendors conveyed the mineral estates, their interests in those minerals ceased to be real estate. They became a chose in action, a personal demand for the consideration. Legal title could only be held as a security for the payment of the consideration owed to the vendors. The vendees in each case became, in substance, the real owners of the estates.

The value of this “lease into a sale” parallel between Kentucky and Pennsylvania becomes even more important since the Pennsylvania courts did not terminate their analytical progression in this field with the Pennsylvania rule. A sharper construction of the subject came in *Hummel v. McFadden* where certain elements were stated to further define and extend the rule. These elements gave the courts a more useful definition with which to work and solidified a test for determining whether a conveyance was a lease or sale. These elements are: (1) the right must be exclusive in the vendee; (2) the vendee must have the right to mine all the coal; and (3) the vendee must have paid either a stipulated consideration or have been compelled to mine.

The utility of this more clearly delineated test is that it applies in Kentucky, since Kentucky’s decisions equate to the Pennsylvania rule. To illustrate, let us apply the *Hummel* test to the facts in the Kentucky case, *Johnson v. Pittsburgh Consolidation Coal Company*. In *Johnson* the grantor conveyed mineral rights to Broas who in turn conveyed to Pittsburgh Consolidation Coal Company. The grantor also conveyed the surface rights to Johnson who contended that Pittsburgh Consolidation merely had a license which he (Johnson) sought to revoke. The original mineral instrument to Broas read as follows:

> Witnesseth, That the said parties of the first part, in consideration of one hundred and twelve 30/100 ($112.30) dollars in hand paid, as a bonus, the receipt of which is hereby acknowledged, do hereby lease, grant, convey and confirm unto said Richard M. Broas his heirs or assigns, for the term and period of nine hundred and ninety

45. 311 S.W.2d 537 (Ky. 1958).
nine years from and next after the date hereof, all the coal, on or under the following tract of land, on the waters of Owl Branch of Shelby Creek, in Pike County, Kentucky, comprising 112.3 acres, more or less, and described as follows, viz.: (description omitted) ***

The conditions of this lease are as follows: At any time during its term said Broas, his heirs or assigns, shall have access to coal, with right to mine, use or remove same; use of surface when necessary for mining purposes or utilizing products of mine, right of way for roads or railroads; use of water, stone, necessary for mining or coking operations, it being expressly understood and agreed that this lease confers no ownership to the fee of premises leased, and that parties of first part retains title to the surface; with full right to dispose of standing timber at discretion; and the privilege to mine and use coal for their own domestic purposes. As rental and for use and enjoyment of lease, and the rights of same herein granted and conveyed, the said Broas, his heirs or assigns, shall pay to parties of first part, heirs or assigns, the sums of two dollars per acre, such rent to become due and be payable on each acre when and as the same is mined, and the said parties of first part covenants to and with party of second part, his heirs or assigns, that he or they shall and may peaceably and quietly have hold and enjoy all rights and privileges hereby granted, for and during the term aforesaid, without interruption or molestation of said parties of first part, or any person whomsoever; and hereby do warrant, generally and will defend the term and all rights and privileges granted by this lease to said Richard M. Broas, his heirs or assigns. 46

Applying the test set forth in *Hummel v. McFadden* to this lease, the conveyance becomes a sale of coal in place. Specifically, the first element of the test is met by the grantor's giving an exclusive right to mine to "Broas, his heirs or assigns," without interruption or molestation. 47 The second element was met in that a right to mine all the coal was given "for the term and period of nine hundred and ninety nine years from and next after the date hereof, all the coal." 48 Finally, the third element was met, for a stated consideration, called a bonus, was paid up front: "in consideration of one hundred and twelve . . . dollars in hand paid, as a bonus . . . ." 49

Because the court's reasoning in *Johnson* follows the analysis in *Hummel*, one can only conclude that Kentucky likewise has

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46. *Id.* at 538.
47. *Id.*
48. *Id.*
49. *Id.*
adopted the test pronounced in *Hummel* in addition to the Pennsylvania rule. In *Johnson*, the court stated that the word "lease" in the phrase "do hereby lease, grant, convey and confirm unto said Richard M. Broas his heirs and assigns" lost its specific meaning because words of enlargement which followed thereby constituting a conveyance of the coal in fee. This confirms two things: The Kentucky court reached the same result as did *Hummel* finding a sale of the coal in place; and second, that the conveyance granted an exclusive right to the coal in the vendee, satisfying the first element of the *Hummel* test. The fact that the court interpreted the conveyance to be for the removal of all the coal satisfied the second element of the test, "the rental is to be paid whenever within 999 years, use of the premises becomes necessary for removal of the coal." The court stated that when the entire instrument was considered, a manifest intention by the parties was shown to give Broas (the vendee) fee title to the coal for $1 per acre. "This interpretation of the instrument is supported by evidence which established $1 per acre as a reasonable consideration for the fee to coal in the area at the time the Broas writing was executed." The third element of the test is thus satisfied: There being 112.30 acres, which at $1 per acre equals $112.30, money paid in advance.

As a further aid in determining whether the elements of the *Hummel* test are met, there are a number of factors which courts can consider. First and foremost is the intention of the parties. This centers around the type of language used in the conveying instrument. Attention should be called to key words such as "lease," "forever," and "conveyance," but they are never conclusive. For example, in the case of *Scott v. Laws* there was argument over the meaning of the word "privilege" as used in the granting clause. While on its face it would appear to connote a lease being dependent on the permissibility of the vendor, the court interpreted the language to convey a sale of the coal in place, based on the overall intent of the parties deduced from the instru-

50. Id.
51. Id.
52. Id. at 539.
53. Id.
54. In *Johnson v. Pittsburgh Consolidation Coal Co.*, 311 S.W.2d 537 (Ky. 1958), the court found the word "lease" in the phrase "do hereby lease, grant, convey, and confirm" lost its meaning due to the words of enlargement which followed. Id. at 538.
55. 185 Ky. 440, 215 S.W. 81 (1919).
56. Id. at 81-82.
LEASE VERSUS A SALE

ment. Secondly, duration of the lease, although never determinative, is a formidable factor. Words such as “until all the coal is removed” are indicative of a sale of the coal. If the instrument conveys only for a term of years, the fewer the years, the more it begins to resemble a lease. Phrasing such as “if all the coal is removed or ten years, whichever first occurs” will probably be construed as a lease. Finally, one must cast an eye toward the consideration given which usually appears in the form of a royalty. Consideration focuses upon two issues, the terms of payment and what constitutes an acceptable minimal consideration. In response to the first question, it was noted in Johnson that money up front or in advance will suffice as consideration. However, with regard to when consideration is given, does the Hummel test for a sale require that the consideration always be in advance of mining? The answer is no, Hummel only requires that there be a stipulated consideration, one which, for example, could be paid every year. A tonnage or percentage royalty, without more, would resemble a lease. Advance recoupable royalties could indicate either a lease or a sale, but if a sufficient amount of the royalty is not recoupable, the transaction will probably be considered a sale. In addressing the question of what constitutes an acceptable consideration, a minimum royalty is regarded as rent, with the right to come on the land and take out the coal. Further, for a minimal royalty to suffice as consideration constituting a sale, it must be a “reasonable substantial minimal royalty,” i.e., one sufficient to insure that the estate granted cannot be lost through abandonment or forfeiture. As a general rule of thumb, if the royalty as consideration is not recoupable, it should be at least ten percent of the amount the lessor could expect to receive given the time and conditions of the granting instrument. If it is recoupable, the amount paid would need to be closer to the amount which would actually be received if the described conveyance was diligently mined, an actual production royalty. Observe that in Shoni Uranium Corp. v. Federal Radorock Gas Hills Partners, the court found that a twenty percent recoupable was not substantial. For a royalty to be admissible

57. In Johnson v. Pittsburgh Consolidation Coal Co., 311 S.W.2d 537 (Ky. 1958), a grant of “all the coal” was determined to constitute a sale of coal. Note this construction of the phrase parallels and satisfies the second element of the Hummel test.
59. Id.
60. 407 P.2d 710 (Wyo. 1966).
as consideration, it must be considered substantial as required by the express terms of the conveying instrument. Thus, it cannot be a voluntary payment by the vendee. Accordingly, if not expressed in the lease, then there is a presumption that the lessor did not convey the minerals intending for the lessee to hold it for speculation, but rather desired complete and expeditious development of the mining property.61

DRAFTING SUGGESTIONS

In light of the foregoing principles operative in this area, several rules can be extracted to aid the drafter in producing an instrument precisely fulfilling his intention. For example, one desiring to be a lessee and not an owner of coal should at the very least do three things. First, avoid binding himself to either mine all the coal or to pay for it if unmined; second, avoid limiting the duration of the lease for a term of years or until all merchantable coal is mined, whichever event first occurs; and last, include a surrender clause allowing the lessee to terminate the lease at his option.62 For a sale of coal in place, the agreement needs to meet the requirements of the Hummel test. Further, the vendor will not want a miner to damage the remaining unsold coal in such manner that it could no longer be mined by the vendor or a subsequent vendee. This is known as the “Lost Coal Concept.”63 Therefore, an improvising lessor will include a provision in a lease for payment involving any such coal which is lost or damaged. The inclusion of this type of clause more strongly militates for a conclusion that the instrument is a lease.

Under the Statute of Frauds,64 oral conveyances can never grant

62. 3 Am. LAW OF MINING § 16.4 (1980).
63. Under the “Lost Coal Concept,” an owner would not want the vendee to damage any of his coal so it could not be mined. Therefore, a provision is usually included providing for payment of such damaged or lost coal which is improperly left.
64. KY. REV. STAT. § 371.010 (1970).

**Statute of frauds—Contracts to be written.—**No action shall be brought to charge any person:

(6) Upon any contract for the sale of real estate, or any lease thereof for longer than one (1) year.

The Statute of Frauds is supplemented by KY. REV. STAT. § 382.010 (1970).

“Estate—Owner may convey—when deed or will necessary.—The owner may convey any interest in real property not in the adverse possession of another; but no estate of inheritance or freehold, or for a term of more than one (1) year, in real property shall be conveyed, except by deed or will.”
more than a license even though meeting the requirements of a lease or sale of coal in place. A licensee has the privilege of going onto the land, exploring for coal, and removing it. When coal is located, the license becomes irrevocable as to the found coal. If the privilege to go on someone else's land and remove minerals has not been exercised and no money has been spent, the license remains revocable.

CONCLUSION

Under the Pennsylvania rule and its counterpart, the *Hummel* test, there is a sale of coal in place when the vendor grants an exclusive right in writing to mine all the coal and obligates the vendee to mine and pay for all of it. This will occur even though the parties denominate the instrument as a lease and the consideration as rent. In contrast, if the vendor leases a tract of coal for mining purposes during a specified period and merely obligates the lessee to pay a tonnage royalty for coal actually mined or improperly left in the working, a true lease results.

Because of the miner orientation of the heavy mining states, judicial construction of a sale from what may have originally been termed a lease may occur. The Pennsylvania Rule and *Hummel* test contain in concise form the criteria necessary for this transition to occur. However, what these criteria essentially do are establish the basic elements of what constitutes a sale of coal in place. It thus follows that a lease which meets those elements is in reality always a sale but originally improperly termed. This is contrary to the light coal mining states where a lease, even though meeting these criteria, still remains a lease. Nevertheless in Kentucky and other jurisdictions a lease has and readily will be construed to be

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65. In Quality Excelsior Coal Co. v. Reeves, 206 Ark. 713, 177 S.W.2d 728 (1944), the lessee was given the exclusive right to mine all the coal with consideration paid in advance thereby satisfying the Pennsylvania rule and *Hummel* test; yet the Arkansas court refused to treat the lease as anything but a lease.

66. Kennedy v. Hicks, 180 Ky. 562, 203 S.W. 318 (1918); In Banker Pocahontas Coal Co. v. Central Pocahontas Coal Co., 113 W. Va. 1, 166 S.E. 491 (1932), the West Virginia court approved the Pennsylvania rule holding that when the owner of the coal grants the exclusive right to mine all the coal and obligates the "lessee" to mine and to pay for all the coal, there is a sale of coal in place although the parties may denominate the instrument a lease and the payment a rental. However, if the owner of the coal demises the tract for mining purposes during a specified period and merely obligates the lessee to pay a tonnage royalty for the coal actually mined or improperly left in the workings, it is a true lease.
a sale of coal in place giving a miner the aforementioned advantages in venue, mining, and tax considerations.

Mark G. Kalpakis
NOTES

FAIR LABOR STANDARDS ACT — RETALIATION PROVISION — FRCP 52

THE FACTS

The Secretary of Labor brought an action pursuant to section 17 of the Fair Labor Standards Act (FLSA) of 1938 seeking to enjoin the defendants from violating section 15(a)(3) of the Act.1 Canada Dry was charged with wrongfully discharging Charles L. Smith from its employ, because he filed a civil action against his employer for overtime compensation2 pursuant to section 16 of the Act.3

Charles L. Smith was employed by Canada Dry Bottling Company of Nashville as its sales manager. On August 4, 1975, Mr. Smith filed suit against his employer and its owners, Robert and Roy Greene, for overtime compensation due him under the Fair Labor Standards Act. Smith had conferred with his attorney, Mr. Coomer, about his overtime problem on or around the first of July 1975. He informed his attorney that he was working approximately sixty-five (65) hours per week but was being paid for only forty (40) hours. Coomer informed Smith that he appeared to have a claim under the Act. Smith then advised Coomer that he intended to meet with his employer in an attempt to settle the dispute, but that if he could not, he “fully intended to file a wage and hour action.”4

On Monday, July 28, 1975, Smith met with Robert Greene. The

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   Any employer who violates the provisions . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, or in an additional equal amount as liquidated damages.
facts of the conversation that took place were disputed. According to the employer, Smith complained that he was working too many hours and stated that he was "turning in his two weeks notice." Smith, on the other hand, stated that he did indeed complain about the hours and the lack of overtime compensation, but informed Mr. Greene that unless something was done, he was "going to do it [him]self." In any event, Smith gave the go-ahead for Coomer to file the wage action.

On August 7, one day before the expiration of the alleged notice of July 28th, Smith and Greene had another meeting initiated this time by Greene, who had learned of the suit the night before. This conversation, too, was disputed. Smith testified that Greene told him he would have to quit or take a leave of absence; Greene claimed at that time he simply accepted Smith's resignation. Thus, the question arose as to whether Smith was released in violation of section 15(a)(3) of the Act for filing a wage claim or simply was leaving after an acceptance of his two weeks notice.

District Judge L. Cleve Morton of the Middle District of Tennessee held that Smith voluntarily resigned his position and had done so prior to the filing of his suit to collect overtime compensation, and he subsequently dismissed the cause. The United States Court of Appeals for the Sixth Circuit, in a per curiam decision, held that the district judge's findings of fact could not be held clearly erroneous, and any other intervening factors which may have taken place during the period between the resignation and its effective date were irrelevant. Judge Engel, in a particularly strong dissent, believed that the facts, construed most favorably to the company, showed that Smith was, in fact, discharged because he filed for overtime compensation and that the events which took place during the period between the resignation and its effective date were crucial to the outcome and should not have been ignored.

**FAIR LABOR STANDARDS ACT**

The Fair Labor Standards Act was aimed at the elimination of labor conditions detrimental to the maintenance of a minimum

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5. *Id.* at 51.
6. *Id.* at 16.
7. *Id.* at 77.
9. *Id.* at 713 (Engel, J., dissenting).
standard of living necessary for the health, efficiency, and general
well-being of workers\textsuperscript{10} and the eradication of the burdens on com-
merce caused by substandard labor conditions.\textsuperscript{11} Being a remedial
statute with a humanitarian end, it is entitled to a liberal construc-
tion and must not be interpreted or applied in a narrow, grudging
manner.\textsuperscript{12} This chapter serves both a public and private purpose;
its enforcement provisions are intended to protect workers and
their families, but it is also intended to protect the employers who
comply with its terms.\textsuperscript{13} Perhaps the legislative history paints the
clearest picture:

The act was a response to call upon a Nation's conscience, at a time
when the challenge to our democracy was the tens of millions of citi-
zens who were denied the greater part of what the very lowest stan-
dards of the day called the necessities of life; when millions of fami-
lies in the midst of a great depression were trying to live on income
so meager that the pall of family disaster hung over them day by
day; when millions were denied education, recreation, and the oppor-
tunity to better their lot and the lot of their children; when mil-
lions lacked the means to buy the products of farm and factory and
by their poverty denied work and productiveness to many other
millions; and when one-third of the nation was ill-housed, ill-clad,
and ill-nourished.\textsuperscript{14}

Section 216 authorizes any employee covered by the Act to
maintain an action to enforce his rights in any federal court,\textsuperscript{15} pro-
vided that jurisdiction is not hindered by lack of diversity or requi-
site amount. At one time the right to sue for a section 215 violation
was thought to be reserved to the Secretary of Labor. The case of
\textit{Fagot v. Flinkote Company}\textsuperscript{16} addressed this issue and held that
section 215(a)(3) may be enforced by an employee in a civil action
even though the statute at that time did not set forth a private
remedy for its breach. The 1977 amendments cured this over-
sight.\textsuperscript{17} Besides the remedies stated in this section, employees su-

\begin{itemize}
  \item \textsuperscript{10} 29 U.S.C. § 202(9) (1976).
  \item \textsuperscript{11} Fleming v. Warshawsky & Co., 123 F.2d 622, 626 (7th Cir. 1941).
  \item \textsuperscript{12} Accord, Tennessee Coal Iron & R.R. Co. v. Muscoda Local 123, 321 U.S. 590, 597
  \item \textsuperscript{13} Lervill v. Inflight Services, Inc., 379 F. Supp. 690, 696 (N.D. Cal. 1974).
  \item \textsuperscript{14} H. R. Rep. No. 521, 95th Cong., 1st Sess. 2 \textit{reprinted in} [1977] U.S. CODE CONG. & AD.
                  NEWS 3201, 3204.
  \item \textsuperscript{15} 29 U.S.C. § 216(b) (Supp. 1977).
  \item \textsuperscript{16} 305 F. Supp 407 (E.D. La. 1969).
  \item \textsuperscript{17} 1977 Amendment. Subsec. (b), Pub. L. 95-151, § 10(a), (b), added provisions relat-
                  ing to violations of § 215(a)(3) of the title by employers, “(1)” following “section 217
\end{itemize}
ing on behalf of themselves, if victorious, are entitled to reasonable attorney’s fees and costs. The right to sue terminates upon the filing of a complaint by the Secretary of Labor in an action under section 217 in which restraint is sought of any further delay in the payment of unpaid minimum wage or overtime compensation owing to such employees under either section 206 or section 207, or legal or equitable relief sought as a result of alleged violations of section 215(a)(3). The Secretary of Labor’s right to sue is discretionary. Any person convicted of wilfully violating section 216 is subject to a fine of not more than ten thousand dollars or imprisonment of up to six months or both.

**Retaliation Provision — Fair Labor Standards Act**

Section 215(a)(3), under consideration here, was designed to obviate fears of economic retaliation which might operate to induce aggrieved employees to accept poor conditions of employment in violation of the Act. Inasmuch as Congress chose to rely on information and complaints of employees rather than on federal supervision to secure compliance, it is clear that effective information would come forward only if workers felt free to approach enforcing officials without fear of reprisals or discharge.

Courts have time and again used their equity power to provide relief in accordance with the intent and purpose of the Act. In *Mitchell v. Goodyear Rubber Co.*, a store employee wrote to the Wage and Hour Division complaining of his employer’s failure to pay him for overtime work. A few days later the store manager,

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of this title in which”, and 1. (2), and substituted “An action to recover the liability prescribed in either of the preceeding sentences” for “Action to recover such liability.”

19. Injunction Proceedings. The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title.

21. “The Secretary may bring an action in any court of competent jurisdiction.”

22. “No person shall be imprisoned under this section except for an offense committed after the conviction of such person for a prior offense under this subsection.” 29 U.S.C. § 216(a) (1976).
24. Id.
25. 278 F.2d 562 (8th Cir. 1960).
after obtaining an admission from the employee that he had written the letter, fired him. The court noted that the employer did not have any other reason for the firing, and nothing was mentioned in the record about any shortcomings of the employee. The court concluded that the discharge was prompted by the knowledge of the letter and that said discharge was a violation of section 15(a)(3) of the Act.

In *Wirtz v. Ross Packaging Company*, the district court entered a judgment refusing to grant relief on behalf of one employee, and the Secretary appealed. The court of appeals held that the discharge of this particular employee after his refusal to sign a receipt for a retroactive wage payment unless such payment was actually made did violate the retaliation statute; and since the FLSA is unlimited in application, it is not necessary that either the employer or employee be engaged in activities covered by the Act's Wage and Hour provisions in order that strictures against discriminatory discharge may be invoked.

**ANALYSIS OF THE SIXTH CIRCUIT DECISION**

In the instant case, the Sixth Circuit gave no consideration to anything that happened after the initial meeting between Smith and Greene where the alleged two weeks notice was given. Simply stated, the Sixth Circuit categorized this case as a judgment call, one which could not be overturned in the district court findings of fact. Judge Engel's opposing viewpoint, however, is convincing. Engel stated that even if Smith gave two weeks notice on August 28th, he still was wrongfully released in violation of the Act, because Greene had no intention of accepting the alleged notice before knowledge of the suit, and Smith, after thinking about it, had changed his mind about leaving. It can therefore be implied that if Greene had no intention of accepting the notice, as argued by the dissent, and Smith had no intention of leaving, the discharge could only be for the reason of the wage claim, as in *Mitchell*, since no other shortcomings or complaints were made about the employee.

Engel highlighted the particular segment of Greene's testimony which supports this contention and also shows the exchange

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26. 367 F.2d 549 (5th Cir. 1966).
27. Id. at 550-51.

Q. All right, so then its your testimony today that he gave you a two weeks' notice
where Greene "fixed it" so as to allow Smith to collect unemployment compensation after he expressed concern over finances.\textsuperscript{29} Other small but pertinent factors support Engel's argument. The word "dismissed" appears on Smith's wage and computation sheet.\textsuperscript{30} On his termination slip the box marked "laid off" was checked, while the "quit" box was untouched.\textsuperscript{31}

The argument against Engel is that Greene "fixed it" so as to get Smith unemployment, but if we look to the relationship between the two, this argument only supports the dissent's contention. Engel pointed to the first name basis between the two men, "I came to work the next morning and called 'Charlie' in the office . . . .",\textsuperscript{32} as well as Greene's previous good measure in paying Smith his full salary even though he was able to perform limited duty at best due to a back injury. Greene also gave Smith the use of a company car with unlimited gas. Thus, the Judge planted the seed and raised the question why, if Greene was so concerned about Smith's family as to make unemployment available to him, he was let go.

In \textit{Dunlop v. Carriage Carpet},\textsuperscript{33} a former employee of Carriage Carpet, Mr. Bellian, was denied employment with a potential employer, because Carriage had informed the prospective employer of a complaint made by Bellian against them under the Act. The per-

\begin{footnotesize}  
\item[29.] Id. at 713 (Engel, J., dissenting).
\item[30.] Transcript at 69, Marshall v. Canada Dry Bottling Co. of Nashville, Inc., No. 77-1088, (M.D. Tenn. 1977).
\item[31.] Id. at 67.
\item[32.] Marshall v. Canada Dry Bottling Co. of Nashville, Inc., 593 F.2d at 713.
\item[33.] 546 F.2d 139 (6th Cir. 1977).
\end{footnotesize}
sonnel manager of the prospective employer informed Bellian that this "black mark" against his record would affect his chances of getting employment elsewhere. The Sixth Circuit held that a former employee who had been voluntarily separated from his employment, and who filed a complaint with the Department of Labor based on his employer's failure to pay overtime rates, was an "employee" for the purposes of the anti-discrimination provisions of the Act. The former employee was entitled to the protection of the Act when the former employer informed a prospective employer of the fact that the employee had filed a complaint with the Department of Labor.

Smith argued, and Judge Engel agreed, that in the instant case if he had in fact voluntarily left Canada Dry but later had second thoughts and applied for reinstatement, the employer could not under the ruling in Carriage have refused him reinstatement because he had sued under the Act. Smith contended that there is no distinction between rehiring a current employee who has left voluntarily and retaining a current employee who has expressed an intention to leave. Thus, Greene's acceptance of Smith's resignation on the thirteenth day, immediately upon hearing of the lawsuit, was a forbidden discrimination under section 15(a)(3).

A second look at the highlighted testimony brings to light another, and in this author's opinion, a stronger argument for the dissent brought out in Mitchell and in Goldberg v. Bama Manufacturing Corp. Both circuits held that where the immediate cause or motivating factor of a discharge is the employee's assertion of statutory rights, the discharge is discriminatory under section 215(a)(3) whether or not other grounds for discharge exist. In the Mitchell case, as stated above, the Eighth Circuit reversed as clearly erroneous the trial court's finding that an employee's discharge was unrelated to his mailing a letter of complaint to the Wage and Hour Division of the Department of Labor a few days earlier. On the contrary, the record revealed that although a few days before his wage-hour complaint he had been scheduled for future discharge, he would not have been discharged at that particular time but for his admission of authorship of the letter. Similarly, in Goldberg, the Fifth Circuit remanded the trial court's re-

34. 593 F.2d at 714.
35. 278 F.2d 562.
36. 302 F.2d 152 (5th Cir. 1962).
fusal to give lost wages to an employee who "probably ought" to have been fired for half a dozen reasons, where the firing was motivated in part by the assertion of her statutory rights.\textsuperscript{37}

In the instant case, Mr. Smith did not have the opportunity to complete his full two weeks but was asked to leave on the thirteenth day, one day after his employer learned of the wage suit. In light of Mr. Greene's testimony that he did not accept the notice on the day it was allegedly given, could Mr. Smith have been asked to leave for any reason other than filing suit?

The majority did not comment on either interpretation; again, they were content to dispose of this case under the blanket of Rule 52.\textsuperscript{38} Rubberstamping this particular case, with a fact situation not unlike Mitchell, flies right in the face of the very purpose of the Act - to remove the risk of employer retaliation against efforts by employees to secure their just wage desserts under this chapter.\textsuperscript{39}

\textbf{Kevin L. Murphy}

\textsuperscript{37} Id. at 153.
\textsuperscript{38} Fed. R. Civ. P. 52.
\textsuperscript{39} See Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977).
BOOK REVIEW


"If an ice bridge two miles in diameter could be built, spanning the immense distance of 93,000,000 miles from Sun to Earth, and, if by some means, the whole of the Sun’s radiation could be concentrated upon this ice bridge, in one second it would be water and in seven seconds more it would be dissipated into vapour." Gail Boyer Hayes introduces her informative volume, Solar Access Law,1 by quoting this passage. She observes "The power of the sun is awesome. But it can be blocked by something as seemingly fragile as an aspen leaf. If we are to harness solar energy, barriers between the sun and solar collectors must be prevented."2

Some authorities predict that solar technology could satisfy one quarter of the total energy needs of the United States by the year 2000.3 Ms. Hayes notes that whatever the actual figure proves to be, the increasing development of solar technology requires new kinds of laws to assure solar collector owners access to the sun. To function properly, collectors must have direct sunlight. Because the contiguous forty eight states are located in northern latitudes, sunlight strikes our nation at less than a vertical angle. This means that most land can be shaded, to varying degrees and during various times of the day, by vegetation and structures situated upon neighboring lots. Our present legal system does not generally recognize a right of access to direct sunlight when the rays are blocked by otherwise lawful activities on adjacent property.4 If so-

3. Id. at XV.
5. Ms. Hayes notes that in Great Britain, prescriptive easements for light are possible under the common law ancient lights doctrine. Also, an English statute gives property owners a right to continue to receive sunlight in their room if they have been receiving that light for at least twenty-seven years. Hayes, supra note 2, at 182. Rights of Light Act, 1959, 7 & 8 Eliz. 2, c. 56. The contrary is true in the United States. In Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 367, (Dist. Ct. App. 1959), the District Court of Appeal of Florida stated “No American decision has been cited, and independent research has revealed none, in which it has been held that — in the absence of some contractual or statutory obligation — a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor.” Id. at 359. Furthermore, “the English doctrine of ‘an-
lar power is to be utilized, disputes are likely to occur. Solar access laws must be developed at a pace commensurate with solar technology to equitably balance the competing interests of solar energy collection and private land use.

*Solar Access Law* reports the study prepared by Ms. Hayes and the Environmental Law Institute (E.L.I.) for the U.S. Department of Housing and Urban Development. The objective of the study was to evaluate legal strategies which would assure owners of both existing and future solar collectors that they would enjoy "a place in the sun."

Ms. Hayes identifies the basic conflict which solar access laws must address and seek to balance. This is the public need to replace fossil and nuclear fuels with renewable energy sources versus private interests in the traditional right to develop and use property. She enumerates four basic assumptions implicit in the E.L.I. study. First, solar access is needed. Second, it is desirable to provide reasonable solar access for on-site solar energy systems. Third, collector owners can protect themselves from shadows cast by structures and vegetation located on their own property, so access laws should only be concerned with shadows cast across boundary lines. Finally, most communities want to minimize restrictions upon land development.

Chapter two of this volume presents twenty pages which explain some technical requirements of solar collectors and factual aspects of sunlight and shadows. This discussion, which includes numerous helpful drawings and diagrams, is supplemented by an additional thirty pages of appended material. For a solar access law to be efficacious, it must consider many technical aspects of solar technology.

Before discussing the kinds of solar access laws worthy of consideration, the author enumerates several criteria by which to evaluate the soundness of any law. Solar access laws should be carefully and concisely drafted. They should protect appropriate amounts of solar access, and make a clear and fair allocation of costs and benefits. They should be compatible with other policies and laws, give adequate notice, and be reasonably flexible. Solar access laws should provide compensation for cancellation of solar access protection, and protect future access. Such laws should be integrated with land use planning. Of paramount importance, they must com-

cient lights' has been unanimously repudiated in this country." *Id.*
ply with the Due Process and Equal Protection Clauses\textsuperscript{6} of the U.S. Constitution. In the absence of carefully considered and drafted access laws, opponents may assert a lack of public purpose, a taking of property without just compensation, or a violation of equal protection.

Parts two, three and four of Ms. Hayes volume present three broad approaches to applying solar access laws. These are area-wide protection, lot-by-lot protection, and compensatory approaches.

Area-wide protection strategies share several qualities. As the name implies, they are used on an area-wide, rather than an individual basis. These devices protect access to solar energy in advance of actual need, and rely on land use controls which pertain to all similarly situated lots. Finally, most of these strategies require thoughtful land use planning before they can be implemented. Ms. Hayes expounds upon three forms of area-wide protection, specifically zoning, solar envelopes and neighborhood scale protection.

Zoning offers several advantages. It has a long history of use and judicial acceptance as a land use tool. It already regulates many aspects of property development which affect solar access, such as maximum height of structures and set back requirements. Despite these advantages, zoning has one major drawback. Because zoning ordinances are frequently and easily changed, and because law does not recognize any vested interest of property owners in existing or prospective zoning regulations, owners of solar collectors may not be willing to rely solely on zoning.

Solar envelopes, another area-wide protection strategy, are described by illustration and text. These are defined as "zoning height limitations that are established with the changing daily and seasonal positions of the sun in mind, and that may vary over different parts of a lot."\textsuperscript{7} Solar envelopes apply to both structures and vegetation, and may be implemented through the use of overlay zones. While traditional zoning regulations define a box shape envelope within which development is permitted, a solar envelope may tailor the top of this box to consist of one or more planes which slope at various angles. The dimensions of a solar envelope

\textsuperscript{6} U.S. \textit{Constr.} amend. XIV.

\textsuperscript{7} Hayes, \textit{supra} note 2, at 91. The author notes that cities with no zoning, such as Houston, Texas, might be able to modify the height regulations of building codes to reach the same results afforded by solar envelopes. \textit{Id.} n. 1.
can vary to accommodate the particular size, shape and orientation of individual lots. An overlay zone map is required to ensure the most effective use of solar envelopes. Such a map must consider local features, including location and density of structures and vegetation, and orientation of streets. Solar envelopes are flexible in design, and require the fewest possible restrictions on private land use consistent with the preservation of future solar access. Ms. Hayes opines "In spite of the considerable data gathering and other efforts that must go into their design, solar envelopes appear to be the best presently available legal device for protecting solar access for entire cities or neighborhoods."

Part three explores some lot-by-lot approaches to solar access protection. These tools protect solar access only when it is immediately required on a particular lot. Parcels which do not require or impact upon solar access may develop as usual. The main advantage of lot-by-lot protection is its tailor-made quality. Offsetting disadvantages include lack of protection for future access, failure of integration with rational land use planning, and potential misallocation of benefit and burden created by an approach which rewards the first person to develop.

Four types of lot-by-lot approaches are discussed. First, building permits might be used. E.L.I. does not favor this method because permits do not regulate vegetation, nor are they integrated with other land use plans. Second, solar collectors could be recorded in public records to assure a specified amount of solar access. Third, common law approaches, such as nuisance, trespass and prescriptive easements, have been considered by early researchers of solar access. Finally, there are approaches based upon accident of time. Ms. Hayes believes the concept of prior appropriation, analogous to Western water law, would be a "poor way to protect solar access." A first-come, first-served, system raises constitutional issues of due process and equal protection, and does not provide for future solar access.

Up to this point, Ms. Hayes has discussed approaches to solar access which rely on the police power, and which do not include

8. Id. at 96.
9. Id. at 192. The doctrine of prior appropriation in Western U.S. water law is well established. In Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882), the Supreme Court of Colorado held that "in the absence of express statutes to the contrary, the first appropriator of water from a natural stream has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation." Id. at 447.
compensation to owners of burdened property. Part four of the volume suggests approaches which afford such compensation, either from private collector owners or public coffers.

Private agreements could supplement solar access protection laws. Such arrangements could include real convenants, equitable servitudes or easements. Because private cooperation is necessarily voluntary, Ms. Hayes concludes "private arrangements offer only a partial solution and are not a substitute for public solar access laws." A sovereign might invoke its power of eminent domain to acquire property for solar energy collection. However, due to high costs, lengthy condemnatory procedures and possible lack of public purpose, sparing use should be made of eminent domain as a solar access protection device. A final compensatory approach is that of transferable development rights (T.D.R.). This newer property concept distinguishes between the right to own and the right to develop. It allows part or all of the right to develop to be sold and transferred to other property. The measure of transferable rights is the development unused but authorized by current zoning. In a solar access context, T.D.R. might be useful where there is no present shading, but where harmful shading would occur if structures were erected to zoned limits.

While proponents of solar access law must consider the substantive legal methods discussed above, they should also attend to the tactical aspect of implementation. Who will make the policy decisions that form the law? Who will implement various parts of the law? Who will make enforcement decisions?

As a result of their analyses, Ms. Hayes and E.L.I. form eight major conclusions. 1) There is no single solar access law which is ideal for all areas. 2) Solar access protection should be part of overall plans to guide land use and conserve energy. 3) Because of variations in latitude, climate, architecture, population density, and economic and social factors, solar access protection can generally be best provided at the local level. 4) Localities can play a positive role even in the absence of state legislation. 5) Solar access laws are most likely to withstand objections on such constitutional grounds as due process and equal protection if there are legislative findings of necessity, if solar access protection is made part of comprehensive land use plans, and if courts perceive solar power as an important partial solution to the energy crisis. 6) Poorly written

10. Id. at 200.
solar access laws could have adverse effects upon development patterns, property values and public attitudes toward solar energy. 7) Approaches based upon comparative time of development (i.e., first-come, first-served) are less equitable and more vulnerable to attack on constitutional grounds than are controls based upon zoning and comprehensive planning. 8) Sweeping laws should not be adopted until localities gather empirical data to support their choice of solar access law.

Reading Solar Access Law is both edifying and enjoyable. Using both text and illustration, Ms. Hayes clearly describes the nature of solar technology and the scope of the solar access problem. She just as deftly prescribes the kinds of methods which individuals and governments can employ to preserve solar access. This volume is thoroughly footnoted, helpfully illustrated and supplemented by three pages of bibliography. Solar Access Law is a valuable source of information for environmental and property lawyers, urban planners, and other citizens interested in this increasingly important topic.

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