ARTICLES

SECTION 1985(3) EMPLOYMENT DISCRIMINATION CONSPIRACIES AFTER THE NOVOTNY DECISION ........................................ 1
Steven C. Schwab

KENTUCKY CRIMINAL LIBEL LAW AND PUBLIC OFFICIALS—AN HISTORICAL ANACHRONISM? .......................... 37
David A. Elder

WHAT YOU THINK YOU KNOW (BUT PROBABLY DON’T) ABOUT THE FEDERAL RULES OF EVIDENCE: A LITTLE KNOWLEDGE CAN BE A DANGEROUS THING ........................................ 81
William O. Bertelsman

Patrick Charles McGinley and Joshua Barrett

COMMENTS

THE CORPORATE OPPORTUNITY DOCTRINE IN THE CONTEXT OF PARENT-SUBSIDIARY RELATIONS .......................... 121
Karen McLaughlin

DEUTSCH v. SHEIN: OLD AND NEW ATTITUDES IN KENTUCKY NEGLIGENCE LAW .......................... 131
Sherry B. Holstein

THE LEGAL CONSEQUENCES OF A DELIBERATE AIR TRAFFIC CONTROLLER SLOWDOWN .......................... 155
Gregory L. Karam

NOTES


BOOK REVIEW

INTRODUCTION

The most comprehensive federal legislation securing equal employment opportunity is Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, sex, color, religion or national origin. The prohibitions of Title VII extend to private and public sector employers, labor organizations, employment agencies and apprenticeship programs. Not until 1979, in Great American Federal Savings and Loan Association v. Novotny did the Supreme Court define the relationship between Title VII and 42 U.S.C. § 1985(3), a civil conspiracy statute surviving from the Reconstruction period, which provides in part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws... the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. In Novotny the Court ruled that, in light of the legislative history of Title VII, conspiracies to interfere with rights created by Title VII are not actionable under section 1985(3). After Novotny a fundamental question remains in the law of employment discrimination: assuming that the coverage of section 1985(3) is not limited to conspiracies to deny constitutional rights, an issue which the Supreme

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3. Section 701(d) and (e) of Title VII, 42 U.S.C. 2000e(d) and (e) (1976).

4. Section 701(c) of Title VII, 42 U.S.C. § 2000e(c) (1976).


7. Id. at 378.
Court has yet to address, to what extent does the rationale of *Novotny* apply to conspiracies to deny rights secured by federal equal employment opportunity legislation other than Title VII?

The answer to this question may have far-reaching implications. For example, if conspiracies to deny rights secured by the Age Discrimination in Employment Act of 1967* (ADEA) are actionable under section 1985(3), the integrity of the enforcement procedures which the act contemplates and the statutory limitation of damages available under the ADEA could be circumvented by a plaintiff who chooses to plead a conspiracy to deny rights secured by the ADEA rather than to proceed under the act itself. This would happen because no such procedures or limitations attach to a section 1985(3) cause of action. A similar problem would arise under the Equal Pay Act (EPA) enacted in 1963. However, if relief for conspiracies to deny rights secured by such legislation is not available under section 1985(3), the conspiracy victim is without a remedy *against the conspiracy and the conspirators qua conspirators* despite the fact that section 1985(3) on its face purports to afford him a remedy. Under the ADEA and the EPA such a situation would enable an individual conspirator to escape civil liability for his participation in the conspiracy as long as he himself does not fall within the statutory definition of defendants (e.g., "employers," "labor organizations," *etc.*). This article will examine the extent to which logic of *Novotny* requires a similar result with respect to employment discrimination conspiracies to deny rights secured by the fourteenth amendment and by major federal equal employment opportunity legislation other than Title VII: the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, the Vocational Rehabilitation Act of 1973 (VRA)* and 42 U.S.C. § 1981.

To a large extent the scope of this article presupposes that section 1985(3) encompasses both conspiracies to deny constitutional rights and conspiracies to deny statutory rights. In recent years the Supreme Court has interpreted section 1985(3) in only *Novotny* and *Griffin v. Breckenridge.* In neither decision did the Court discuss what, if any, conspiracies to deny federal statutory rights might be actionable under section 1985(3). The concurring opinions of Justices Powell* and Stevens* and the dissenting opinion of Justice

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11. 403 U.S. 88 (1971)(hereinafter referred to in text as *Griffin*).
12. 442 U.S. at 378.
13. Id. at 381.
White in Novotny do discuss this question and its resolution is crucial to the problems which this article addresses. For, if no conspiracies to violate federal statutory rights may be pleaded under section 1985(3), then a fortiori no conspiracies to violate federal statutory rights to equal employment opportunity may be pleaded under the statute.

After identifying the major federal legislation, other than Title VII, which prohibits employment discrimination, this article will discuss the history of the Supreme Court’s interpretation of section 1985(3) and the significance of the Court’s decision in Griffin that at least some private conspiracies are within the coverage of section 1985(3). It will then discuss the Novotny decision and the issue which it leaves undecided: whether conspiracies to deny statutory rights are ever actionable under section 1985(3). It will conclude that conspiracies to deny statutory rights are within section 1985(3). Then, the article will examine the effect of the rationale of Novotny on conspiracies to deny rights created by the ADEA, the EPA, and VRA, 42 U.S.C. § 1981 and the fourteenth amendment. It will conclude that the logic of Novotny prohibits the recognition under section 1985(3) of conspiracies to deny rights secured by the ADEA and the EPA, but that it does not prohibit the recognition under section 1985(3) of conspiracies to deny rights created by the VRA, section 1981 or the fourteenth amendment.

MAJOR FEDERAL EQUAL EMPLOYMENT OPPORTUNITY LEGISLATION OTHER THAN TITLE VII

To a limited extent employment discrimination prohibited by Title VII is also actionable under two important civil rights statutes which survive from the Reconstruction era: 42 U.S.C. § 1981 and 42 U.S.C. § 1983. Discrimination on the basis of race and alienage in the formation and execution of contracts is prohibited by section 1981,16 a statute which was originally enacted as part of the Civil Rights Act of 1866,17 and which was reenacted as part of

14. Id. at 385.
15. 403 U.S. at 102.
All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
17. Act of April 9, 1866, ch. 31 § 1, 14 Stat. 27.
the Enforcement Act of 1870. Section 1981 applies to private persons (employers as well as non-employers) and to state and local governments, but does not apply to the federal government. Section 1983, like section 1985(3), a descendant of the Civil Rights Act of 1871, creates a civil cause of action against any person who, under color of state law "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws." Since section 1981 forbids both private discrimination and discrimination under color of state law, section 1981 and section 1983 overlap insofar as both statutes create a cause of action for discrimination under color of state law, on the basis of race and alienage in the formation and execution of contracts.

Unlike section 1981 and section 1983, which prohibit specific types of discrimination regardless of whether they occur in an employment context, the EPA and the ADEA prohibit certain kinds of discrimination only if they are employment-related. The VRA, on the other hand, prohibits both discrimination against handicap...
capped persons which arises in an employment context and such discrimination which does not arise in an employment context.\(^3\)

The EPA duplicates the coverage of one aspect of discrimination prohibited by Title VII: *sex discrimination with respect to compensation for work* which requires equal skill, effort and responsibility, unless the disparate treatment is (1) pursuant to a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality, or (4) a differential based on some factor other than sex. The EPA applies to the federal, state and local governments and to almost all private employers.\(^4\)

The ADEA and the VRA in no way overlap with the prohibitions of Title VII. Unless age can be shown to be a bona fide occupational qualification for a specific job, discrimination on the basis of ages between forty and seventy is prohibited by the ADEA.\(^5\) The act applies to private employers,\(^6\) labor organizations,\(^7\) employment agencies,\(^8\) the federal government\(^9\) and state and local governments.\(^10\) Unlike other employers subject to the act, the federal government may never impose an age-based ceiling after which employment may be denied on the basis of age.\(^11\) Section 503(a) of the VRA requires federal contractors and subcontractors with contracts for more than $2,500 to include provisions in their contracts which obligate them not to discriminate against handicapped persons and to implement affirmative action programs for their benefit.\(^12\) Section 504 forbids discrimination against handicapped persons in "any program or activity receiving Federal financial

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26. 29 U.S.C. §§ 623(a) and 630(b) (1976).

27. 29 U.S.C. §§ 623(c) and 630(d) (1976).

28. 29 U.S.C. §§623(b) and 630(c) (1976).


30. 29 U.S.C. §§ 623(a) and 630(b) (1976).


assistance. . .”\(^{88}\) It is generally agreed that section 504 creates a private cause of action on behalf of the victim of the prohibited discrimination;\(^{44}\) whether section 503(a) creates a private cause of action is far from clear.\(^{56}\)

**GRIFFIN V. BRECKENRIDGE AND THE REQUIREMENT OF STATE ACTION UNDER SECTION 1985(3)**

The statute which is now codified at 42 U.S.C. § 1985(3) has never been free from ambiguity. It was originally part of section 2 of the Civil Rights Act of 1871,\(^{86}\) which was popularly known as the Ku Klux Klan Act. The statute creates a civil cause of action for “any person or class of persons” who have been injured as a result of certain conspiracies which interfere with a category of

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34. In Southeastern Community College v. Davis, 442 U.S. 397, 404-05, n.5 (1979), the Supreme Court left this question undecided. Decisions holding that such a cause of action exists under section 504 include NAACP v. Medical Center, Inc., 589 F.2d 1247 (3d Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), rev’d on other grounds, 442 U.S. 397 (1979); Kampmeier v. Nyquist, 553 F.2d 296, 297 (2d Cir. 1977); United Handicapped Fed’n v. Andre, 558 F.2d 413, 415 (8th Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1281 (7th Cir. 1977). *But see* Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87, 89 (4th Cir. 1978) (no private cause of action is available for employment discrimination unless a primary purpose of the federal assistance is to provide employment).

Similarly Executive Order 11246, 3 C.F.R. 169 (1964), requires most federal contractors and subcontractors to commit themselves *inter alia*, to not discriminate in an employment relationship on the basis of any criterion proscribed by Title VII and to assume affirmative action obligations. Executive Order 11246 has been consistently interpreted to create no cause of action on behalf of a person who has been harmed by breaches of the obligations which it requires to be assumed. See Cohen v. Illinois Inst. of Technology, 524 F.2d 818 (7th Cir. 1975); Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir.), *cert. denied* 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964); Braden v. University of Pittsburgh, 434 F. Supp. 836 (W.D. Pa. 1972). The Ninth Circuit, however, has ruled that a rule for action for a writ of mandamus is available to compel the monitoring agency (under Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), *reprinted in 5 U.S.C. app., at 289 and in 92 Stat. 3781 (1978)*, the Office of Federal Contract Compliance Programs) to enforce the obligation assumed pursuant to the order. Legal Aid Soc'y of Alameda County v. Brennan, 608 F.2d 1319, 1330-32 (9th Cir. 1979).

rights which the Supreme Court has never clearly articulated. On its face, section 1985(3) does not require state action before a conspiracy may be pleaded under it. However, the language in which the statute sets out the proscribed conspiracies—"equal protection of the laws; or of equal privileges and immunities under the laws" (emphasis added)—is susceptible to more than one interpretation. Because such language closely resembles that of the text of the fourteenth amendment, whose substantive guarantees cannot be violated without the presence of state action, the statute might plausibly be read to prohibit only certain conspiracies to violate, under color of state law, rights secured by the fourteenth amendment.

After its enactment in 1871, section 1985(3) lay dormant, for all practical purposes, for a century. During that period, the Supreme Court never seriously considered the possibility that purely private conspiracies might, under some circumstances, fall within the statute. Originally, section 2 of the Civil Rights Act of 1871 provided
criminal penalties as well as civil remedies for engaging in the pro-
scribed conspiracies. In 1875, in *United States v. Cruikshank*, the
Court ruled that a criminal conspiracy to interfere with fourteenth amend-
ment rights could not fall within section 2, unless the con-
spiracy contained some element of state action.\(^9\) In reaching this
result, the Court held that Congress had no constitutional author-
ity to reach private discrimination under the enforcement powers
of the fourteenth amendment.\(^{40}\) The Court did not examine
whether state action is a necessary element of a section 1985(3)
civil conspiracy until *Collins v. Hardyman*\(^{41}\) in 1951.

In *Collins*, plaintiffs as members of a private political associa-
tion, held a meeting for the purpose of opposing the Marshall Plan. They alleged that defendants, who in no way acted under color of
state law, had conspired within the meaning of section 1985(3) to
interfere with their first amendment rights of assembly and peti-
tion and with their entitlement to equal privileges and immunities
under the laws of the United States. Plaintiffs alleged that defen-
dants interfered with these rights by engaging in threats and acts
of violence which disrupted their meeting.\(^{43}\) Despite the absence of
any reference to state action in the statute, the Court either held,
or assumed without deciding, that the complaint did not state a
cause of action under section 1985(3), because it failed to allege the
presence of state action in the conspiracy.\(^{46}\) The Court conceded

\(^{39}\) 92 U.S. 542, 554-55 (1875). In *Cruikshank*, the Court did not consider the extent to
which the thirteenth amendment permits Congress to reach purely private conspiracies
which might otherwise fall within the scope of § 1985(3). *Id.* at 555.

\(^{40}\) 92 U.S. at 555. In *United States v. Harris*, 106 U.S. 629, 644 (1883), the Court inter-
preted the criminal conspiracy provisions of section 2 as not requiring state action and then
ruled that the statute was beyond the legislative authority of Congress. *Harris* was reaf-
ffirmed in *Baldwin v. Franks*, 120 U.S. 678, 689-90 (1887). The criminal conspiracy
provisions of section 2 (then Rev. Stat. 5519) were repealed in 1909. 35 Stat. 1154.

The fourteenth amendment provides in part, “The Congress shall have power to enforce
by appropriate legislation, the provisions of this article.” U.S. Const. amend. XIV, § 5.

Similarly, the thirteenth amendment provides in part, “Congress shall have power to en-
force this article by appropriate legislation.” U.S. Const. amend. XIII, § 2.

\(^{41}\) 341 U.S. 651 (1951).

\(^{42}\) *Id.* at 653-55.

\(^{43}\) *Id.* at 661-63. What Collins actually held is far from clear. The dissenters understood
that the Court had ruled that state action is a necessary component of any section 1985(3)
conspiracy and the case is often cited as standing for that proposition. Technically the
Court ruled only that no conspiracy existed within the meaning of the statute, because the
Court thought that any conspiracy to which the statute could apply would entail “some
manipulation of the law or its agencies.” 341 U.S. at 661. Indeed, there is language in the
opinion which suggests that the Court did not understand that it had imported any state
action requirement into the statute. Consider, “We do not say that no conspiracy by private
that reservations about the constitutionality of section 1985(3) without a state action requirement influenced its interpretation of the statute, but it did not hold that without such a requirement the statute would be beyond the legislative authority conferred on Congress by the fourteenth amendment. In a three judge dissent, Justice Burton maintained that section 1985(3) should not be interpreted to require the presence of state action before a conspiracy may be pleaded under the statute. He also maintained that Congress has adequate authority to enact such legislation under the fourteenth amendment.

Griffin v. Breckenridge marked a major change in the Court's approach to section 1985(3). In Griffin, black plaintiffs alleged that a group of white defendants stopped their car on a public highway, forced them out of the car and beat them. According to the complaint, defendants conspired to prevent them from seeking equal protection of the laws and from enjoying equal rights, privileges and immunities under state and federal law. Among the liberties allegedly violated were rights to freedom of speech, assembly and petition, "rights to be secure in their persons and their homes" and "rights not to be enslaved nor deprived of life and liberty" without due process of law. The complaint, which sought punitive and compensatory damages, contained no allegations that defendants acted under color of state law or that the conspiracy involved the presence of any element of state action.

Using a rule of construction that Reconstruction era civil rights legislation should be given interpretations consistent with the broad scope of the language in which they were drafted, a unani-
mous Supreme Court held that the complaint stated a cause of action under section 1985(3). Without purporting to overrule Collins, which was understood to have required the presence of state action, the Court concluded that Collins is, at best, a decision to be confined to its facts. The Court then addressed the concern of the Collins Court, that the statute, if not interpreted as requiring state action, would involve an attempt by Congress to pass legislation far beyond the scope of any power Congress properly possesses under any section of the Constitution. Without citing any specific cases, the Court concluded that during the nineteen years which had elapsed since Collins, the powers of Congress had been interpreted so generously that the constitutional issues which caused so much concern in Collins no longer remained serious problems. The Court then ruled that the statute should be read literally, as not to require state action. Having decided that section 1985(3) does reach at least some private conspiracies, the Court turned to the difficult problem of narrowing the types of conspiracies which are cognizable under section 1985(3). The Court recognized that section 1985(3) was never “intended to apply to all tortious, conspiratorial interferences with the rights of others” and concluded that the danger “of interpreting [section] 1985(3) as a general federal tort law” would be avoided by requiring the presence of some class-based, “invidiously discriminatory motivation” behind the conspirator’s actions. The Court, however, reserved the question of whether a conspiracy motivated by “discriminatory intent other

51. 403 U.S. at 103.
52. Id. at 95. “Whether or not Collins v. Hardyman was correctly decided on its own facts is a question with which we need not here be concerned.” Id.
53. 403 U.S. at 93-95.
54. Id. at 96. The Court found it difficult to understand how the reference to persons who “conspire or go in disguise on the highway or on the premises of another” could lead to a conclusion that the statute requires state action, since such actions are almost always associated with “private marauders.” Id. at 96 (emphasis added). The Court was also influenced by the fact that the forty-second Congress, which passed the Civil Rights Act of 1871, part of which has survived as section 1985(3), incorporated state action requirements in very specific language in other sections of the act, warranting an inference that Congress intended to include no such requirement in section 1985(3). Id. at 98-99. The Court also found persuasive several statements by sponsors and supporters of the bill which became section 2, which in rather clear language, supported its conclusion that section 1985(3) requires no state action. Id. at 100-02.
55. Id. at 101.
56. Id. at 102.
57. Id.
than racial" could fall within section 1985(3).58

Having arrived at what it deemed to be the correct construction of the statute, the Court addressed whether section 1985(3), as construed, is within the legislative power of Congress. It concluded that the enforcement powers of section 2 of the thirteenth amendment clearly authorized such legislation59 and that Congress independently possessed authority to pass such legislation under an implied power to protect the constitutional right to interstate travel.60 In ruling that the thirteenth amendment permitted Congress to reach such private conspiracies against blacks, the Court relied on Jones v. Alfred H. Mayer Co.61 in which the Court observed that Congress has considerable latitude in deciding whether specific legislation is reasonably related to the eradication of slavery and its after-effects.62 “Not only may Congress impose such lia-

58. Id. at n.9. “The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus.” Id. at 102 n.10. In so ruling the Court declined to follow the interpretation which Screws v. United States, 325 U.S. 91, 101-07 (1945), had placed on 18 U.S.C. § 242, a descendant of the Enforcement Act of 1870, Act of May 31, 1870, ch. 114 § 16, 16 Stat. 144 (1870)(§ 16 reenacted with minor changes § 2 of the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27 (1866)), which makes it a criminal offense to deprive one of a constitutional or statutory right under color of state law. In Screws, in order to overcome fourteenth amendment vagueness challenges the Court ruled that an indictment alleging a violation of section 242 must allege specific intent to deprive a person of the rights in question. 325 U.S. at 103. Screws requires that when the right at issue is a constitutional right it must be either clearly spelled out in the Constitution or clearly recognized through decisions of the Supreme Court. Id. Under such, circumstances a defendant charged with having violated section 242 can be held to have had adequate notice of the existence of a constitutional right of which his conduct is depriving his victim.

Similarly, in United States v. Guest, 383 U.S. 745, 753-54 (1966), the Court avoided the same constitutional difficulty by requiring that an indictment which alleges a conspiracy to deny federal statutory or constitutional rights under 18 U.S.C. § 241, a statute which survives from section 17 of the Enforcement Act of 1870, 16 Stat. 144, also allege specific intent to interfere with the rights alleged to have been violated.

59. 403 U.S. at 105 (emphasis added). For the text of section 2 of the thirteenth amendment see note 40 supra. Because, as applied to the facts of this case, the statute prohibited private racially motivated conspiracies which contain no element of state action, the Court's discussion and conclusion focused on whether or not the authority for the statute could be found in the thirteenth or in the fourteenth amendment. The Court concluded that Congress could have passed the statute pursuant to some implied power to enforce a constitutionally protected right of interstate travel. 403 U.S. at 105-06. Ironically, the discussions in the forty-second Congress centered on whether or not authority existed under the fourteenth amendment. See Cong. Globe, 42d Cong., 1st Sess., parts 1 and 2 passim (1871) (emphasis added).

60. Id. at 105-07.


62. “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate the determina-
bility, but the varieties of private conduct that it may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude." In emphasizing that Congress could reach private conspiracies to deny the constitutional rights of Blacks under the thirteenth amendment, the Court stressed that it had not ruled that section 1985(3) reaches any conspiracies which are not directed against Blacks. Accordingly, the Court found it unnecessary to decide whether section 1985(3) creates a cause of action against conspiracies to interfere with fourteenth amendment rights in the absence of state action. Because it found no reason to address that problem, the Court was able to avoid commenting on a related, but much more complex question: the extent to which Congress, in passing legislation to enforce the substantive guarantees of the fourteenth amendment, may interpret those guarantees more liberally than the Court has interpreted them.

63. 403 U.S. at 105.

64. "We can only conclude that Congress was wholly within its powers under § 2 of the thirteenth amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." Id. (Emphasis added).

"[The right of interstate travel] is assertable against private as well as governmental interference." Id. at 105.

65. "In identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment." Id. at 107. The Court then cited Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112, 135 (opinion of Douglas, J., concurring and dissenting); United States v. Guest, 383 U.S. 745, 761 and 779 (opinions of Clark, J., concurring and Brennan, J., concurring and dissenting). Id. at n.12. The references to Morgan and to the opinions of Justices Douglas, Clark and Brennan in Mitchell and Guest suggest the possibility that, although section 1985(3) is a statute passed in part under the enforcement powers of the fourteenth amendment, it may be a fourteenth amendment statute which is premised on a congressional perception that the fourteenth amendment does not necessarily posit a state action requirement. Morgan definitely suggests the possibility that in passing legislation to effect the substantive guarantees of the fourteenth amendment Congress may interpret those guarantees more liberally than the Court has been willing to do. For the text of the enforcement power of the thirteenth amendment see note 40 supra.

In Guest, in interpreting 18 U.S.C. § 241, (called "the closest remaining criminal analogue to § 1985(3)" in Griffin v. Brekenridge, 403 U.S. 88, 98 (1977) six justices in two concurring opinions would have interpreted section 241 to reach purely private conspiracies to interfere with fourteenth amendment rights and would have held that, in passing legislation under the enforcement powers of the fourteenth amendment, Congress is not necessarily limited by a state action requirement. Justice Clark wrote, "[T]here can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies - with
EXACTLY WHAT STATE ACTION REQUIREMENT DID GRIFFIN REMOVE FROM SECTION 1985(3)?

Regardless of what the Court meant to say in Griffin, the opinion contains language which suggests that section 1985(3) does extend to purely private conspiracies to deny constitutional rights other than those secured by the thirteenth amendment: "Little reason remains, therefore, not to accord to the words of the statute their apparent meaning. . . . On their face, the words of the statute fully encompass the conduct of private persons."66 Such apparently straightforward language, however, has been a source of considerable confusion to lower federal courts which have had to decide whether Griffin means that a private conspiracy to interfere with an interest, which the Constitution (as interpreted by the Supreme Court) secures only against state action, may nevertheless be actionable under section 1985(3).67 Some courts have so read Griffin. For example, the Eighth Circuit in Action v. Gannon68 sustained a section 1985(3) complaint filed by members of a religious group whose services were interrupted by a politically motivated group. Similarly, the Fifth Circuit, in Westberry v. Gilman Paper Co.,69 in an opinion which was subsequently withdrawn, upheld a section 1985(3) complaint filed by a white environmental activist against persons whom he alleged had conspired to discharge him from his job and to kill him.

The interpretations of Griffin, contained in Action and in the

or without state action - that interfere with Fourteenth Amendment rights." 383 U.S. at 762 (concurring opinion).

In a similar vein Justice Brennan wrote, "Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection. 383 U.S. at 782 (concurring opinion). Justice Stewart's majority opinion in Guest specifically declined to address the question of whether or not section 241 reaches purely private conspiracies because it concluded that the indictment under examination did sufficiently allege the presence of state action. 383 U.S. at 755-57.

66. 403 U.S. at 96.

67. Griffin gave three examples of conspiracies which fall within section 1985(3): (1) those which violate thirteenth amendment rights of blacks "who have been the victims of conspiratorial, racially discriminatory private action," 403 U.S. at 105; (2) those which violate a constitutionally protected right of interstate travel, id., and (3) those which violate a fourteenth amendment right to equal protection, id. at 97. The controversy generated by Griffin centers on whether or not a conspiracy which contains no element of state action can fall within the category of cases which the third example illustrates. 403 U.S. 101-03.

68. 450 F.2d 1227 (8th Cir. 1971)(en banc).

69. 507 F.2d 206 (5th Cir.), vacated, 507 F.2d 216 (5th Cir. 1975)(per curiam).
original opinion in *Westberry*, appear to assume too much. First, this interpretation of section 1985(3) requires that a court rule on an issue which the Supreme Court specifically left undecided in *Griffin*: the scope of the power of Congress under section five of the fourteenth amendment.\(^7\)\(^0\) Also, to reach the conclusions of *Action* and *Westberry*, a court would have to find that when Congress passed section 2 of the Civil Rights Act of 1871, it believed that it could reach purely private acts of discrimination by passing "appropriate legislation"\(^7\)\(^1\) under the fourteenth amendment and *that it intended to do so.*\(^7\)\(^2\) The legislative history of section 2 hardly suggests such an unqualified reading of the statute. While Congress in 1871 *may* have thought that it *could* reach purely private discrimination under the fourteenth amendment,\(^7\)\(^3\) Congress apparently did not enact section 2 on the assumption that it was passing fourteenth amendment legislation which, *lacking a state action requirement, would reach purely private conspiracies.*\(^7\)\(^4\)

Second, such a reading of *Griffin* ignores specific language in the opinion which does not suggest such an expansive reading of section 1985(3). In *Griffin*, the Court observed that the violations of constitutional rights in that case were "so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not."\(^7\)\(^5\) Furthermore, the Court in *Griffin* stated: "A century of Fourteenth Amendment adjudication has in other words, made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons.*\(^7\)\(^6\) Thus, while *Griffin* is not free from ambiguity, the more

\(^7\)\(^0\) 403 U.S. at 107.
\(^7\)\(^1\) U.S. CONST., art. XIV, § 5. For the text of § 5 of the fourteenth amendment see note 40 supra.
\(^7\)\(^2\) See note 65 supra.
\(^7\)\(^3\) In the Civil Rights Cases, 109 U.S. 3, 25 (1883), the Supreme Court, in ruling that section 1 and section 2 of the Civil Rights Act of 1875, Act of Mar. 1, 1875, 18 Stat. 335 (1875), which prohibited private discrimination in public accommodations, were beyond the thirteenth or fourteenth amendment powers of Congress, rejected any such understanding. See note 65 supra.
\(^7\)\(^4\) See especially Comment, *A Construction of Section 1985(c) In Light of Its Original Purpose*, 46 U. Chi. L. Rev. 402, 407-22 (1979), which argues persuasively that in passing section 2 of the Civil Rights Act of 1871 Congress was motivated almost exclusively by an urgent need to prevent the territorialism and violence in which the Ku Klux Klan was engaging in southern states.
\(^7\)\(^5\) 403 U.S. at 103.
\(^7\)\(^6\) Id. at 97 (emphasis added).
reasonable interpretation of section 1985(3), in light of *Griffin*, would appear to be a purely private conspiracy which is marked by the appropriate "class-based . . . animus" to deny any right which can be violated without state action is prohibited by the statute.78

THE NOVOTNY DECISION

Against this background, the Supreme Court decided *Great American Federal Savings and Loan Association v. Novotny.*79 Before discussing the Court's decision, it is appropriate to mention the substantial differences in the relief available under section 1985(3) and the relief available under Title VII—differences of which the Court was well aware in *Novotny.*80 While section 1985(3) specifically authorizes damages, it does not mention equitable relief. Nevertheless, some courts have held that they have inherent equitable authority to issue injunctive relief in an action pleaded under section 1985(3).81 On the contrary, Title VII does not authorize damages. Relief under Title VII is exclusively equitable, although it may include back pay for a period of not more than two years.82 Since Title VII remedies are equitable, Title VII actions are not triable by a jury.83 However, since section 1985(3) authorizes damages as the primary (if not exclusive) form of re-

77. Id. at 102.
78. The decisions in the courts of appeals reflect the confusion which *Griffin* generated. The following cases are basically consistent with this proposition: McLellan v. Mississippi Power and Light Co., 545 F.2d 919, 924-27 (5th Cir. 1977)(en banc); Doski v. M. Goldseker Co., 539 F.2d 1326, 1333-34 (4th Cir. 1977); Murphy v. Mount Carmel High School, 543 F.2d 1189, 1193-95 (7th Cir. 1976); Cohen v. Illinois Institute of Technology, 524 F.2d 818, 828-29 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); Dombrowski v. Dowling, 459 F.2d 190, 193-96 (7th Cir. 1972); Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 507 (4th Cir. 1974). The following cases are basically not compatible with this assertion: Weise v. Syracuse University, 522 F.2d 397, 406-08 (2d Cir. 1975); Westberry v. Gilman Paper Co., 507 F.2d 206, 210-15 (5th Cir.), vacated, 507 F.2d 216 (5th Cir. 1975) (per curiam); Richardson v. Miller, 446 F.2d 1247, 1248 (3d Cir. 1971); Action v. Gannon, 450 F.2d 1227, 1231-33 (8th Cir. 1971)(en banc). See generally Reiss, *Requiem for an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination,* 50 S. CAL. L. REV. 961, 1007-09 (1977).
80. Id. at 374-76.
82. Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1976).
83. See, e.g., Harman v. May Broadcasting Co., 583 F.2d 410, 411 (8th Cir. 1978); Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301, 308-10 (6th Cir. 1975); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).
dress, actions alleging conspiracies within the scope of section 1985(3) are triable by a jury.\textsuperscript{84}

In \textit{Novotny}, respondent (plaintiff) had been secretary of the petitioner association, a member of its board of directors and a loan officer of the association. Because of his objections to petitioner's violations of the Title VII rights of female employees, respondent was not reelected to the board and his employment was terminated. After his discharge, he filed a timely charge with the Equal Employment Opportunity Commission\textsuperscript{85} and, after waiting the required statutory period,\textsuperscript{86} he received a right to sue letter which authorized him to file a Title VII complaint in a federal district court.\textsuperscript{87} Respondent then filed suit under Title VII, but he also alleged a cause of action under section 1985(3), claiming to have also suffered damages as a result of a conspiracy within the meaning of

\textsuperscript{84} Also, the statutes of limitations applicable to section 1985(3) actions differ from those applicable to a Title VII action. Since the civil rights statutes which have survived from the Reconstruction period contain no statutes of limitations, the Court has ruled that federal courts are to apply the most analogous state statutes of limitations to causes of action pleaded under those statutes. \textit{See, e.g.,} Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462-64 (1975). Notes 85, 86 and 87 infra, set forth the statutes of limitations which govern a Title VII action.

\textsuperscript{85} Title VII requires that a charge be filed with the EEOC within 180 days of the alleged discrimination. If the discrimination occurred in a state with a state agency which is responsible for the enforcement of state legislation which also prohibits the conduct in question, the charging party may have up to 120 additional days (or 30 days after the state agency has ended its involvement, whichever period is shorter) within which to file with the EEOC. § 706(e) of Title VII, 42 U.S.C. § 2000e-5(e) (1976).

\textsuperscript{86} If the state has an appropriate agency the charging party must first file with the state agency and wait 60 days before he files a charge with the EEOC unless the state agency ends its involvement before the expiration of the 60 day period. If the state agency terminates its involvement before expiration of the 60 day period, the charging party can file his charge with the EEOC as soon as the state agency has ended its involvement. § 706(c) of Title VII, 42 U.S.C. § 2000e-5(c) (1976).

\textsuperscript{87} After a charge has been filed in a timely manner the EEOC conducts an investigation to decide if the charge discloses reasonable cause to believe a Title VII violation exists. If the Commission finds reasonable cause of a violation, it will attempt to conciliate the grievance by attempting to obtain a settlement (called a conciliation agreement) which involves a waiver by the charging party of his cause of action in exchange for the respondent's agreement to correct the situation which led to the filing of the charge. § 706(b), 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(b), -5(f)(1) (1976).

Should the EEOC's attempt to conciliate fail, the Commission must then decide whether or not to file a suit in its own name. If the EEOC decides not to file a suit, it must issue the charging party a right to sue letter within 180 days after the charge was filed with the Commission. Upon receipt of the letter the charging party has 90 days within which to file a complaint in a federal district court. § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1) (1976).
that statute. The district court dismissed the section 1985(3) cause of action, ruling that directors of a corporation are not capable of conspiring among themselves or within their corporation as a matter of law. The Court of Appeals for the Third Circuit reversed and held: (1) that conspiracies motivated by an invidious animus against women are within section 1985(3); (2) that respondent, as an indirect victim of such a conspiracy, had standing to sue under section 1985(3); (3) that a conspiracy to violate Title VII rights may be pleaded under section 1985(3); and (4) that intracorporate conspiracies are within the reach of section 1985(3).

The Supreme Court reversed and held that conspiracies to deny Title VII rights are not actionable under section 1985(3). An important factor for the Court in reaching its decision was its assumption that section 1985(3) creates no substantive rights but only provides additional remedies (damages and possibly injunctive relief) for persons injured by conspiracies to deny rights cre-

89. Id. at 230.
90. 584 F.2d 1235, 1262 (3d Cir. 1978). The court of appeals also ruled that respondent had stated a cause of action under section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a) (1976), which prohibits retaliation against an employee because he has opposed any practice prohibited by Title VII, and that section 704(a) applies to both formal and informal actions taken in protest of Title VII violations. 584 F.2d at 1259-61. Certiorari was not sought on this issue. See Petition for Certiorari at 2.

Because the Court concluded that a Title VII conspiracy is not actionable under section 1985(3), it assumed, but did not decide, that the actions of directors of a corporation can constitute a conspiracy within the meaning of section 1985(3). 442 U.S. at 372 n.11. In Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972), Judge (now Mr. Justice) Stevens, in a case pleaded under section 1985(3), ruled that the actions of officers of a corporation are actions of agents which are taken for the benefit of a principal, the corporation, and, as such, are attributable to the corporation and cannot constitute a conspiracy because in such a situation there is only one actor, the corporation. Id. at 196. See also Cole v. University of Hartford, 391 F. Supp. 888, 891-94 (D. Conn. 1975)(university cannot, within the meaning of section 1985(3), conspire with itself or with its agents insofar as they act in their official capacities). Assuming the correctness of the Dombrowski approach, this limitation would not apply to a situation where an employer and a union engage in conspiratorial acts otherwise actionable under section 1985(3), or where the corporate representatives did not act in whole or in part as agents of the corporation in engaging in conduct which otherwise falls within Section 1985(3). See, e.g., Rankin v. University of Pennsylvania, 386 F. Supp. 992, 1005-06 (E.D. Pa. 1974). See further Reiss, Requiem for an "Independent Remedy": The Civil Rights Act of 1866 and 1871 as Remedies for Employment Discrimination, 50 S. Cal. L. Rev. 961, 1009-11 (1977).
91. 442 U.S. at 378.
ated by some other source. Because respondent's allegedly violated right came not from section 1985(3), but from Title VII, the Court reasoned that to allow him to plead a conspiracy to violate Title VII would be to create a situation in which the administrative process and relief contemplated by Title VII could be undermined merely by pleading a conspiracy to violate Title VII. The potential for such a situation required, the Court believed, an inference that Congress, when it passed Title VII must, by implication, have assumed that Title VII conspiracies could not be pleaded under section 1985(3). Nor were the Court's concerns alleviated by the fact that a plaintiff must prove both the elements of a conspiracy and a class-based motive to recover under section 1985(3), as interpreted in *Griffin*. The Court concluded that, despite the possibility that this "incomplete congruity" might mitigate the harm done to Title VII, if conspiracies to violate Title VII were actionable under section 1985(3), the efficiency of the administrative procedures which Title VII contemplates would be significantly reduced.

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93. The Court distinguished section 1985(3) from other Reconstruction era statutes, such as 42 U.S.C. § 1981 (private cause of action for racial and alienage discrimination in contractual relationships) and 42 U.S.C. § 1982 (private cause of action for racial and alienage discrimination in real and personal property transactions). 442 U.S. at 377. The Court specifically ruled that sections 1981 and 1982 were not repealed by subsequent civil rights legislation, respectively, in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 457-61 (1975) and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413-17 (1968). Novotny presented, the Court maintained, no issue of implied repeal because section 1985(3), as construed, contains no substantive rights which overlap with rights created by subsequent legislation. Id. at at 376. In this manner the Court distinguished Brown v. General Services Administration, 425 U.S. 820 (1976)(section 717 of Title VII, 42 U.S.C. § 2000e-16 (1976 and Supp. II 1978), which makes Title VII the exclusive remedy for federal employees challenging discrimination on the basis of a criterion prohibited by Title VII, is an implied exception to section 1981). Id. at 376-78. See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974)(re-sort to arbitration for a grievance which would also sustain a Title VII cause of action has no bearing on the right to file a Title VII action because arbitration and Title VII are separate and distinct remedies).

94. See notes 85, 86 and 87 supra.

95. 442 U.S. at 375-76.

96. Id. at 375 at 378. It is not clear whether the majority read the complaint as alleging a section 704(a) cause of action for retaliation against respondent for opposing Title VII violations and a conspiracy to retaliate in violation of section 704(a), or a section 704(a) retaliation cause of action and a section 703(a) conspiracy to discriminate against women which resulted in the harm which respondent suffered. Apparently the majority assumed that the former interpretation of the complaint was correct: "The primary question . . . is whether a person injured by a conspiracy to violate § 704(a) . . . is deprived of the equal protection of the laws; or of equal privileges and immunities under the laws within the meaning of § 1985(c)." Id at 372. at 372. Justice White's dissent read the complaint as alleging a section
Justice Powell, while concurring in the majority’s conclusion that section 1985(3) is a purely remedial statute, advocated an even narrower reading of the statute. Without citing authority for his statement, he maintained that section 1985(3) should be limited to those conspiracies which interfere with “fundamental rights derived from the Constitution,” and that Griffin should not be extended to allow conspiracies to deny statutory rights to be pleaded under section 1985(3).

In a second concurring opinion, Justice Stevens agreed with Justice Powell that section 1985(3) is not applicable to statutory rights. He thought that the language of the statute, insofar as it

704(a) retaliation cause of action and a conspiracy to discriminate against women employees. Justice White understood that respondent alleged that he was indirectly injured as a result of this conspiracy when he opposed the Title VII violations of the rights of women employees. Id. at 385. If Justice White’s understanding of the complaint is correct, there would not be any disruption of the administrative scheme of Title VII by allowing respondent to proceed under section 1985(3) without resort to EEOC procedures, because he would not himself have possessed the section 703(a) cause of action which is subject to that process. Justice White’s reasoning, however, is premised on his rejection of the majority’s assumption that section 1985(3) creates no substantive rights, an assumption which he characterized as a “pervasive and essential flaw” in the Court’s analysis. Id. at 388. Both the district court, 430 F. Supp. at 228, and the court of appeals, 584 F.2d at 1237-48, appear to have read the complaint as did Justice White, and paragraph sixteen would appear to require such an understanding. The petitioners also apparently understood the complaint this way. See Brief for Petitioners at 43-47. The fact that respondent, however, did exhaust the administrative process required by Title VII tends to call into question the correctness of this understanding. Had the majority read the complaint in this manner, it would have had to decide whether or not respondent had standing to assert the conspiracy against women employees. The court of appeals ruled that he had standing to do so. 584 F.2d at 1244-45.

97. Id. at 579-81 at 379-81 (Powell, J., concurring).

98. Id. at 379. In a footnote the majority opinion said: “Nor do we think it necessary to consider whether § 1985(c) creates a remedy for statutory rights other than those fundamental rights derived from the Constitution.” Id. at 370 n.6.

99. In a footnote, Justice Powell specifically disapproved of Hodgins v. Jefferson, 447 F. Supp. 804, 808 (D. Md. 1978)(conspiracies to violate the Equal Pay Act are actionable under section 1985(3)); Murphy v. Operating Eng’rs, Local 18, 99 L.R.R.M. 2074, 2124-26 (N.D. Ohio 1978)(conspiracies to violate rights under the Labor-Management Reporting and Disclosure Act of 1959 are actionable under section 1985(3)); and Local No. 1, ACA v. International Brotherhood of Teamsters, 419 F. Supp. 263, 276 (E.D. Pa. 1976)(same). Id. at 381, n.*. Other non-Title VII decisions which recognize that conspiracies to interfere with statutory rights may fall within section 1985(3) include Taylor v. Nichols, 558 F.2d 561, 567 (10th Cir. 1971)(defendants did not conspire to violate the “equal protection of the laws or of equal privileges and immunities under the law, i.e., rights guaranteed by federal law or the federal Constitution”) and Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975)(in dismissing a conspiracy to violate rights secured by the Immigration and Nationality Act, 8 U.S.C. § 1324, because the act creates no private causes of action, the court recognized that some conspiracies to deny statutory rights may fall within section 1985(3)).

100. Id. at 381 (Stevens, J., concurring).
refers to "equal protection of the laws" and "equal privileges and immunities under the laws" clearly suggests congressional intent to limit section 1985(3) to conspiracies to violate constitutional rights. He also reasoned that the legislative history of the statute requires this conclusion. Justice Stevens further stressed that dispensation of the state action requirement in Griffin should not be loosely interpreted. He maintained that Griffin held only that a private conspiracy to deny a constitutional right is actionable under section 1985(3), if the right which is violated is one which would not require the presence of state action for a violation in the absence of a conspiracy, e.g., the right of interstate travel and "the right to be free of the badges of slavery."

Justice White, writing for himself and Justices Marshall and Brennan, dissented. He rejected the majority's characterization of section 1985(3) as a statute which creates remedies, but not rights, and concluded that section 1985(3) and Title VII overlap rather than conflict with respect to the rights which they create.

101. Id. at 382-83. Justice Stevens seems to have drawn conclusions rather quickly from the history of section 1985(3). He attached considerable significance to the fact that the bill which originally introduced section 2 of the Civil Rights Act of 1871 would have created a cause of action for victims of conspiracies to deny "rights, privileges, or immunities . . . under the Constitution and laws of the United States," Id. at 382 n. 3 (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871))(emphasis added). The present language which creates a cause of action for victims of conspiracies to deny them "equal protection of the laws" and "equal privileges and immunities under the laws," he thought, clearly supported his conclusion. Id. at 382.

102. Id. at 383-84. Justice Stevens had placed this interpretation on section 1985(3) as a circuit judge in Dombrowski v. Dowling, 459 F.2d 190, 192-96 (7th Cir. 1972).

103. 442 U.S. at 385. (White, J., dissenting). Unlike the majority, Justice White read the complaint as stating a cause of action for retaliating against respondent for his opposition to such a plaintiff's attempting to by-pass the EEOC process by filing under section 1985(3). Id. at 387-88.

104. Id. at 393-94. Justice White drew the logical consequences from his assertion that the majority had mischaracterized section 1985(3) when it concluded that the statute contains no substantive rights. He thought that, unless Title VII and section 1985(3) are completely irreconcilable, the Court had no alternative but to attempt to reconcile section 1985(3) with Title VII, as the Court has reconciled Title VII with other Reconstruction era civil rights statutes. Among the cases Justice White cited to support this proposition were Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)(Title VII does not affect section 1981 cause of action) and Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (fair housing provisions, 42 U.S.C. § 3601 et seq, of the Civil Rights Act of 1968 do not affect a section 1982 cause of action for racial and alienage discrimination in real property transactions). Id. at 391. Justice White reaffirmed the principle that the mere fact that two statutes overlap does not mean that they are irreconcilable. He relied extensively on Brown v. General Services Administration, which held that statutes are to be presumed capable of reconciliation unless it "would require the suspension of disbelief" to follow such a presumption. Accord, Brown v. General Services Administration, 425 U.S. 820, 833 (1976), cited in Novotny at
Nor was he willing to accept the proposition that if section 1985(3) creates substantive rights, it is an insurmountable barrier to the smooth functioning of the administrative process contemplated for a Title VII action. He thought that any potential conflicts between section 1985(3), understood as a source of substantive rights, and the Title VII administrative process could be eliminated by requiring a section 1985(3) plaintiff, who also has a Title VII action, to exhaust the Title VII administrative process as a prerequisite to bringing his section 1985(3) action. Justice White would have held that section 1985(3) provides a cause of action for any appropriate conspiracy to violate any federal statutory or constitutional right as long as the conspiracy is “imbued with ‘individually discriminatory motivation’ amounting to ‘class based ... animus.’”

391. Accordingly, he concluded that section 1985(3) causes of action are not incompatible with Title VII causes of action, because section 1985(3) actions are “directed at a discrete and particularly disfavored form of discrimination,” id., i.e., at conspiracies to deny federal rights which are characterized by “invidiously discriminatory motivation” and “class-based animus.” Accord, Griffin v. Breckinridge 403 U.S. 88, 102 (1971) cited in Novotny at 392.

Justice White also argued that even if the majority had correctly characterized section 1985(3) as authorizing only a remedy, rather than as creating substantive rights, such a distinction provides no justification for finding that Title VII impliedly limits the availability of section 1985(3) as a vehicle for a specific remedy which is on its face available to a Title VII plaintiff who has been wronged through a conspiracy which otherwise falls within the statute. He maintained that the majority had assumed, without Title VII violations and a conspiracy to discriminate against women employees, as a result of which conspiracy respondent was injured when he protested the Title VII violations of the rights of women employees. See note 86 supra. Because of his belief that section 1985(3) does create substantive rights, Justice White stressed that respondent sought a remedy for an injury which he suffered as a result of the conspiracy against others and which is “distinct and separate” from whatever injuries petitioner’s sex discrimination may have caused the women employees. Id. at 390. Accordingly, he reasoned that in a situation where a plaintiff seeks relief for an injury which he suffers as a result of the denial of the Title VII rights of other people, there is no reason to rule that Title VII provides an exclusive remedy. Ordinarily, in such a situation, at least apart from the largely fortuitous facts of a case like Novotny, in which respondent coincidentally happened to have a section 704(a) of Title VII cause of action for retaliation against himself for his opposition to the discrimination against others, a plaintiff will have no Title VII remedy at all. Accordingly, he thought that it made little sense to be concerned about explaining why, that the Court has more freedom to find an implied repeal if a statute creates only an entitlement to a specific remedy as opposed to an entitlement to a substantive right. On the contrary, he concluded that the standard most recently articulated in Brown should control in both situations. 442 U.S. at 393 n. 13. “With respect to substantive rights, an implied repeal of post-Civil War civil rights legislation occurs only when the legislative scheme of the new statute is incompatible with the old.” Id. at 394.

105. Id. at 396. Griffin v. Breckinridge, 403 U.S. at 102 cited in Novotny at 392.

106. Id. at 392 (quoting Griffin v. Breckinridge 403 U.S. at 102). In a footnote, id. at 389 n.5, Justice White set forth his understanding of the significance of the change in the language in the amended bill which became section 2 of the Civil Rights Act of 1871:
CAN VIOLATIONS OF FEDERAL STATUTORY RIGHTS BE PLEADED UNDER SECTION 1985(3)?

In his concurring opinion in Novotny, Justice Powell wrote: "The doubts which will remain after the Court's decision are far from insubstantial."\(^{107}\) Although the majority opinion is silent on the issue, two positions on the extent to which conspiracies to violate federal statutory rights are actionable under section 1985(3) emerge from the concurring opinions of Justices Powell and Stevens and from the dissenting opinion of Justice White.\(^{108}\) The correct resolution of that issue is crucial. If no conspiracy to deny federal statutory rights can fall within the statute, then a fortiori, no conspiracy to deny federal statutory rights to equal employment opportunity can be actionable under section 1985(3). The ambiguous reference to conspiracies to deprive a person of "the equal protection of the laws, or of equal privileges and immunities under the laws" (emphasis added) in Section 1985(3) can be fairly read to support either the position of Justices Powell and Stevens (no statutory rights are within the scope of section 1985(3)) or the position of Justice White (all statutory rights are within the coverage of section 1985(3)).

Before section 2 of the Civil Rights Act of 1871 was enacted, the original bill was withdrawn. It clearly would have applied to conspiracies to deny both constitutional and statutory rights.\(^{109}\) Justice Stevens observed in his concurrence that, had the original bill

As originally introduced, § 2 of the Civil Rights Act of 1871 . . . encompassed "rights, privileges, or immunities . . . under the Constitution and laws of the United States." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871). The substitution of the terms "the equal protection of the laws" and "equal privileges and immunities under the laws" . . . did not limit the scope of the rights protected but added a requirement of certain "class-based, invidiously discriminatory animus behind the conspirators' action." Id. at 389 n.5 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).

Justice White commented further: "Because § 1985(c) refers to all federal rights, it is irrelevant that the particular right sought to be vindicated thereunder was not in existence at the time the cause of action was enacted." Id. at 394 n.15.

107. Id. at 381 n.*.

108. The majority opinion said: "Nor do we think it necessary to consider whether § 1985(c) creates a remedy for statutory rights other than those fundamental rights derived from the Constitution." Id. at 370 n.6.

No reported decision has held that only violations of constitutional rights can fall within the scope of section 1985(3). If conspiracies to deny federal statutory rights are within section 1985(3), then it would appear at least arguable that conspiracies to deny rights under rules and regulations issued by federal executive orders, could come within the statute. No reported decisions discuss these possibilities.

become law, section 2 would have authorized both civil actions and 
criminal prosecutions for deprivations of "rights, privileges, or im-
munities . . . under the Constitution and laws of the United States."
After the original bill was withdrawn, a second bill con-
taining the present language was introduced and passed. Justice 
Stevens observed that when Congress deleted "rights, privileges, or 
immunities . . . under the Constitution and laws," it added lan-
guage similar to that which appears in the fourteenth amendment, 
i.e., "equal protection of the laws," and "equal privileges and im-
munities under the laws" (emphasis added). From this he con-
cluded that Congress must have enacted section 2 with the under-
standing that its basic function would be to provide civil and 
criminal actions against conspirators who interfere with rights se-
cured against state action by the fourteenth amendment. Justice 
White, however, interpreted the decision to change the lan-
guage in the original bill as only an indication of an intent to add 
the class-based animus qualification to conspiracies which would 
be actionable under the statute.

The concurring opinions of Justices Powell and Stevens in 
Novotny do not indicate an extensive familiarity with the legisla-
tive history of section 2. The few relevant statements scattered 
throughout the legislative history of section 2 support, but only to 
a limited extent, Justice White's position. Those remarks primarily 
indicate a congressional concern that conspiracies which come 
within the statute be characterized by a particular motive which is 
directed at specific classes of people. None of the statements spec-
fically indicate any intent to limit section 2 conspiracies to those 
which deny constitutional rights. Despite the lack of clarity, a few 
statements tend to support the conclusion that the amended bill 
was drafted to reach conspiracies to deny both constitutional and 
statutory rights. A sponsor of the original and the amended bill, 
Representative Shellabarger, said that the amended bill would de-
ter those who would "‘trample into dust’ these newly-acquired po-
litical rights of the freedmen and the constitutions and laws which

110. 442 U.S. at 382 n.3 (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)).
111. Id. at 383.
112. Id. at 389 n.5.
113. The Court in Griffin v. Breckenridge, 403 U.S. 88, 100 (1971) believed that "‘the 
explanations of the added language centered entirely on the animus or motivation that 
would be required . . . ‘"
confer them." 114 Indeed, a leading opponent of the amended bill, Senator Thurman, thought that it made actionable not only conspiracies to deny federal statutory rights but also conspiracies to deny rights created under state law:

It is because the second section of this bill undertakes to give jurisdiction to the Federal courts of offenses not against the Constitution of the United States, not against the laws of the United States alone, but also against the laws of the States alone; . . . it is [in part] for that reason that I cannot vote for it. . . . My objection to it is that it goes beyond offenses against the Constitution and the laws of the United States. 115

Accordingly, in light of a legislative history which does not suggest that in amending the original bill Congress intended to eliminate the coverage of statutory rights from section 2, a conclusion that section 1985(3) does not extend to conspiracies to deny statutory rights is not warranted. Conspiracies motivated by a class-based animus to deny rights secured by contemporary equal employment opportunity legislation should be recognized under section 1985(3), unless the rationale of the majority opinion in Novotny, i.e., the incompatibility between section 1985(3) and the administrative process which accompanies subsequently enacted civil rights legislation, dictates a different conclusion. 116

114. Cong. Globe, 42d Cong., 1st sess. 517 (1871). Representative Shellabarger also referred to a conspiracy actionable under Section 2 as one which would "deprive a citizen of the United States of such rights and immunities as he has by virtue of the laws of the United States and of the Constitution thereof." Id. at 382. Later, he said that section 2 prohibited a conspiracy "to defeat United States law made in protection of the fundamental rights of national citizenship, whether that law be constitutional or statutory law. Id. at App. 113.

115. Id. at 822. Several other members of the forty-second Congress apparently understood conspiracies to interfere with statutory rights as within the scope of section 2. Senator Edmunds remarked that section 2 refers to conspiracies "to deprive citizens of the United States, in the various ways named, of the rights which the Constitution and the laws of the United States made pursuant to it give to them. . . ." Id. at 568. Representative Hawley said that the statute protected "the rights and privileges to which [a person] is clearly entitled under the Constitution and laws of the United States. . . ." Id. at 383. In discussing the constitutionality of section 2, Representative Willard opposed the proposition that Congress could constitutionally reach the crimes of ordinary robbery and mayhem and make them "offenses against the rights, privileges, and immunities of a person under the Constitution and laws of the United States" (emphasis added). Id. at App. 188. Taken in context, his statement also appears to reflect an understanding of a congressional intent to create a cause of action for conspiracies to deny both constitutional and statutory rights.

116. In interpreting the scope of criminal conspiracies which fall within 18 U.S.C. § 241, a statute which was originally a part of the Enforcement Act of 1870, see notes 58 and 65 supra, the Court has ruled that an indictment under section 241 may allege either a denial
THE IMPACT OF THE NOVOTNY DECISION ON OTHER EQUAL EMPLOYMENT OPPORTUNITY LEGISLATION

In Novotny, the Court emphasized the "balance, completeness and structural integrity" of Title VII in reaching its conclusion that conspiracies to deny rights secured by Title VII cannot be pleaded under section 1985(3). This article will now examine the extent to which the rationale of Novotny applies to other major federal legislation which secures equal employment opportunity. But, before discussing the effect of Novotny on specific legislation, it will set forth the basic remedies and enforcement procedures which accompany rights created by the legislation in question.

First, however, it is appropriate to mention which federal agencies are responsible for enforcing the equal opportunity legislation which this article is examining within the context of section 1985(3) conspiracies. Under Reorganization Plan No. 1 of 1978, the EEOC is charged with responsibility for enforcing not only Title VII, but also the ADEA and the EPA. The VRA is enforced in part by the Office of Federal Contract Compliance Programs and in part by HEW. No federal agency is responsible for the enforcement of section 1981 or section 1983.

42 U.S.C. Section 1981 and Section 1983

Novotny probably has no application to a conspiracy which involves a governmental official who acts under color of state law to deny a right actionable under section 1983. In analyzing the appropriate relationship between section 1985(3) and section 1983, it is important to note that section 1983, like section 1985(3), creates no substantive rights. Like section 1985(3), section 1983 only provides a cause of action against anyone who deprives a person "of any rights, privileges or immunities secured by the Constitution of constitutional or federal statutory rights. See United States v. Mosley, 238 U.S. 383, 387 (1915); United States v. Waddell, 112 U.S. 76, 79 (1884). To the extent that section 241 and section 1985(3) parallel one another historically and grammatically, the recognition of conspiracies to deny statutory rights as within section 241, may suggest that section 1985(3) extends to conspiracies to deny federal statutory rights.

117. 442 U.S. at 376 (quoting Brown v. General Services Administration, 425 U.S. 820, 832 (1976)).
118. No reported decision has sustained a section 1985(3) action predicated on a statutory right under circumstances where the plaintiff failed to comply with the enforcement procedures contemplated by the statute which created the right in question.
and laws," i.e., rights created by some other source. The rationale of the majority opinion in Novotny does not apply to a conspiracy to violate rights which are actionable under section 1983, because there are no administrative procedures with which a plaintiff must comply before filing a complaint under section 1983. Furthermore, even if the position espoused by Justices Powell and Stevens in their concurring opinions in Novotny is correct, i.e., that section 1985(3) recognized only conspiracies to deny constitutional rights, it would affect only a very small number of conspiracies to deny rights actionable under section 1983, because almost all actions pleaded under section 1983 allege violations of constitutional rights.

The ability to plead a conspiracy to violate section 1981 under section 1985(3) should likewise be unaffected by Novotny. Like section 1983, section 1981 contains no administrative procedures which must be complied with before an action may be pleaded under section 1981. However, the Powell-Stevens position would presumably prohibit a conspiracy to interfere with section 1981 rights from being pleaded under section 1985(3), simply because such a conspiracy would involve a violation of a statutory right (unless the conspiracy contained some element of state action, in which case it could also be pleaded under section 1983). Indeed, because both Title VII and section 1981 prohibit racial discrimination, if a conspiracy to violate rights secured by section 1981 is actionable under section 1985(3), then, at least with respect to one form of discrimination prohibited by Title VII, Novotny would have no effect. However, there are four reasons for not following the Powell-Stevens constitutional conspiracies only position, at least with respect to section 1981. First, only two members of the

122. 442 U.S. at 379.
123. Id. at 382.
124. The position that section 1985(3) would be limited to only conspiracies to deny rights which preexisted the passage of the statute was apparently never seriously considered by the forty-second Congress. See Cong. Globe, 42d Cong., 1st Sess. parts 1 and 2 (1871)(passim). Nothing on the face of section 1985(3) suggests such an interpretation. In interpreting 18 U.S.C. § 241, see notes 68 and 65 supra, Justice Holmes wrote: “[W]e cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face § 19 [now § 241] most reasonably affords.” United States v. Mosley, 238 U.S. 383, 388 (1915). Similarly, in Monroe v. Pape, 365 U.S. 167, 183 (1961), in commenting on the scope of the Civil Rights Act of 1871 the Court said: “Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language . . . .” (emphasis added).
Court endorsed this position in *Novotny*. Second, as this article suggests, the legislative history of section 2 of the Civil Rights Act of 1871 does not support this position. Third, the Supreme Court has recognized that section 1981 was not limited or impliedly repealed by Title VII despite the substantial overlap between Title VII and section 1981 with respect to racial discrimination. *A fortiori* it would appear that if section 1981 actions are not affected by Title VII, then conspiracies to deny section 1981 rights are likewise unaffected by Title VII. Fourth, footnote six in the Court’s opinion in *Novotny* obliquely referred to the lack of any need in *Novotny* to consider “whether section 1985(c) creates a remedy for statutory rights other than those fundamental rights derived from the Constitution.”* While it is not easy to discern exactly what those rights are to which the Court was alluding, *it would appear that section 1981, as a thirteenth amendment statute passed immediately after the Civil War to remove what Congress perceived to be the “badges and the incidents of slavery,” would indeed fall within the definition of “fundamental [statutory] rights derived from the Constitution.”*  

The Age Discrimination in Employment Act

The procedures under which the ADEA is enforced are similar to, but less formal than, those under which Title VII is enforced. *A charge setting forth the alleged violation of the ADEA must be filed with the EEOC within 180 days of the alleged violation.* However, if the discrimination occurred in a state which has a state agency which is responsible for enforcing comparable state legislation, the charging party may have up to an additional 120 days (or thirty days after state proceedings are terminated, whichever period is shorter) within which to file a charge with the EEOC. In addition, the charging party must file a charge with the state agency sixty days before he files his charge with the

126. 442 U.S. at 370 n.6.  
127. Justice White’s dissent in *Novotny* alludes to this reference but sheds no light on its meaning. *Id.* at 388-89 n.5.  
129. *Since Novotny* ruled that Title VII conspiracies may not be pleaded under section 1985(3), the administrative procedures and remedies available under Title VII have only an analogous relationship to the scope of this article. *See notes 85, 86 and 87 supra.*  
131. *Id.*
In contrast to Title VII, however, once the statute of limitations has been satisfied by filing a charge with the EEOC within the prescribed period, the charging party need wait only sixty days before he files an ADEA complaint in a federal district court. During this sixty day period the Commission will investigate the charge and attempt conciliation just as if a charge had been filed under Title VII. If conciliation fails, the EEOC may file an action in its own name. If the EEOC decides to file suit, the private cause of action is extinguished. Damages under the ADEA are defined by statute and compensatory and punitive damages are probably not available.

The statute of limitations under the following provisions:


133. 29 U.S.C. § 626(d) (Supp. II 1978). It is not clear whether or not the 60 day notice requirement may be tolled for equitable reasons. See Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976), aff'd by an equally divided Court, 434 U.S. 99 (1977)(requirement may be tolled for equitable reasons in an appropriate case).

134. 29 U.S.C. § 626(b) and (d) (1976 and Supp. II 1978).


136. The ADEA substantially incorporates the damages provisions of section 16(b) of the FLSA. The ADEA authorizes damages consisting of "unpaid minimum wages or unpaid overtime compensation," as defined by the FLSA, consisting of an additional amount equal to "unpaid minimum wages or unpaid overtime compensation." 29 U.S.C. § 626(b) (Supp. II 1978) incorporating 29 U.S.C. § 216(b) (Supp. II 1978).

137. 29 U.S.C. § 626(b) provides in part:

Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections [16 and 17 of the Fair Labor Standards Act] . . . Provided, That liquidated damages shall be payable only in cases of willful violations of this [Act]. In any action brought to enforce this [Act] the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this [Act] . . . (emphasis added).

The weight of authority is that the reference to legal relief in section 626(b) does not justify a conclusion that Congress intended to authorize compensatory and punitive damages in addition to the liquidated damages ("unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title"). See, e.g., Slatin v. Stanford Research Institute, 590 F.2d 1292, 1296 (4th Cir. 1979)(no compensatory damages are available under the ADEA). Accord, Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107 (1st Cir. 1978); Dean v. American Security Co., 559 F.2d 1036 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978); Rogers v. Exxon Research & Engineering Co., 550 F.2d 834 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978); Gifford v. B.D. Diagnostics, 458 F. Supp. 462, 464 (N.D. Ohio 1978)(no punitive damages are available under the ADEA); Quinn v. Bowmar Publishing Co., 446 F. Supp. 780, 784 (D. Md. 1978)(same). Nevertheless, the Supreme Court in ruling that ADEA actions are triable by juries said:

[Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary . . . . We can infer, there-
ADEA is three years for a wilful violation and two years for a non-wilful violation.\(^{138}\)

There is very little reason to assume that the rationale of *Novotny* does not apply to a conspiracy to violate the ADEA. Recognition of a section 1985(3) action for such a conspiracy would allow a plaintiff to frustrate statutes of limitations either identical or similar to the statutes of limitations contained in Title VII. It would also create a situation in which the Commission's responsibilities to investigate and attempt conciliation of ADEA actions could be easily frustrated. Similarly, allowing an ADEA conspiracy to be pleaded under section 1985(3) would create a situation in which an ADEA plaintiff could effectively undermine the right of the EEOC to bring the action in its own name (which causes the private action to expire).\(^{139}\) If no notice of an ADEA cause of action is ever given to the Commission, it is difficult to imagine how the Commission could (or would) conduct an investigation, attempt conciliation or consider filing on behalf of the charging party.

Only two reported decisions have attempted to seriously analyze whether an ADEA conspiracy can be pleaded under section 1985(3). In *Platt v. Burroughs Corp.*,\(^{140}\) a pre-*Novotny* case in which an ADEA plaintiff also pleaded a conspiracy under section 1985(3) to violate his rights under the ADEA, the Court's conclusion and reasoning are consistent with that of the Supreme Court in *Novotny*. The court in *Platt* concluded that the ADEA "is a precisely drawn, detailed statute" which "provides the exclusive judicial remedy for claims of age discrimination"\(^{141}\) and ruled that no conspiracy to violate the ADEA could be pleaded under section 1985(3). The court relied heavily on the fact that the ADEA incorporates section 16 of the Fair Labor Standards Act (FLSA)\(^{142}\) which probably provides the sole remedy for an employee who sues

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141. Id. at 1340.

142. 29 U.S.C. § 216(b) (1976). "The provisions of this title shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 217 of this title. . . ."
under the FLSA. Insofar as the ADEA incorporates section 16, the court thought it had no choice but to conclude that section 16, as incorporated into the ADEA, serves the same purpose in the ADEA as it serves in the FLSA. Without really discussing the parameters of Novotny, the court in Pavlo v. Stiefel Laboratories, Inc., a case decided after Novotny, and which cannot be reconciled with the Supreme Court's decision, ruled that a plaintiff may plead an ADEA conspiracy under section 1985(3), if he himself has no ADEA cause of action, but was injured as a result of a conspiracy to violate the ADEA rights of other employees. In reaching this conclusion, the court emphasized that recognition of a section 1985(3) cause of action on such facts in no way undermines the integrity of the administrative process which the ADEA contemplates. However, the court made no effort to articulate the source of the right which the plaintiff was allegedly denied and the court's failure to do so suggests a misunderstanding of the Supreme Court's interpretation of section 1985(3) in Novotny. The Pavlo distinction between a section 1985(3) plaintiff who has an ADEA cause of action and a section 1985(3) plaintiff who has no ADEA cause of action is simply inconsistent with the Supreme Court's unqualified interpretation of section 1985(3) as a statute which creates no rights and which creates only a cause of action for infringed rights which have been created by some other source of law.

The Equal Pay Act

Unlike the ADEA and Title VII plaintiff, an EPA plaintiff need not proceed through any administrative procedures to perfect a cause of action under the EPA. Because the EPA is a section of the FLSA, EPA actions are governed by the FLSA. Accordingly, damages are defined precisely, as under the ADEA, by statute, and compensatory and punitive damages are not available. Similarly,

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143. In reaching this decision, the Court followed the reasoning of Lerwill v. Inflight Motion Pictures, Inc., 343 F. Supp. 1027 (N.D. Cal. 1972).
144. 424 F. Supp. at 1340.
145. [1980] LAB. REL. REP. No. 27 (22 FAIR EMPL. PRAC. CASES) 489. This case involved a section 1985(3) conspiracy action filed by a plaintiff who did not fall within the age group (between 40 and 70) which the ADEA protects. Plaintiff alleged that he was discharged in order to create an appearance that employees who fell within the protected age group were not discharged in violation of the ADEA.
146. 442 U.S. at 376-78.
148. 29 U.S.C. § 216(b) defines precisely the damages available under the FLSA and the
a prospective plaintiff's cause of action expires if the EEOC decides to file an action which seeks back pay for the aggrieved party. And, as under the ADEA, a cause of action must be filed within two years, if the violation is not wilful, and within three years, if the violation is wilful.

Allowing a plaintiff to proceed under both the EPA and section 1985(3) would not cause as much disruption to a statutory enforcement scheme as would allowing a plaintiff to proceed under section 1985(3) with respect to a violation of Title VII or the ADEA. Nevertheless, the recognition of a cause of action based on an EPA conspiracy as within section 1985(3) would probably affect the “balance, completeness, and structural integrity” of the EPA enough to justify a court in reaching the same result under the EPA which the Supreme Court in Novotny reached under Title VII. The recognition of a conspiracy to violate the EPA as actionable under section 1985(3) would not be consistent with the two and three year statutes of limitations applicable to the EPA, since section 1985(3) actions are controlled by the most analogous state statutes of limitations. Similarly, because the EPA is a part of the FLSA, a conclusion that EPA conspiracies may fall within section 1985(3) would allow a plaintiff to circumvent the statutorily prescribed damages authorized by the FLSA. Assuming that the court in Platt correctly reasoned that the remedies provided under the ADEA and the FLSA are exclusive, its conclusion would a fortiori apply to the EPA, because the EPA is actually a part of the FLSA, whereas the ADEA only substantially incorporates the remedies authorized by the FLSA. Also, allowing a plaintiff to proceed under section 1985(3) would allow him to undermine the EEOC’s right under section 16(b) and (c) of the FLSA to cut off a private cause of action by filing an action which seeks back pay for the complainant.

149. 29 U.S.C. § 216(b) and (c) (Supp. II 1978).
150. See note 138 supra.
151. 442 U.S. at 376 (quoting Brown v. General Services Administration, 425 U.S. 820, 832 (1976)).
152. See note 125 supra.
154. 29 U.S.C. § 216(b) and (c) (Supp. II 1978). Without discussing any of the problems which the recognition of such an action would appear to entail, the court in Hodgin v. Jefferson, 447 F. Supp. 804, 808 (D. Md. 1978), a pre-Novotny decision, cursorily relied on what it perceived to be “the modern trend” toward “expanding the scope of class-based conspiracies.
As mentioned earlier, section 503(a)\textsuperscript{155} of the VRA requires most government contractors and subcontractors to assume contractual obligations not to discriminate against handicapped persons and to undertake affirmative action programs for their benefit. A person aggrieved by the failure of a contractor or subcontractor, to whom section 503(a) is applicable, to discharge his obligations must notify the Office of Federal Contract Compliance Programs within 180 days of the alleged breach of contract.\textsuperscript{156} If the contractor has an internal review procedure, the OFCCP will refer the complaint to the contractor for sixty days.\textsuperscript{157} After that period expires, the OFCCP will investigate and if it finds probable cause of a breach of those obligations, it will attempt conciliation.\textsuperscript{158} Should conciliation fail, the OFCCP must decide whether or not to invoke administrative remedies or to file suit to enforce or rescind the contract.\textsuperscript{159} Again, as mentioned earlier, whether section 503(a) authorizes a private cause of action against the non-complying contractor is uncertain.\textsuperscript{160} Also, as mentioned earlier, violations of section 504, which prohibits discrimination against handicapped persons in federally funded programs and activities, probably do give rise to private causes of action on behalf of persons who have been discriminated against.\textsuperscript{161} The remedies available to HEW in enforcing section 504 are quite similar to those available to the OFCCP in enforcing section 503(a). In addition to those remedies, HEW can, of course, terminate federal assistance to the program in question.\textsuperscript{162}

\begin{thebibliography}{9}
\bibitem{156} 41 C.F.R. § 60-741.26(a) (1979).
\bibitem{157} 41 C.F.R. § 60-741.26(b) (1979).
\bibitem{158} 41 C.F.R. § 60-741.26(e) and (g) (1979).
\bibitem{159} 41 C.F.R. § 60-741.28 (1979).
\bibitem{160} See note 38 \textit{supra}.
\bibitem{161} See note 37 \textit{supra}.
\bibitem{162} See B. Schlei and P. Grossman, \textit{Employment Discrimination Law} 744-48 (1976) and 1979 Supplement 62-63. Courts have consistently ruled that Executive Order 11246, 3 C.F.R. 169 (1964) as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), which prohibits most government contractors from employment discrimination based on race, sex, color, national origin or religion, and which requires contractors to which it applies to undertake affirmative action programs, creates no cause of action on behalf of a person who has been discriminated against in violation of the executive order. See note 38 \textit{supra}.
\end{thebibliography}

Under Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979) \textit{reprinted in} 5 U.S.C. app. at 289 and in 92 Stat. 3781 (1978), most federal contract compliance programs are now administered by the Office of Federal Contract Compliance Programs. While the OFCCP may proceed on its own initiative against a government contractor who breaches the anti-discrimina-
To the extent that private actions exist under the VRA, unless no conspiracies to deny statutory rights are within section 1985(3), there is no logical reason why an otherwise appropriate conspiracy to violate section 503(a) or section 504 should not come within the scope of section 1985(3). The administrative procedures authorized under sections 503(a) and 504 are designed primarily to implement the contractual remedies available to the federal government and its contracting agencies. Accordingly, such procedures have little, if anything, to do with providing relief to the victim of discrimination. They would not be frustrated in any meaningful sense by allowing victims of conspiracies which otherwise fall within section 1985(3) to proceed thereunder.

A POSTSCRIPT

Novotny is not a narrow decision, despite the fact that the Court's characterization of the complaint could have led to a more limited holding. The Court chose to construe the complaint as alleging a cause of action under section 704(a) for retaliation against the plaintiff for opposing the violations of the Title VII rights of others and a section 1985(3) cause of action as a result of a conspiracy to effect the same retaliation. Accordingly, the Court could have ruled only that a plaintiff who claims a violation of a right which he possesses under Title VII may not plead a conspiracy under section 1985(3) to carry out the violation of that right. Such a holding would have prevented a plaintiff from circumventing the administrative process of Title VII by proceeding under section 1985(3). It would also have allowed a plaintiff who has not suffered the violation of a Title VII right which he possesses, but who is injured in the course of a conspiracy to deny the Title VII rights of others, to seek redress under section 1985(3). However, the Court foreclosed that possibility when it interpreted section 1985(3) to create no substantive rights, but only remedies for interference with a right which a plaintiff possesses under some source of law other than section 1985(3).

Because the rationale of Novotny applies to the ADEA and the EPA as well as to Title VII, section 1985(3) conspiracies to violate
rights secured by any of these acts should not logically be actionable under section 1985(3). The result is the elimination of a significant deterrent against employment discrimination. An individual who participates in a conspiracy to violate the ADEA, the EPA or Title VII may act with impunity as long as he does not qualify as a potential defendant (e.g., "employer," "labor organization," etc.), under the act in question. Such a result suggests an unwillingness or inability of the Court to take seriously what Justice White in his dissent in Novotny recognized as a "discrete and particularly disfavored form of discrimination."

In reaching its result in Novotny, the Court seems to have been motivated by concerns which, while not baseless, are not as serious as they might appear. The Court seems to have almost assumed that there is something inherently attractive about circumventing the administrative process of Title VII by proceeding under section 1985(3). Such, however, is hardly the case. A pre-Novotny plaintiff who might have chosen to proceed under section 1985(3), rather than under Title VII, would not have been entitled to have the EEOC investigate his claim. Nor, would he have been entitled to the Commission's conciliation efforts. The EEOC could not have filed suit on his behalf and he would not have been entitled to the appointment of counsel. Furthermore, the burden of proof under section 1985(3) is significantly more exacting than is the burden of proof required to show a Title VII violation. Not only would a section 1985(3) plaintiff have had to show a Title VII violation, he would also have had to show: (1) the elements of a conspiracy and (2) a class-based animus which motivated the conspiracy. Nor, is it necessarily unfair to subject a section 1985(3) defendant to a statute of limitations which is longer than those set forth in Title VII. A conspiracy is often difficult to discover and it frequently involves attempted concealment. However, since a consistent application of the Court's reasoning in Novotny requires a similar result with respect to section 1985(3) conspiracies to violate

164. 442 U.S. at 391.
165. See note 87 supra.
166. Id.
167. Id.
rights secured by the ADEA and the EPA, victims of these conspiracies, as well as victims of conspiracies to deny rights secured by Title VII, are without a remedy.
As any first year law student soon becomes exasperatingly aware, the traditional common law of defamation—libel and slander—is replete with archaic, rigid and arbitrary rules, reflecting its erratic evolution over several centuries of English history. Its eclectic background, and the peculiarity of the rules, led one early twentieth century historian and critic to opine that “perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies” and to conclude that “[i]t is, as a whole, absurd in theory and very often mischievous in its practical application.” The law of defamation, both civil and criminal, remained substantially unchanged from its English heritage until the infusion of free speech and press strictures of the constitutional “revolution,” beginning in 1964 with the dynamic duo of *New York Times Co. v. Sullivan* and *Garrison v. Louisiana*.

This article will delineate the “modern” Kentucky law of criminal libel, potentially applicable to criticism of public officials, in a tripartite framework: an overview of the all-important English law of criminal libel; the pre-1964 development of the common law offense in Kentucky; the impact of the constitutional “revolution” upon criminal libel under Kentucky law. It is hoped this analytical perspective will give the reader an awareness of the “special and peculiar circumstances” molding criminal libel, evidence the po-
tential for, and pattern of, abuse of freedom of expression during its pre-constitutional period of development, and illustrate the necessity of permitting this offense, generally indefensible from a constitutional and policy perspective with respect to public officials, to disappear from the corpus of modern Kentucky criminal law.

**ENGLISH COMMON LAW DEVELOPMENTS—AN OVERVIEW**

Although it has long been popularly believed that the victim of defamation was without a non-ecclesiastical remedy in medieval England, modern scholarship has convincingly demonstrated that the general populace was extremely sensitive to personal insults and affronts and that the early English law provided the defamed party at least some limited civil and criminal remedies. Indeed, records of the thirteenth and fourteenth centuries disclose that the manorial or seignorial courts, filling the vacuum left by the absence of a remedy in the King’s courts, handled a significant amount of defamation conflict resolution, normally with a civil remedy for damages. Apparently, these local tribunals provided the victim with substantial justice at the local level and in the social milieu within which the defamation had occurred.

6. Anglo-Saxon law shared this sensitivity to personal insults with other legal systems of Germanic origin. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 483 (5th ed. 1956) [hereinafter cited as T. PLUCKNETT]. The early Lex Salica provided for payment of damages for calling a man a “wolf” or “hare” (three shillings) or a woman a “harlot” (forty-five shillings). Apparently, however, the defamer was liable only upon failure to prove the truth of the imputation. In a similar vein, under statutes enacted during the reigns of Edgar (946-961) and Canute (1027-1034), proven false accusation “injuring” the victim “either in his property or reputation” mandated excision of the defamer’s tongue. The Norman Custumal required that one who defamed another as “thief” or “manslayer” pay damages and make a public confession as a liar while holding his nose with his fingers. See generally II F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 537 (2d ed. 1898). For the complete text of the statutes of Kings Edgar and Canute, see Donnelly, History of Defamation, 1949 Wis. L. Rev. 99, 100 n.3 [hereinafter cited as Donnelly].

7. Apparently, every cause of action at the local level, whether for defamation or assault or battery, required allegation and proof of shame, dishonor or disgrace as an element. Maitland, Slander in the Middle Ages, 2 THE GREEN BAG 4, 5 (1890). Such hontage was likewise a common element of compensation in addition to damnum (damage) in such courts. II F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 537 (2d ed. 1898). Apparently, however, vindication rather than compensation was the motivating force in many cases, as illustrated by the release of most of the judgment awarded the complainant. Donnelly, supra note 6, at 101-02. See also Carr, The English Law of Defamation I, 18 L.Q. Rev. 255, 263-68 (1902) [hereinafter cited as Carr I].

8. The local remedy was from “a cheaper, a more familiar and perhaps a more trusted” jurisdiction than the King’s Courts. Carr I, supra note 7, at 263. Upon the decay of the manorial or seignorial courts, until approximately 1535 (from which date the common law
Contemporaneously with the handling of the vast majority of cases involving the common people at the local level or within the ecclesiastical system, an obscure, limited criminal statute, De Scandalis Magnatum, was promulgated in 1275, prohibiting the telling or publishing of "any false News or Tales whereby Discord or Occasion of Discord or Slander may grow between the King and his People or the great Men of the Realm." Violations were enforceable in the King's Council (and later in the Star Chamber) by indefinite commitment of the purveyor until the "first author of the tale" was produced. Though never applied criminally during the middle ages and of little practical significance in and of itself, civil action for defamation has a "continuous history"), there was no common law remedy except under De Scandalis Magnatum; all others were relegated to an ecclesiastical remedy.

Prior to 1066, temporal and ecclesiastical cases were heard by the same tribunal. After the Norman Conquest of that year, however, the jurisdictions separated. The ecclesiastical courts, entrusted with saving the soul of the sinner and protecting the mores of society, claimed wide jurisdictional authority over moral issues including accusatory language, defamation, under canon law. The normal sanction was acknowledgement of the groundlessness of the imputation and, if made to the public, usually a public penance during mass in the parish of the victim. By 1661, as a practical matter, ecclesiastical jurisdiction had been displaced. Until its abolition in 1855, it existed only theoretically and was without enforcement capability. A multiple of factors contributed to the supersession of the ecclesiastical courts: the inadequacy of canon law punishment; the popular sentiment against the excesses and corruption of the canonical courts [with their use of the "extortionate and tyrannical" gossip-gatherers called apparitors, Carr I, supra note 7, at 268-69, 272]; the challenge to their authority by the law courts and the recognition of a civil action for defamation (libel or slander—no distinction was made during the sixteenth century); the regular use of "temporal damages." Donnelly, supra note 6, at 103-06.

The text is partially quoted in Donnelly, supra note 6, at 108 and fully quoted in FOLKARD'S STARKIE ON SLANDER AND LIEEL 218 (4th Eng. ed. 1877) [hereinafter cited as FOLKARD'S STARKIE]. The statute was reenacted in 1378 with a specification of "magnates" covered: "Prelates, Dukes, Earls, Barons, and Other Nobles and Great Men of the Realm . . . the Chancellor, Treasurer, Clerk of the Privy Seal, Steward of the King's House, Justices of the one Bench or of the other, Great officers of the Realm." See Donnelly, supra note 6, at 108 & n.43; FOLKARD'S STARKIE at 218-19. The principal statutory justification for such protection was the "great peril and mischief [that] might come to all the realm, and quick subversion and destruction of the said realm, if due remedy be not provided." Id. at 219. The act was reenacted in 1388, 1554 and 1559; it was not repealed until 1888 upon entry into force of the Statute Law Revision Act of 1887. Veeder I, supra note 1, at 554 n.3, although no recorded use of it took place after 1710. Carr I, supra note 7, at 263. The statute was a type of class legislation and probably was used only where "caste prejudice or bureaucratic dignity" would have precluded any other confrontation. Id. at 272-73.

T. PLUCKNETT, supra note 6, at 487.

FOLKARD'S STARKIE, supra note 10, at 218. This was later modified to include punishment by the advice of the King's Council, where the initial teller could not be found. Id. at 219.

Kelly, Criminal Libel and Free Speech, 6 U. OF KAN. L. REV. 295, 298 (1958) [hereinafter cited as Kelly]. However, the statute was interpreted to grant a civil cause of action for
De Scandalis Magnatum was a very important development in the evolution of criminal libel. It magnified the medieval Germanic heroic culture's obsession with personal honor and prestige into a criminal statutory prohibition of "scandal of magnates." Explicitly to secure the established order, English law had adopted for the first time what was, in essence, a criminal libel law—a statute with the intendment and precedential impact of legal authorization of direct curtailment of free expression critical of public institutions and personages. 14

With the advent of printing with its "potentiality of illimitable diffusion of seditious doctrine," 15 the inherent limitations of civil remedies and of prosecutions for treason or "scandal of magnates" resulted in the evolution of the Star Chamber into a tribunal of "criminal equity" 16 with almost unfettered authority to offset the deficiencies of existing law. 17 In the noted case of De Libellis Famosis, 18 involving an "infamous libel in verse" against a de-

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14. Id. at 297-98; Veeder I, supra note 1, at 554.
16. Id. at 392; Veeder I, supra note 1, at 562.
17. In addition to its creation of the new crime of libel, the Star Chamber was empowered to disregard form, procedure, rules of evidence, and to permit appearance of its own lawyers, and not of private counsel. Id. at 563. It was, in effect, a prosecutorial "arm of the government." Spencer, Criminal Libel—A Skeleton in the Cupboard (1), 1977 C RIM. L. Rev. 383, 384.
18. III The Reports of Sir Edward Coke (G. Wilson ed. 1793), Part V, 125 [hereinafter cited as Coke Reports]. The case could be prosecuted at common law, or in the Star Chamber (by bill if denied or ore tenus upon confession). The sanctions included fine or imprisonment.
ceased archbishop, Lord Coke, in one of his more maligned efforts at legal scholarship, 19 laid the foundations of the common law offense of criminal libel. He initially bifurcated the offense into its subspecies—libels against "private" and "public" persons. Libel of the former deserved punishment because of its undoubted tendency to provoke breaches of the peace: "for although the libel be made against one, yet it incites all those of the same family, kindred or society to revenge, and so tends per consequens to quarrels, and breach of the peace, and may be the cause of shedding of blood."20 If directed against a "magistrate, or other public person,"21 it was considered "a greater offense" for it concerned "not

19. Coke cited no English authority for his conclusion that criminal (or seditious—the terms are used interchangeably in the literature) libel was a common law crime and apparently knew of no prosecutions at common law. Twenty-two years later he mentions two fourteenth century precedents in his Third Institute. However, such were not libel prosecutions, according to Irving Brant, who has concluded that seditious libel was exclusively an innovation of the Star Chamber, "injected into the common law solely by the fiat of Coke." Brant, Seditious Libel: Myth and Reality, 39 N.Y.U. L. Rev. 1, 5 (1964). Coke's primary sources were biblical in support of his conclusion that "libelling and calumniation is an offense against the law of God." Coke Reports, supra note 18, at 126. Sir James Fitzjames Stephen, in his classic treatise on English criminal law, remarks with respect to the legal scholarship in De Famosis Libellis, "even in Coke it would be difficult to find anything less satisfactory." II J. Stephen, supra note 18, at 304.

20. Coke Reports, supra note 18, at 126. The "breach of the peace" rationale had historical justification at the time; dueling was extremely common and of significant concern to the government. T. Plucknett, supra note 6, at 490; Veeder I, supra note 1, at 567. Dueling was finally outlawed in 1613. Id. at 555 & n.1. As a justification for a modern offense of criminal libel in "a settled and civilized community it is plainly irrational and unscientific." Veeder, The History And Theory Of The Law Of Defamation II, 4 Colum. L. Rev. 33, 44 (1904) [hereinafter cited as Veeder II]. It is the sanctity of reputation which provided the only rational justification for the criminal offense because the "breach of peace" argument was "absurd in itself." Id.

21. [F]or what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects under him? And greater imputation to the State cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice.

Coke Reports, supra note 18, at 125.
only the breach of the peace, but also the scandal of government.” That “scandal of government” and not the reputation of the defamed individual was the underlying justification was clearly demonstrated by Coke’s rejection of death of the victim as a supervening bar to prosecution. Though the defamed individual die, when the libeller “traduces and slanders the state and government [the victim] dies not.” Departing from the express statutory language of De Scandalis Magnatum (and perhaps why the case was not tried within the statute, since it was clearly covered thereunder), from the practice of the manorial or seignorial courts, and from the Roman offense from which the crime was adopted, Coke concluded that it was “not material” whether the libel was true or the victim of “good or evil fame,” “for in a settled state of government the party aggrieved ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling, or otherwise.” Indeed, he deemed the libeller, famosus defamator, a “greater offender” than one using physical force. At least in the latter case, one had a known assailant and an opportunity for self-defense; whereas, in the former, the “poisoning” is “more dangerous” be-

22. Id. The libelling of a deceased “private” person was deemed likely to result in a “breach of the peace by the family of the deceased victim.” Id. The Star Chamber also awarded compensatory damages in some cases as an ancillary remedy and a substitute for dueling; clearly, in the Star Chamber no definite distinction was made between tort and crime. Upon absorption of its functions by the common law courts (where the distinction was rigidly adhered to), the tort-crime distinction required reevaluation. This resulted in a retention of the Star Chamber rule regarding truth in criminal proceedings and the adoption of the then prevailing rule to the contrary in civil cases. T. Plucknett, supra note 6, at 497.

23. Id. at 487, suggests that De Scandalis Magnatum was not used so that the Star Chamber would not be limited by its narrower boundaries.

24. See note 6 supra; Ray, Truth: A Defense to Libel, 16 Minn. L. Rev. 43, 44 (1931). The maxim, “The greater the truth, the greater the libel,” is probably traceable to Mansfield. Id. at 43.

25. T. Plucknett, supra note 6, at 490. One writer suggests that this severely-punished offense under Roman Law was attributable to attacks on Roman emperors by anonymous, scurrilous writings. De Villiers, The Roman Law of Defamation, 34 L.Q. Rev. 412, 418 (1918). The Roman Law offense, unlike its illegitimate English offspring, was not based on the form of the publication, but the character of the matter, the extent of its dissemination (usually by scattering in the streets, which prevented its being privileged) and its anonymous source. Veeder I, supra note 1, at 564-65.

26. Coke Reports, supra note 18, at 126. Apparently, the practice of the Star Chamber with respect to slanderous words was inconsistent. In the case of slander not constituting sedition, truth could be pleaded as a defense, which is “wholly out of place if defamation is regarded as a crime.” 8 W. Holdsworth, supra note 1, at 336.
cause the offender is "secret" and not easily identifiable. 27

Upon the abolition of the Star Chamber in 164128 and the absorption of its functions soon thereafter by the common law courts, 29 two significant problems arose. One was the redefinition of libel necessitated by the waning and ultimate demise of press licensing laws. Another was the specification of the respective functions of judge and jury in criminal libel cases, a nonexistent problem for the omnipotent Star Chamber. The re-evaluation of the definition of criminal libel required by the lapse of the extensive press licensing laws in 1694, and the resultant non-viability of the definition of libel (as printing without prior authorization) 30 occurred a mere decade later. In 1704, in the famous trial of Tutchin, charges were preferred for articles in the opposition newspaper Observator imputing governmental maladministration of, and corruption in, the Navy. 31 Lord Holt rejected the defense contention that "nothing is a libel but what reflects upon some particular person," because "[t]o say that corrupt officers are appointed to administer affairs is certainly a reflection on government." Such impersonal attacks on government mandate prosecution of the libeller "[f]or it is very necessary that the people should have a good opinion of it." 32

The "good opinion" of government definition of libel of a "pub-

27. Indeed, libel "robs a man of his good name, which ought to be more precious to him than his life." The rejection of truth as a defense was a stringent rule well attuned to suppression of free expression, reflecting the preeminent function of the offense at common law. Kelly, supra note 13, at 303.
28. T. PLUCKNETT, supra note 6, at 496.
29. Id.
30. 8 W. HOLDSWORTH, supra note 1, at 341; T. PLUCKNETT, supra note 6, at 499.
31. The looseness of the "good opinion" definition suggests that the demise of prior restraints probably had little material effect on what constituted seditious libel thereafter under the jurisdiction of the common law courts. 8 W. HOLDSWORTH, supra note 1, at 341.
32. If people should not be called to account for possessing the people with an ill opinion of the government no government can subsist . . . to produce animosities as to the management of it . . . has always been looked upon as a crime, and no government can be safe without it is punished.

II J. STEPHEN, supra note 18, at 318. This definition was the basis for the jury instruction in the famous trial of John Peter Zenger in 1735. See Deutsch, From Zenger to Garrison: A Tale of Two Centuries, 38 N.Y. St. B.J. 409, 417 (1966) [hereinafter cited as Deutsch]. See generally Three Trials: John Peter Zenger, H. S. WOODFALL AND JOHN LAMBERT 1765-1794 (1974). Zenger was defended by Andrew Hamilton, a leading attorney of the day. He gained an acquittal by an appeal for jury disregard of the court's instructions, an argument that the court was aware of but apparently powerless to prevent. This was a defense counsel's preeminent tactic during the eighteenth century. See notes 37-40 infra, and accompanying text.
lic person" or of government qua government, paralleling its Cokean progenitor, equated protected free expression with a dearth of prior restraint, licensing, or censorship. It granted significant flexibility to prosecution, either at public or private behest, for "abuse" thereof—"ill opinion" or "scandal of government." One classical treatise writer defined "good opinion" libel as "written censure upon public men for their conduct as such, or upon the laws, or upon the institutions of the country," reflecting a "King can do no wrong" philosophy basically incompatible with "serious public discussion of political affairs."

The "good opinion" rule and its government-as-master philosophy soon collided with the emergent "government-as-servant philosophy.


35. II J. STEPHEN, supra note 18, at 348. He also defined criminal libel as "written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever." Id. at 350. For a critical discussion of the misuse of this common law-Blackstonian definition connoting freedom of speech or press with "no prior restraints," see Brant, Seditious Libel: Myth and Reality, 39 N.Y. U.L. REV. 1 (1964), who deemed such equation, in light of the founding fathers' awareness of the history of English abuses, one which "transcends belief," as such necessarily entails adoption of the "good opinion" of government rule of the common law. Id. at 17. Compare the more recent balanced account of Eichbaum, The Antagonism Between Freedom of Speech and Seditious Libel, 5 HAST. CONST. L.Q. 445, 459 (1978), in which the author concludes that, despite the modern consensus of the invalidity of the Sedition Act of 1798, the issue of the founding fathers' purported repudiation of common law criminal libel "remains doubtful." The present Supreme Court's view is that both civil and criminal liability for defamation was "well established in the common law" at the time of adoption of the first amendment, and that there is "no indication" the framers of the Constitution "intended to abolish such liability." Herbert v. Lando, 441 U.S. 153, 158 (1979). The New York Times decision wrought "major changes" in an area traditionally thought not to be within the purview of first amendment protection." Id. at 159.

36. II J. STEPHEN, supra note 18, at 348.

37. In his classic treatise on English criminal law, Sir James Fitzjames Stephen contrasts the "government-as-master" and "government-as-servant" philosophies:

Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if mistaken his mistakes should be pointed out with utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority.

If, on the other hand, the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which
liberal philosophy of the eighteenth century, with its political sentiment that "no imaginable censure of government," 38 should be considered criminal unless imminently and actually tending to a breach of the peace. Consequently, the legal battle ground of the reformers shifted to the respective spheres of judge and jury. The judges at common law, however, imbued with the traditional conservative philosophy of government-as-master, quickly curtailed the province of the jury in criminal matters. By 1731, its function was limited to findings of publication of the document by the defendant and the "innuendo" ascribed to such in the indictment or information—usually undisputed issues. 39 The issue "whether these defamatory expressions amount to a libel or not" was a matter of law for the court, and not for the jury. 40

The endeavor of the reformers of the last quadrant of the eighteenth century to ameliorate the rigors of the common law of criminal libel came to a head in the famous Dean of St. Asaph's Case, in which two of the greatest minds of contemporary English law, Lords Erskine and Mansfield, delved into the functions of court and jury. Erskine, reflecting the popular (not necessarily legal) notion of the function of juries, and finding some legal support in superfluous vituperation of the indictment, argued that the jury had a right to render a general verdict of guilty or not guilty depending on its view of the criminality or innocence of the purportedly libelous matter. 41 Mansfield, clearly reiterating settled law, 42

he forms a part. He is finding fault with his servant. If others think differently they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place, or perhaps that the arrangements of the household will be modified. To those who hold these views fully and carry it out to all its consequences there can be no such offence as sedition.

II J. STEPHEN, supra note 18, at 299-300.

For similar Kentucky references to the "government-as-servant" or "popular sovereignty" philosophy of government, see the discussions contained in the travaux préparatoires of the 1890 Constitutional Convention. IV OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 469-70, 494, 535, 571, 716-18, 756 (1890) [hereinafter cited as IV 1890 REPORT]. Particularly noteworthy is the statement that the maxim "All power is inherent in the people" is "good doctrine," "good rhetoric," "good logic," "a good thing." Id. at 495. See also the sarcastic religious analogy to King John (of Magna Carta fame) who "assumed to delegate back to God some of the powers that he usurped. . . . On the contrary, today, politically, the voice of the people is the voice of God." Id. at 686.

38. II J. STEPHEN, supra note 18, at 300.
40. II J. STEPHEN, supra note 18, at 322.
41. The common forms used in criminal proceedings gave rise to the popular view in the
affirmed the trial court's charge of what was, in essence, a special verdict on the factual issues of publication and innuendo. He rejected the "jealousy of leaving the law to the Court" as "puerile rant and declamation," and proclaimed (somewhat surprisingly given his extensive governmental affiliations) the total independence of the judiciary. He summarily rejected what he deemed Erskine's contention: "That the law shall be in every particular cause what any twelve men, who shall happen to be the jury, shall be inclined to think liable to no review." Mansfield correctly perceived what Erskine later admitted, that the latter's arguments regarding the "is" of the law were in fact a plea for amending the law.

eighteenth century that seditious or malicious intent, not mere publication and innuendo, was an element of the crime; this perspective had a "large influence" on its history. W. Holdsworth, supra note 1, at 342. However, the English judiciary was of a decidedly different view. In a late seventeenth century decision, Chief Justice Jeffreys stated the prevailing law of the seventeenth and eighteenth centuries when he held that written libels "in themselves carry sedition and faction and ill will towards the government" and, consequently, the writing itself "proves the evil mind it was done with." Id. at 343. This conservative judicial view, "harmonised admirably" with the "government-as-master" view of the period; however, in the latter part of the eighteenth century when popular views changed, the limited jury findings of publication and innuendo were inconsistent with public opinion. Id. at 345. For verbatim accounts of Lord Erskine's speeches, both at the trial level and on appeal, see I. SPEECHES OF THOMAS LORD ERSKINE (1970) [hereinafter cited as I. ERSKINE], especially at 158-207. See also the classical treatment by Stephen, who terms the passage of the Fox Libel Act one of the most interesting developments of the history of criminal law. II J. STEPHEN, supra note 18, at 316-364.

42. One commentator has concluded that Mansfield's views "failed to discern the birth of a new era" in following uncritically the precedent of the past. He found such attributable to the "conservatism and narrowness" Mansfield evidenced when functioning in his dual capacity of Chief Justice of King's Bench and politician. It is worthy of note that Mansfield sat in the House of Lords, was often a government advisor while simultaneously sitting as a judge, and once injudiciously entered a copy of a criminal libel opinion into the House of Lords' official records in response to criticism by Lord Camden. Shientag, supra note 33, at 133-38; II J. STEPHEN, supra note 18, at 324-26. The latter concludes that this politicizing of a legal opinion by Mansfield demonstrated a "want of present of mind" and was "wholly inconsistent" with his judicial duties. Id. at 326.

43. Upon the falling into disuse of the writ of attaint (used to control jury misbehavior), the jury had the "legal power, if not the moral right," to bring in a general verdict of "not guilty" in contravention of instructions of the court and could not be penalized for its decision. However, in criminal libel cases, the jury's function was limited to findings of publication and innuendo, in essence, a special verdict which even the conservative jurist Mansfield deemed anomalous. Shientag, supra note 33, at 130; Howe, Juries As Judges of Criminal Law, 52 HARV. L. REV. 582, 583 (1939) [hereinafter cited as Howe].

44. Shientag, supra note 33, at 130.


46. Id. at 215. "Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable." Id. Upon motion in arrest of judgment, however, after affirming the prior statement of the law, Mansfield and the King's Bench found the averment of the indictment improper and dismissed it. Id. at 221.
to reflect the popular image of the jury as the ultimate arbiter of criminality." In this respect, Erskine's posture was ultimately victorious through the passage of the Fox Libel Act of 1792, which, over the express objections of the judiciary and purporting (erroneously) to declare the existing law, granted the jury the right to give a general verdict of guilty or not guilty. It proscribed judges' requiring or directing the jury to "find the defendant or defendants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." This statutory enactment, far from expressly establishing truth as an affirmative defense, was of limited legal significance on its face. It was, however, of enormous practical impact in fact, in implicitly requiring criminal intent, subject, of course, to the jury's

47. Lord Erskine apparently later made a notation upon a copy of the verdict that the appeal to the King's Bench was made "from no hope of success, but from a fixed resolution to expose to public contempt the doctrines fastened on the public as law by Lord Chief Justice Mansfield, and to excite, if possible, the attention of Parliament to so great an object of national freedom." II J. Stephen, supra note 18, at 341.

48. Upon referral by the House of Lords, the judges gave the following summary regarding the law of criminal libel at the time of contemplation of what became the Fox Libel Act of 1792: that the criminality or innocence of the act was for the court, not the jury; that the truth or falsehood of a libel was immaterial and not an issue to be left to the jury (the allegation of falsity in the indictment being an irrelevant matter of form); that the judge had the right, where publication and innuendo were found by the jury, to direct an acquittal, though the "safer course" is to "leave the matter to the court upon the record" (apparently by a post trial motion in arrest of judgment); that criminal intention was a mere matter of form, requiring no proof by the prosecutor nor permitting proof in rebuttal by the defendant, such intent not being an element of libel at common law. II J. Stephen, supra note 18, at 343-44.


50. The text is quoted in part in II J. Stephen, supra note 18, at 344-45. Such right of general verdict on the "whole matter in issue" did not preclude the trial judge from giving instructions—the judge "shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue . . . in like manner as in other criminal cases." Id. at 345. Stephen interprets this provision as intended to give the judge the same function as in other trials: if he thought the jury should acquit he "ought to say so," contributing thereby to the "immediate determination of the case" rather than by the unwieldy and time-consuming motion in arrest of judgment. Id. at 347.

51. Truth was considered a factor mitigating punishment, at least by the eighteenth century. In 1843, Lord Campbell's Act provided that truth was an absolute affirmative defense if publication was for the "public benefit." T. Plucknett, supra note 6, at 501-02. For a text of Lord Campbell's Act, see R. McEwen & P. Lewis, Gatley on Libel and Slander app. 2, at 650 (7th ed. 1974). Note that this limitation parallels the "good intent" (or similar language) rules of the majority of American jurisdictions at the time of Garrison v. Louisiana, 379 U.S. 64 (1964). See notes 99-105 infra, and accompanying text.

52. II J. Stephen, supra note 18, at 359.
ad hoc retrospective interpretation. On balance, though the subsequent jury practice was not uniformly liberal, the assumption of the framers of the Fox Libel Act that juries would "not regard as criminal expressions whose offensiveness consisted merely in being distasteful to the authorities" was probably a net gain for freedom of expression and all that was practicably achieveable in the English historical milieu of the late eighteenth century.

KENTUCKY CRIMINAL LIBEL LAW—PRIOR TO 1964
The Judge-Jury Controversy And The Fox Libel Act

The language of the present Kentucky Constitution regarding the function of the jury in criminal libel trials—"in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases"—has remained substantially unchanged from the earliest Kentucky Constitution in 1792, despite earnest efforts at the 1890 Constitutional Convention to repudiate the constitutional subsumption of the Fox Libel Act of 1792. The Committee on the Preamble and

53. T. PLUCKNETT, supra note 6, at 500-01.
54. Id. at 501; II J. STEPHEN, supra note 18, at 362-63. Trials were especially common and the juries tough and government-minded during the four years succeeding the Fox Libel Act, characterized by Stephen as perhaps "the most anxious and stormy" in European history. Id. at 362.
55. T. PLUCKNETT, supra note 6, at 501.
56. II J. STEPHEN, supra note 18, at 359. This sub silentio requirement of an evil intent was "in practice an improvement upon the old law, which...was...altogether inconsistent with serious political discussion." Id.
58. The prior (1792, 1799, 1850 and 1890) Kentucky Constitutions are contained in III THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS (F. Thorpe ed. 1909) [hereinafter cited as CONSTITUTIONS]. It is probable that the earliest (1792) Constitution was significantly influenced by the 1790 Pennsylvania Constitution and United States Constitution’s adoption of the Bill of Rights four months prior to the start of the Kentucky Convention in 1792. JOURNAL OF THE FIRST CONSTITUTIONAL CONVENTION OF KENTUCKY, HELD IN DANVILLE, KENTUCKY, APRIL 2 TO 19, 1792, IV (1942).
59. The expansive debates, numbering four volumes and several thousand pages, led one Representative (Applegate) to remark that he had heard every maxim and analogy except "that time-honored expression 'May my tongue cleave to the roof of my mouth.'" IV 1890 REPORT, supra note 37, at 689. Representative Darbin similarly commented on the representatives' long-windedness and their apparent intent that the world "knows that there are still a few orators in the grand old State of Kentucky." Id. at 646. During the debates, Representative Pugh mentioned in passing that he hoped to have the "good fortune to be living at that period in the great unknown when this discussion shall bid fair to terminate." Id. at 680. One early twentieth century historian termed the 1890 Convention the "most
the Bill of Rights proposed a substantially modified substitute which would have given the jury the more limited right, “both in civil and criminal trials, to determine the facts, under the direction of the Court as to the law, as in other cases.”60 In presenting the case for the alternative provision, Chairman Rodes offered a scholarly and correct narration of English law at the end of the eighteenth century (limiting juries in criminal libel cases to a finding of publication and innuendo), concluding that “in that state" the “press was not secure.”" In presenting the case for the alternative provision, Chairman Rodes offered a scholarly and correct narration of English law at the end of the eighteenth century (limiting juries in criminal libel cases to a finding of publication and innuendo), concluding that “in that state” the “press was not secure.”61 The Fox Libel Act, supported by “public sentiment”62 and “driven of necessity,”63 indirectly and almost clandestinely “saved them for awhile”65 by statutory en-

loquacious body that ever assembled in the state.” I E. JOHNSON, A HISTORY OF KENTUCKY AND KENTUCKIANS 465 (1912).

60. IV 1890 REPORT, supra note 37, at 301 (emphasis added). Another supporter of the proposal, Representative Allen, succinctly delineated its effect as limiting the jury “to determine the facts, all the facts, and nothing but the facts, ‘under the direction of the Court as to the law.’” Such a change would bring Kentucky law into line with the general provisions of the criminal code and would amend the old law which emanated from a time when “infamous judges” rejected truth as inadmissible, when “the most terrible, the most infamous, the most horrible persecutions that blot the pages of the history of England” were taking place, when the defendants were in a “hole” from the judge’s interpretation of the law, since “neither purpose nor end [of the Fox Libel Act] is desirable today.” Unlike that period, when the “only way of escape” for the criminal libel defendant was by use of “some hook or crook” to make the juries, which were “taken from the public, and . . . swayed by the feelings of liberty that then prevailed in the land,” the arbiters of fact and law, now no persecutions or imprisonments of printers or publishers were occurring. Id. at 504.

61. Rodes apparently deemed the Fox Libel Act’s adoption in 1792 an innovative “advance,” unparalleled by any other jurisdiction at the time. Id. at 447. He equated “freedom of the press,” “that palladium of our rights,” with lack of prior restraints, and concluded that “[l]icense and censorship are the enemies of the press” from which there was “no danger in this country.” Id. at 448.

62. Id.

63. Id. at 449.

64. Id. at 448. Fox’s motivation in promoting the bill was correctly delineated by Rodes: Public sentiment was on his side, but the judges were against him, and he thought if he could get the matter before the jury, to let them pass upon the question of guilty or not guilty, the judges could not force them to their verdict, nor control them in their deliverance. That is how the provision that the jury shall be the judges of the law and fact under the direction of the court as in other cases came about.

Id. (emphasis added). To the rhetorical question why the “law for the court” and “facts for the jury” dichotomy was not implemented in libel cases, he answered that Fox did “all he could” but “public sentiment was not up to it.” Fox had to “make concessions” and “secure his object indirectly” with the resulting “inheritance he left us.” Then, Rodes characterized such “inheritance,” clearly adopted by the Kentucky Constitutions, as “not right.” The “right” statement of judge-jury functions was contained in the constitutional change recommended by the Committee. After quoting from Cooley, to the effect that “we must perhaps conclude that the intention has been simply to put libel cases on the same footing with any other criminal prosecutions, and that the jury will be expected to receive the law from the court,” Rodes stated that such was the view “we contend for and nothing else.” He rejected
actment. However, in the totally different legal-political environment of late nineteenth century Kentucky, the presence of truth (and "good intent") as a defense, coupled with the enhanced independence of the judiciary, rendered the preferred status of the jury in criminal libel cases anomalous and unnecessary. Another delegate, Representative Applegate, clearly evidencing a gross misinterpretation of the Fox Libel Act of 1792, supported the Committee proposal by interpreting the impact of the present provision literally to mean that "the court shall preside and keep order, and the jury, after having heard the evidence, shall imagine what the law is." Such a view of judge-jury functions reminded him of a county judge who, after listening to interminable wrangling of opposing counsel over the language of jury instructions, ultimately admonished the jury, "Gentlemen of the jury, the law is very much mixed in this case; you will take and decide it as you think best." Such a perspective on the jury's functions, defensible when the law was "so supreme and rigid," was undesirable "in this enlightened age, where the government is but a figurehead."

The opponents of abrogation of the Fox Libel Act language of the Kentucky Constitutions primarily relied upon the practical argument that the traditional rule had worked without apparent difficulty and referenced the inability of the spokesman for the change to cite any difficulties emanating from the established rule. Representative Beckham, after sketching the Mansfield-Er-

the differentiation of jury functions in libel as "more important" than in murder cases, asking hyperbolically "[w]hy do you lay down the law now as they did 200 years ago?" Id. at 448-49.

65. Id. at 449.

66. Id. at 448. The "good intent" proviso was not a statement of the then constitutional law but was part of the substitute proposal of the Committee on the Preamble and the Bill of Rights, which was ultimately defeated. See notes 96-98 infra, and accompanying text.

67. The judiciary was deemed "independent" with "secured salaries" in one sense, but "dependent in another, elected by the people." In any event, this hybrid "amply secured" freedom of the press. IV 1890 REPORT, supra note 37, at 448.

68. Id. at 595.

69. Id.

70. Representative Bronston queried what "abuses" had occurred thereunder, "what rights have been trammeled that demand a change?" Id. at 542. He recommended that the Kentucky press "open wide their eyes" to the Committee's endeavor. See also the exchange of Bronston and Rodes, in which the latter admitted that there was no history of difficulties with the old provision. Id. at 940. Representative Bullitt probably reflected the majoritarian sentiment when he recommended keeping all the old "Bill of Rights" with all its "blood stains." See in a similar vein, the general statement of Representative Beckham that "we ought to touch lightly that which is secure, that which is consecrated by time." Id. at 523.
skine debate in the *Dean of St. Asaph’s Case* and its statutory repudiation in the Fox Libel Act, stated that any change in the incorporation of the Act in the 1792 and subsequent Constitutions would be “ill-advised.”

Representative Bronston noted that under the Committee proposal, the court would be permitted to decide by peremptory instruction “whether the case shall or shall not go to the jury.” Referring to his limited experience (of one case) of a “libel upon a Court of Justice,” he concurred in the “wisdom” of the present provision.

Reflecting an almost paranoid (but widely shared) suspicion of the administration of justice, he refused to submit the “humble citizen”—“who goes before such concentrated power, and who has dared to charge the judge upon the bench with corruption in the office, who has by that act of his arraigned the combined wisdom and sympathy of the entire Judiciary of the State against him”—to the “primary jurisdiction” and untender mercy of a judge who might prohibit the presentation of defenses or give peremptory instructions to the jury. The jury’s final say on the facts and the law did not, in his analysis, result, however, in uncontrolled speculation (Representative Allen’s jury “imaginings”) about what the law was:

The Court may lay down the law, but the Court cannot, dare not

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71. Id. at 525. To Rode’s attempt to correct an apparent misapprehension of Beckham that the Fox Libel Act had included a proviso permitting truth as a defense, the latter replied that the “substance is the same.” Id. This closely parallels the unwritten, practical effect of the Act which Stephen discusses. See notes 52-56 supra, and accompanying text.

72. Id. at 542.

73. Representative Pettit characterized the Kentucky courts at one point as a “stench” in the “nostrils” of the people, during a discussion of what he deemed the multiple evils existing under Kentucky law at the time. Id. at 452.

74. Id. at 542.

75. Id. According to his scenario, the imputer of corruption in office to a judge, charged with criminal libel, “goes poor and in tatters,” admits publication, and proffers evidence of truth and “good intent” (in compliance with the standards of the Committee amendment) to the trial judge, who makes the following determination: “‘Under the law, your evidence is not sufficient, and I will not permit it to go to the jury,’ and he turns to them and says, ‘Gentlemen of the Jury, find the man guilty.’” Id. Regarding the right of appeal in such a case, Bronston was of the view that the court of appeals (now the supreme court) “might yield to sympathy for men in like position, and say, for the protection of the Court, ‘we will affirm the ruling and let the man be punished.’” Id. He concurred in the sagacity of the Kentucky “forefathers” who said the judiciary “cannot and shall not do it.” Id. Essentially the same hypothetical and supporting arguments with respect to a libel on a “court of justice” were reiterated later in the debates, with Bronston concluding that the “very purpose” of the present rule is to allow the “whole question to be determined by twelve men as to whether or not the law has been violated” following instructions by the court on the definition of the law. Id. at 942.
apply those principles of law to the facts. The jury must do it. In no case shall the Court undertake that question, on the one hand for the protection of the press and on the other hand for the protection of the individual.76

Representative Askew concurred with this proper interpretation of the Fox Libel Act and stated that the Act, on its face "declaratory of the common law, had corrected the usurpation of the jury function by English "time-serving and bloody Judges."77 He saw no justification for the proposed restatement, which was not required to "meet the demands of anybody."78

Against this background of discussion and legal interpretation of the meaning and effect of the Kentucky Constitution's inclusion of the Fox Libel Act, the Convention ultimately retained the old wording, with its English historical flavor and precise definitional content, giving the court the power to instruct the jury on the law but not the right to deny the jury the ultimate arbitrament of the facts and the law. In Walston v. Commonwealth,79 the only case of record construing the jury's unique constitutional "right to determine the law and the facts" in criminal libel prosecutions, the Kentucky Court of Appeals rejected defendant's assignment of error based on the trial court's "depriving him of the constitutional right to have the jury, without direction from the court, decide the law as well as the facts of his case."80 After noting the undoubted origin of the Kentucky provision in the Fox Libel Act of 1792,81 the

76. Id. at 542-43 (emphasis added).
77. Id. at 564. Representative Askew quoted approvingly from a Pennsylvania decision the proposition that the "general verdict" right was merely a restoration of the common law right of which juries had been "unconstitutionally deprived." He reiterated the proper construction of the effect of the Fox Libel Act given by Bronston: "The court can give the law . . . but there is no power yet made can prevent the jury from passing on the law. It is their duty to take it from the court, but then they have the power to pass upon it." Id. (emphasis added).
78. Id. at 564-65.
79. 106 S.W. 224 (1907), upon rehearing from a terse prior opinion in the same case at 102 S.W. 275 (1907).
80. 106 S.W. at 225.
81. Id. at 226. The court assumed that the provision had been taken from the Sedition Act of 1798. Actually, it had been in existence in the 1792 Constitution, antedating the federal statute by six years. The 1790 Pennsylvania Constitution was apparently the source of both the Kentucky provision (see note 58 supra) and the Sedition Act language. See Howe, supra note 43, at 587. The latter author concluded that the debates on the Sedition Act suggest that it was intended to eliminate questions concerning jury determination of admissibility of evidence or of the constitutionality of the statute—none "questioned expressly the propriety of allowing the jury to determine the ultimate legal question of the substantive meaning of the statute." Id. The phrase—"under the direction of the court, as
court of appeals concluded that “[w]hatever may have been the effect” of the statute in England, it had found no “authoritative utterance of this court” to prevent a trial court “from instructing the jury as to the law of the case, or even directing their verdict,” as in the present case.\(^\text{82}\) In libel prosecutions, “as in all other cases,”\(^\text{83}\) it was the duty of the court to “instruct” the jury regarding the law and the duty of the jury to “accept” the law as given by the court. The constitutional requirements of section 9 were met by the jury’s “application” of the law given them by the court: “[t]herefore, in a sense they have the ultimate decision of the law, as well as the facts of the case.”\(^\text{84}\) The court of appeals’ rejection of the precedential value of the English statute in deciphering its Kentucky derivative is a clear departure from the *travaux preparatoires* of the 1890 Constitutional Convention, from which the old Fox Libel Act proviso had emerged revivified and refulgent with its late eighteenth century flavor, meaning, and effect. Apparently, the court of appeals was unaware of the extensively and hotly debated issue of retention of the old provision, since no reference to the multi-volume reports of those proceedings is cited in the opinion.

Although the *Walston* interpretation was recently footnoted approvingly in *Ashton v. Commonwealth*\(^\text{85}\) for the conclusion that section 9 did not “effect any change in the mode of jury trial,”\(^\text{86}\) the latter opinion appears to have been similarly unaware of the intent of the drafters in reenacting, unsullied, the old constitutional provision. It remains to be seen whether, if raised anew and enveloped in its 1890 coloration, the present supreme court would repudiate the provision’s extraordinary historical underpinnings and permit the judge not only to instruct the jury on the law but “direct their verdict” when it deems such advisable.

in other cases”—was interpreted as not “intended to refer at all” to the issue of the weight the jury should accord the instructions of the court of the meaning of the law. *Id.* On the history of the Pennsylvania provision and its development to modern times, see Howe, *supra* note 43, at 594-96. Apparently, at the time the Kentucky article was adopted, the prevailing Pennsylvania view was that the jury was informed by the court of the court’s opinion as to the law and was *specifically informed* that the jury was the final judge of the law and the facts. *Id.* at 695.

\(^\text{82}\) *Id.* (emphasis added).
\(^\text{83}\) *Id.* (emphasis added).
\(^\text{84}\) *Id.*
\(^\text{85}\) 405 S.W.2d 562 (Ky. 1965), *rev’d on other grounds*, 334 U.S. 195 (1966).
\(^\text{86}\) *Id.* at 566 n.6.
The Defense of Truth And The Question of "Good Intent"

Although the truth of the criminal libel had been determined to be immaterial at English common law, Kentucky Constitutions from 1792 to the present have provided that "the truth thereof may be given in evidence."87 As part of its package deal of modifications, the 1890 Committee on the Preamble and the Bill of Rights attempted to substitute language to the effect that "it shall be a sufficient defense in any case, that the matter published was true and was published with good intent."88 This alternative provision, mirroring the pro-reputation bias and press wariness of the Committee, was primarily justified by a hypothetical posed by Representative Allen. A young man commits a juvenile "act of indiscretion," thereafter reforms himself and becomes an upright and honorable citizen, and, several decades later during a political campaign is confronted by his opponent or a maliciously motivated enemy with such "stories of old."89 In such cases, truth alone should be insufficient; the jury should be entitled to assess the "good intent" of the publisher.

The opponents of the Committee proposal disagreed on a number of substantial grounds with its raison d'etre—that the "common sense of this Convention will teach them that the truth ought not at all times be told"90—and its political candidate hypotheti-

87. CONSTITUTIONS, supra note 58.
88. IV 1890 REPORT, supra note 58, at 301. Chairman Rodes, in his initial defense of the "good intent" language, said that if both were met the defendant would go free, if truth alone were proved such would be only a mitigating circumstance, and if neither were met, the defendant must suffer the consequences. Id. at 449. The supportive remarks of Representative Allen similarly treat "truth" and "good intent" as cumulative defense requirements. Id. at 504.
89. Id. In such cases the "good intent" of the publisher would be a question for the jury. Id. Compare the question posed to an editor during the hearings on Lord Campbell's Act in 1843. The Act, as first drafted, would have limited the defense of truth in civil and criminal actions to "public benefit" cases. As passed, the Act was limited to criminal cases, leaving untouched the absolute defense in civil cases. The editor was asked: "If a lady should be held up to the public as having false hair, false teeth, and false eyebrows, which is utterly unknown to anybody but her waiting-maid, that, if proved, is an absolute defense. Do you approve of that?" The witness answered negatively. "The Greater the Truth, the Greater the Libel," 26 CAN. L.T. 394, 396-97 (1907). See discussion in note 138 infra.
90. Id. at 399. The existent pre-1890 rule regarding the defense of truth in civil and criminal libel was vague, although the majority view in the debates appears to have been that truth was an absolute defense to both. See, e.g., the Bronston colloquy with Chairman Rodes regarding whether the "good intent" requirement was an added burden. Somewhat qualifying his earlier frank assertion that both would be required (and that truth alone would merely be a mitigating circumstance), id. at 449, Rodes later stated that such wrought no change in the law. Id. at 941. Representative Bronston was of the view that, at least
Representative Brents suggested that the "good intent" qualification would render "very uncertain" the verdict "in any given case" and characterized the additional requirement as "paste stuck on a pure diamond." Representative Twyman, though acknowledging his confusion as to the exact impact of the change, concluded that the "all sufficient" defense of truth had "proven satisfactory" and should not be tainted by issues of "malice" or "good feeling." Representative Montgomery, though noting possible hardships from publication of the truth, contended that "truth ought to, under all circumstances, be allowed to be published, whether it damages anybody or not." With respect to the malicious republication of old truths regarding a candidate for public office, he was opposed to "any constitutional inhibition upon telling the truth on all occasions," since the populace of Kentucky had regarding civil cases, such was a "radical" change. With respect to the issue of whether truth was alone sufficient as a defense, he indicated it was ultimately possible for the jury, under the present Kentucky provision, to disregard the truth. Id. at 942. The implication from his remarks is that truth, legally a defense in toto, could, under the traditional view of the jury's function as arbiter of both the law and the facts, be disregarded by the jury. Representative Young, likewise an opponent of the "good intent" provision, seems also to have interpreted the existing "may" provision as granting truth the status of a "mitigating" circumstance. Id. at 943. The only recorded criminal libel decision existing at the time of the 1890 debate rejected the common law rule whereby truth was no defense and concluded that the Kentucky Constitution, the "organic law," was intended to "secure" truth as a defense. Tracy v. Commonwealth, 87 Ky. 578, 9 S.W. 822 (1888) (dicta). More recent criminal libel decisions have reaffirmed that view. See Browning v. Commonwealth, 116 Ky. 282, 76 S.W. 19 (1903); Smith v. Commonwealth, 98 Ky. 437, 33 S.W. 419 (1895); Provident Savings Life Assur. Soc. v. Johnson, 115 Ky. 84, 72 S.W. 754 (1903); Ashton v. Commonwealth, 405 S.W.2d 562, 565 (Ky. 1965), rev'd on other grounds, 394 U.S. 195 (1969). The minority sentiment in the debates suggesting truth was not an absolute defense in civil libel cases was clearly inconsistent with the then prevailing rule, although probably the result of loose language in the then recent case of Riley v. Lee, 88 Ky. 603, 11 S.W. 713 (1889). See the contemporaneous decision of McIntyre v. Bransford, 17 S.W. 359 (Ky. 1891). This absolute defense in civil defamation cases was one of the precipitating factors in Kentucky's early adoption of a right of privacy where truth is not a defense. Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927). See Comment, Torts—Right of Privacy in Kentucky, 38 Ky. L.J. 487 (1950). The present civil libel statute on truth as a defense is section 411.045 of Kentucky Revised Statutes (1971).

91. IV 1890 Report, supra note 37, at 618-19.
92. Id. at 680-81.
93. Id. at 939. He also noted that proof of truth was a relatively "easy matter," whereas how the defendant would "go about proving his intentions, I cannot conceive." Id. at 938. Representative Bronston posed two examples in which "good intent" would be ambiguous or difficult to define: where the defendant claims that the intent was to "correct him in his manner of life"; where defendant claimed publication with the intent to befriend one who is a political opponent of the libelled victim. Id. at 543. He concluded that retention of the present rule, which had brought forth no complaint from the press or the individual, would eliminate this quagmire. Id. at 543.
"the right to know the truth about the man, whether it occurred yesterday or fifty years ago, because they have a right to judge the man by everything he has done." Representative Youngs similarly balanced the interest in reputation against the interest in free expression of truth and decided that there were "more cases where greater wrong will arise if you attempt to muzzle the press." Under such circumstances, where publication of truth causes injury, "let the man bear that misfortune." Any other alternative to allowing the press to "plead the truth and stand or fall by it" (the traditional view to which there had been no objection or complaint) would multiply a thousandfold the number and complexity of trials and would institutionalize an element of inevitable self-censorship, "a dangerous element, which will put the press . . . in such a condition that they will be afraid to tell the truth because it may be difficult for them to prove the good intent." Such a burden of also proving "good intent," "a burden no one is willing to assume," will "in fact destroy the liberty of the press.""  

Institutional inertia, the absence of demonstrated problems with the traditional rule, and strong arguments of constitutional policy collectively precipitated rejection of the "good intent" cumulative prerequisite to truth as an affirmative defense. The Kentucky Constitution thus retained the century-old language with its majoritarian interpretation of truth as an absolute defense, a decidedly liberal view epitomizing the frontier influence and inurement to vituperative epithets from which the original provision arose. This view, rejecting the nineteenth century English statutory "public benefit" limitation and the overwhelming tendency of American jurisdictions to append a "good intent" or similar delimitation, marked Kentucky as one of the progressive minority.

94. Id. at 939.
95. Id. at 943. See also Comment, Constitutionality of the Law of Criminal Libel, 52 COLUM. L. REV. 521, 532 (1952), where the author farsightedly noted, presaging New York Times and Garrison, that a "motive" test had "no real bearing" on the informational contribution of defamatory statements in resolving a public controversy.
97. Reisman, Democracy and Defamation: Control of Group Libel, 42 COLUM. L. REV. 727, 736 (1942), concludes that Lord Campbell's Act of 1843, making truth a qualified defense, was "merely declaratory" of the "seemingly innocuous alteration" and "less obvious revolution" wrought by the "procedural evasion" of the Fox Libel Act.
98. Garrison v. Louisiana, 379 U.S. 64, 70-71 n.7 (1964). Truth as a defense (if with "good intent") was presaged in the trial of the printer, John Peter Zenger, in 1735. State v. Browne, 206 A.2d 591 (N.J. 1965). As late as 1927, one Kentucky commentator stated am-
on the issue of truth in criminal libel cases at the dawn of the constitutional revolution.

Early Kentucky Cases of Criminal Libel

A chronological survey of the reported criminal libel case law prior to 1964 discloses some highly illuminating statistical information. Six of the seven cases in which the victim's status is disclosed primarily or exclusively concerned libels of governmental officials: a group libel of a deceased sheriff, jurors and a presiding judge; two cases involving a libel of the same "collector of internal revenue"; a libel of a clerk of the quarterly court of a

biguously that truth was not an absolute defense unless for "public information." He refers only to non-Kentucky decisions, however, without reference to the rejection of the "good intent" limitations or the discussions thereof in the 1890 proceedings. ROBBERSON'S NEW KENTUCKY CRIMINAL LAW AND PROCEDURE 1395 (92d ed. 1927). This confusion may have emanated from the language of section 9 of the Kentucky Constitution—"publication of papers investigating the official conduct of officers or men in a public capacity or where the matter is proper for public information" (emphasis added)—which lists alternatively the types of criminal libel prosecutions in which truth "may be given" in evidence (which has been construed as an absolute defense). Clearly, the constitutional language was not intended to place a "public information" limitation on truth as a defense to criminal libel.

99. The remaining case, Browning v. Commonwealth, 116 Ky. 282, 76 S.W. 19 (1903), involved a criminal libel based upon a private letter written by the defendant to a third party. Rejecting the distinction drawn in the law of slander between imputation of crime (actionable) and possession of a disposition to commit crime (non-actionable), the court of appeals adopted a broad definition of criminal libel: "Any defamatory words calculated to degrade or injure the reputation of a person in society, when written and published maliciously." Id. at 285, 76 S.W. at 20. The court rejected the contention that the letter was qualifiedly privileged based on a confidential relation with the recipient of the letter. It affirmed the "general rule" that only truth is a defense (upon which the defendant has the burden of proof). The court found a lack of "probable cause"—based on facts which "reasonably induced" him to believe that his property was endangered—to support the privilege. Consequently, the libel was "malicious," based on the unrebutted presumption from publication. Id.

100. Tracy v. Commonwealth, 87 Ky. 578, 9 S.W. 822 (1888).

101. Smith v. Commonwealth, 98 Ky. 437, 33 S.W. 419 (1895); Shields v. Commonwealth, 21 Ky. 1588, 55 S.W. 881 (1900). In the latter case, the defendant was not permitted to take advantage of the "official records"—judicial proceedings privilege, since the newspaper which printed the libel got its information solely from the defendant, not from such official sources. The modern law would invalidate the conviction on dual grounds of non-compliance with the "actual malice" requirement and the official records exception. Under the latter, publication of an accurate and complete or fair abridgement of an official proceeding is privileged in civil defamation cases; the privilege extends to "any person who makes an oral, written or printed report to pass on the information that is available to the general public." RESTATEMENT (SECOND) OF TORTS § 611, comment C (1977). For a recent case wherein the Supreme Court invalidated a conviction for publication by a newspaper of the identity of a juvenile offender, see Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979). The information, "lawfully obtained" from monitoring a police band radio frequency and from eyewitnesses did not involve "unlawful press access to confidential judicial proceedings."
In five of these six cases, the defendant either "caused" the publication of the libel in a newspaper, was in fact the editor of the newspaper, or was the newspaper itself. The remaining case involved the circulation of a letter by a county judge in the form of a petition for removal of another governmental official (commonwealth's attorney) and was directed toward parties having a similar common interest. All six cases impute either corruption, incompetence or maladministration in respect to official duties, and/or question the official's fitness for such position.

The last and most interesting of the pre-1964 cases is the single opinion issued in the cases of Cole v. Commonwealth, Warley v. Commonwealth, Louisville News v. Commonwealth, involving newspaper articles generally critical of the administration of justice toward blacks in Kentucky and specifically referring to an imminent trial of three blacks for the rape of a white woman. The court of appeals concluded that the presiding judge in the trial had been variously accused by one or more of the defendants of "busying himself with the prosecution," of having made a foreordained decision to expeditiously convict and hang the defendants, "no matter what the circumstances are," of pushing the defendants "to the gallows by a farcical trial," and of supporting "legal lynching" and "mob law." Such statements imputed to the presiding judge "gross misconduct" and "want of integrity" and were, consequently, libelous. Also, though not specifically identified therein, the opinion held that the articles were clearly "of and concerning" the presiding circuit judge, Ruby Laffoon. In the "conduct of particular trials, courts are not impersonal," since there "can be no trial without a judge." The charge was not merely a "general one concerning the actions of courts," but had reference to a "particu-

102. Commonwealth v. Duncan, 127 Ky. 47, 104 S.W. 997 (1907). The court of appeals rejected the question of absolute privilege in the case, since the method of addressing the grand jury (by an open letter to the editor in a newspaper) was publication to the "public at large" and was not within the absolute privilege to testify before a grand jury or in judicial proceedings.


107. 222 Ky. at 360, 300 S.W. at 911 [emphasis added].
The court of appeals, following its broad-brush definition of criminal libel, concluded that the imputations were neither qualified nor constitutionally privileged. The qualified privilege of "fair comment," based on criticism by the "press and the public" in "the interests of society and the efficiency of the public service," covered "caustic or severe" opinion critical of public officials' conduct only if "fair and reasonable and made in good faith." However, it did not render privileged "false statements of fact" or accord the libeller the right to "draw inferences or express opinions not based on the truth." In such cases, the general rules applicable to libel were enforceable. It rejected as without merit the defendants' reliance on section 1, subsection 6 of the Bill of Rights—which grants the right of "applying to those invested with

108. Id. See also Leflar, The Social Utility of the Criminal Law of Defamation, 34 Tex. L. Rev. 984, 988-89 (1956) [hereinafter cited as Leflar]. Leflar categorizes the case as one with "intimations of racial as well as political retribution." Judge Laffoon, as a result of publicity emanating from this trial and related other litigation, became well known throughout Kentucky, resulting in his election as Governor in 1931. Id. at 989 n.15. The element of colloquium, "of and concerning" the defamed, also has constitutional overtones. Unlike the New York Times decision, where the complainant was not identified by name or position, the reference to Laffoon was not based on the "bare fact" of his official position alone, there being specific reference to his position as judge ("The judge, who under the law simply acts as referee in a case, has in this instance busied himself with the prosecution. . . ."), and the defamatory comments were "so understood by others." 222 Ky. at 360, 300 S.W. at 911. Unlike Sullivan, where there was not even "an oblique reference" to the respondent as an individual—"either by name or official position"—it is clear that the allegations could "reasonably be read as accusing" defendant "of personal involvement" in the alleged injudicious acts. 376 U.S. at 288-90.

109. See notes 160-73, infra and accompanying text.

110. 222 Ky. at 359, 300 S.W. at 910-11. The "opinion"-"fact" dichotomy postulated by the decision would not pass the constitutional scrutiny of today's libel law. In dicta in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974), the Supreme Court concluded that under the First Amendment "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." As a result, "pure" opinion—where the maker states the facts upon which the opinion is based, or where the opinion is based on facts both parties are aware of or assume to exist and where other facts are not therein implied in order to justify the comment—the language is apparently absolutely privileged. See Elder, The Law of Defamation and Constitutional Privilege: A Contextual Analysis of Oklahoma Law in Light of Gertz v. Robert Welch, Inc. Through Hutchinson v. Proxmire, 4 Okla. City U.L. Rev. 17, 29-30 n.65 (1979), for a list of some of the precedents applying the "opinion" rule. See generally RESTATEMENT (SECOND) OF TORTS § 566, comments b and c (1977). One court, however, has concluded that pure opinion is not absolute but is defeasible by a showing of "actual malice." Mashburn v. Collin, 355 So. 2d 879, 884-85 (La. 1977). It is unclear whether the "opinion" rule applies to professional discipline of an attorney for disparaging personal comments made of a judge. See note 186 infra.
the power of government for redress of grievances or other proper purposes, by petition, address, or remonstrance"—since the articles were intended for the general public and not those entrusted with redressing grievances.\(^{111}\) Though not cited in the opinion, the criminal libel decision two decades earlier in *Yancey v. Commonwealth*\(^{112}\) was apparently distinguishable. The letter circulated in that case by the county judge "of and concerning" the local commonwealth's attorney was in form a petition or affidavit directed to parties having a common interest or duty and was addressed to the general assembly.

The foregoing summary of pre-1964 Kentucky criminal libel cases leads to certain significant conclusions. First, the criminal sanction was predominantly used against critics of alleged official misconduct. Second, the doctrine of "fair comment" was limited to pure opinion only and excluded factual misstatements. Third, no reference whatever is found to federal or state constitutional freedoms of speech and press; the only constitutional privilege deemed applicable was the state constitutional right to petition for redress of grievances.\(^{113}\) This combination of an expansive definition of libel, and limited sphere of application of qualified and constitutional privileges, placed the media in an extremely precarious position, permitting the imposition of criminal sanctions for innocent factual misstatements. As the court noted tersely at the end of the *Cole v. Commonwealth* opinion, absent one of the limited privileges delineated above, "[t]he publications, as well as their falsity, being admitted, there can be no doubt that appellants were guilty of criminal libel."\(^{114}\)

**The "Modern" Law of Criminal Libel**

In 1964, in the historic decision of *New York Times Co. v. Sullivan*, the Supreme Court initiated the constitutional "revolution" in the law of defamation in a civil libel case arising out of the civil

\(^{111}\) 222 Ky. at 360, 300 S.W. at 911-12.

\(^{112}\) 135 Ky. 207, 122 S.W. 123 (1909).

\(^{113}\) Id. at 212, 122 S.W. at 124-25. Failure to address the First Amendment issue is not unduly surprising, since the application of the provision to the States by incorporation into the Fourteenth Amendment Due Process Clause had been determined only two years previously. Gitlow v. New York, 268 U.S. 652 (1925). Possibly, the court was relying on the prior rejection of broad freedom of the press privileges contained in prior civil case law. See Riley v. Lee, 88 Ky. 603 (1889).

\(^{114}\) 222 Ky. at 361, 300 S.W. at 911-12. The Kentucky cases discussed in the text suggest that Kelly's conclusion regarding the "apparent atrophy" of the crime in the twentieth century was not universally true. Kelly, *supra* note 13, at 295.
rights movement, "one of the major public issues of our time." Viewed 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 such "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," it concluded that a "public official" was required to prove "actual malice"—"knowledge that it was false or with reckless disregard of whether it was false or not"—by evidence of "convincing clar-

115. 376 U.S. 254, 271 (1964). It was Justice Black, the Alabamian, who characterized the case for what it obviously was, one with "racial overtones," and who recognized the use of civil libel law to "harass[ ] and punish[ ]" pro-desegregation efforts, such as those of "outside agitators" from the liberal eastern press. Id. at 294-95 (Black, J., with Douglas, J., concurring). This is not the only recorded attempt to use the libel law to curtail desegregation. A bill was introduced in the Mississippi legislature in 1956 to make it a crime (punishable by one year and $1000.00 fine) to slander or libel the state, entities thereof, "their inhabitants, their institutions or their government." The law was undoubtedly directed at strident criticism of Mississippi authorities for pro-segregation efforts. Leflar, supra note 108, at 1033.

116. 376 U.S. at 270.

117. Id.


The Kentucky Constitutions have similarly rejected this "absolute" notion. From the earliest 1792 Constitution to the present one, freedoms of speech and press have been qualified by responsibility for their "abuse." Although in Article 1 the 1890 and present Constitutions do isolate "certain inherent and inalienable rights," they retain the "abuse" provision in Article 8 as a limitation upon the right of "[e]very person" to freely and fully speak, write and print on any subject." There were numerous discussions during the 1890 Convention about the relativity of freedom of speech and press, precipitated by the deletion of the "abuse" qualification from the Committee draft. Representative Bronston, an opponent of the deletion, indicated such an unfettered right might be permissible on a Crusoe-esque desert isle, but not within a developed society. IV 1890 Reports, supra note 37, at 538. See also the remarks of Representative Montgomery, who noted that speech and press guarantees were "relative," not "absolute," and that his research had failed to disclose any constitutions in which these rights were "unquestioned, unqualified and unrestrained without being responsible." Id. at 817. His amendment to qualify the language in Article 1 was initially rejected based on Chairman Rodes assertion that the "full statement" of it was contained in the Committee substitute. Id. at 817. This negative vote was later reversed upon acceptance of an amendment by Representative Bronston. Id. at 823-24. The version ultimately adopted was the broad provision (unqualified in Article 1) and restatement of the traditional "abuse" caveat in Article 8. The evident intent, despite the minor innovation contained in Article 1, was to retain the "relativity" (liability for "abuse") perspective and to repudiate an "absolutist" view. Clearly, the Kentucky Constitution, with its "abuse" limitation, was not intended to grant greater protection in this respect than the federal guarantee
ity” as a precondition to civil libel liability for criticism of official conduct. Under this constitutionalization of the minority view of the common law privilege of “fair comment,” an affirmative defense of truth inadequately implemented constitutional values of free speech and press, and necessitated protection of good faith defamatory factual error.

Rejecting the “altogether different” English tradition of libel antedating it by approximately four months. See note 58 supra. For a similar interpretation of an “abuse” provision of a state Constitution with respect to the flexibility Gertz accords states to impose more stringent requirements for civil libel than required by the federal Constitution, see Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976).

Presumably, the traditional beyond-a-reasonable-doubt standard is required in criminal libel cases. Weston v. State, 528 S.W.2d 412 (Ark. 1975) [containing a correct statement of the “actual malice” standard and proof beyond a reasonable doubt].

The pre-1964 rule, which permitted truth (with or without its “good intent” qualification) as an affirmative defense, is clearly inconsistent with prevailing constitutional standards. In civil libel cases involving “public officials” (and “public figures”), the burden of proof now rests upon the complainant to show “actual malice” by “clear and convincing” evidence. Id. comment e; Elder, The Law of Defamation and Constitutional Privilege: A Contextual Analysis of Oklahoma Law in Light of Gertz v. Robert Welch, Inc. Through Hutchinson v. Proxmire, 4 OKLA. CITY U.L. REV. 17, 74-75 (1979). In criminal libel cases the prosecution has the burden of proving “actual malice” by proof beyond a reasonable doubt. The common law presumption of falsity and malice (“implied”) is thus constitutionally impermissible. State v. Anonymous, 6 Conn. Cir. Ct. 751, 360 A.2d 909 (1976).

Neither “factual error” nor “defamatory content,” nor the combination of the two, deprived the defendants of the “constitutional shield” protecting their “criticism of official conduct.” 376 U.S. at 273. The Supreme Court cited criminal contempt decisions in which it had held that “half truths,” “misinformation,” and “concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of the judge or his decision.” Such repression “[could] be justified, if at all, only by a clear and present danger of the obstruction of justice.” Elected public officials, like judges, must be “men of fortitude, able to thrive in a hardy climate,” and criticism of them does not relinquish its constitutional protection because of its effectiveness in diminishing official reputation. Id. Compare the different rules apparently applicable when an attorney contests professional disciplinary sanctioning for personal criticism directed at a judge in his official capacity. See note 187 infra.

It rejected the affirmative defense of truth as sufficient protection. A “rule compelling the critic of official conduct to guarantee the truth of all his factual assertions,” or be penalized with indeterminate liability, would lead to “self-censorship” due to concerns about proof of truth or the expenditures of trial. Id. at 279.

Under the English system at common law, the Crown was “sovereign” and the people “subjects.” Quoting from James Madison, the Supreme Court adopted the opposite view with regard to freedom of the press: “the censorial power is in the people over the Government, and not in the Government over the people.” 4 ANNALS OF CONGRESS 934 (1794). Consequently, this Madisonian view deemed the “right of free discussion of the stewardship of public officials” a “fundamental principle of the American form of government.” 376 U.S. at 274-75. The Supreme Court repeated the statement made in City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88 (1923), “no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have
of public persons, the Court concluded, in the form of a retrospective advisory opinion, that the Sedition Act of 1798, which punished the printing, writing or uttering of any “false, scandalous, and malicious” matter directed at the Government or Congress with the intent to “defame” or “bring [it] . . . into contempt or disrepute . . . or to excite against [it] . . . the hatred of the good people of the United States,” and which was “vigorously con-

any place in the American system of jurisprudence.” 376 U.S. at 291. In City of Chicago, the Court held that the monarchical “king can do no wrong” philosophy had been repudiated by the American system, where the “people are sovereign . . . and the magistrates are servants of the people.” Within such a system, the “magistrates” are capable of error and the people have a “fundamental right to criticize them and to expose their inefficiency and corruption so that they may be displaced . . . without fear of being called to account in the courts for their expressions of opinion.” 139 N.E. at 88. The Illinois Supreme Court noted that the case was not concerned solely with freedom of the press, for if the state were empowered to sue the press it would have equal rights vis-a-vis the “private citizen who venturers to criticize the ministers who are temporarily conducting the affairs of his government.” Id. at 90.

Like the judge or others performing the administration of justice, the individual, “acting in his sovereign capacity,” is “absolutely immune” from civil or criminal sanctions where criticizing his governors. Id. at 91. For a recent case following City of Chicago and rejecting the contention that the state had a right, as a corporate entity or as parens patriae for its citizenry, to sue for defamation, see State v. Time, Inc., 249 So. 2d 328 (La. App. 1971), rehearing denied, writ denied, 252 So. 2d 456 (La. 1971). In the latter, the court specifically rejected the “calculated falsehood”—“no constitutional protection” holding of New York Times-Garrison as supportive of the state’s contention. The court’s implicit assumption that “impersonal attacks on governmental operations” are absolutely privileged and are not limited by the “calculated falsehood” caveat is undoubtedly correct, as evidenced by the New York Times decision’s discussion of the Sedition Act of 1798, the City of Chicago decision, and the requirement of “colloquium” (“of and concerning”) of an identifiable public official.

Another recent decision, containing an excellent discussion of the authorities, extended the non-liability (for criticism of governmental conduct) rule to a city-county hospital authority. Cox Enterprises, Inc. v. Carroll City/County Hospital Authority, 273 S.E.2d 841 (Ga. 1981). Surprisingly, given the uniformity of the decisional law, the Restatement has refused to take a position on this issue. RESTATEMENT (SECOND) OF TORTS § 561, caveat (1) and comment thereon (1977).

One recent criminal libel conviction, invalidated under the New York Times-Garrison rejection of presumed or implied malice in public official cases, closely approaches a criminal libel for “scandal of government.” The defendant, editor of a student newspaper at a local university, was indicted for libelling an unidentified (in the opinion) presidential candidate in the rather unique form of a drawing of a closed fist from which extended an erect middle finger depicting the end of a penis. State v. Anonymous, 6 Conn. Cir. Ct. 751, 360 A.2d 909 (1976).

124. 376 U.S. at 273-74. For the full text of the Sedition Act of 1798, see 1 Stat. 596-97 (1798) [expired 1801]. Note that the Act permitted “in evidence in his defense, the truth of the matter contained in the publication charged as a libel.” 1 Stat. 597. Despite this substantial liberalization of the common law rejection of truth, the Act helped coalesce sentiment regarding the essential meaning of the First Amendment, resulting ultimately in the modern view of the “indisputable axiom of first amendment jurisprudence that government lacks constitutional power to silence its critics.” L. Tribe, AMERICAN CONSTITUTIONAL LAW
demned" in its day, had been invalidated "in the court of history." Constitutional standards of the First Amendment had rendered obsolete its underlying "doctrine that the governed must not criticize their governors" and replaced it with the "fundamental principle of the American form of government," the "right of free public discussion of the stewardship of public officials." Having thus rejected the notion that "prosecutions for libel on government have any place in the American system of jurisprudence," it refused to permit a civil damage award based on the "bare fact" of the unnamed and unidentified respondent's official position alone, in essence, an "impersonal attack on governmental operations."

As implied in *New York Times Co. v. Sullivan* in the Court's *contraario* reasoning that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the

577 (1978).

125. 376 U.S. at 274. The Supreme Court quoted from the Virginia Resolutions in which "palpable and alarming infractions" of the Constitution were condemned because directed "against the right of freely examining public characters and measures, and of free communications thereon." *Id.* Although not cited specifically, the Virginia Resolutions of 1798 were paralleled by substantially similar resolutions in the Kentucky legislature. For complete texts of the Kentucky resolutions see *The Virginia Report of 1799-1800; The Virginia Resolutions of December 21, 1798, 162-67* (L. Levy ed. 1970); *E. Johnson, History of Kentucky and Kentuckians 153-57* (1912). The legal arguments were primarily based on a limited government-states' rights perspective; the First Amendment was deemed a secondary consideration. In reply to the Virginia and Kentucky Resolutions, disseminated to the constituent states with a requested response, seven legislatures rejected the implied right generally of state self-determination of the acts of the Congress and concluded that the acts, the validity of which was ultimately a matter for judicial review, were constitutional and necessary. *The Virginia Report of 1799-1800; The Virginia Resolutions of December 21, 1798, 168-77* (L. Levy ed. 1970).

126. 376 U.S. at 276. It noted a "broad consensus" that the Act, "because of the restraint it imposed upon criticism of government and public officials," was unconstitutional. See generally the sources cited in *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923). Only one case, in ambiguous dicta, seems to suggest that either criminal or civil liability could be imposed for libel of government: "The citizen has the right to criticise the acts of government, provided it is with the good motive of correcting what he believes to be existing evils, and of bringing about a more efficient or honest administration of government". *Riley v. Lee*, 88 Ky. 603, 604, 11 S.W. 713, 714 (1889). This "good motive" limitation, in essence making the right defeasible, is inconsistent with the modern absolute privilege rule. See note 123 supra.


128. 376 U.S. at 275.


130. 376 U.S. at 292.
reach of its civil law of libel,” and its discussion of the “broad consensus” of the invalidity of the Sedition Act of 1798, a criminal libel statute not complying with the constitutional “actual malice” standard was doomed to suffer a fate paralleling the civil remedy for damages. In Garrison v. Louisiana, decided shortly after New York Times Co. v. Sullivan, the Supreme Court invalidated a statutory criminal defamation conviction of defendant-appellant, a District Attorney in New Orleans, for holding a press conference in which he gave a statement “disparaging” the “judicial conduct” of eight criminal court judges by imputing the large residue of criminal cases to their “inefficiency, laziness, and excessive vacations” and alleging that the judges had impeded his investigation of vice in New Orleans. The Court rejected the distinction

131. Id. at 277. It concluded that civil damage awards might be “markedly more inhibiting” than “[the] fear of prosecution under a criminal statute,” where, at least, the defendant would have the benefit of criminal procedural safeguards (including the prohibition against double jeopardy). The spectre of multiple judgments and indefinite civil liability would provoke self-censorship among those who vent public criticism. Id. at 277-79.

132. The “actual malice” recklessness alternative is not an objective one, akin to “gross negligence,” but is “subjective in nature,” “an awareness . . . of . . . probable falsity,” that the publisher “in fact entertained serious doubts” as to the truth of his publication. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

133. 379 U.S. 64 (1964).

134. 14 LA. REV. STAT. §§ 47-49 (1950). “Whether the libel law be civil or criminal, it must satisfy relevant constitutional standards.” 379 U.S. at 68, 74 n.3. The Supreme Court rejected the contention that criminal libel served a different function from civil libel and should not be subject to the same constitutional constraints. Id. at 67. It concluded that there was a “modern consensus” that the rule of law, with its supplanting of self-help by a civil remedy for damages, had effectively eliminated the traditional “breach of the peace” justification for criminal libel. The Court quoted Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 924 (1963). In the absence of a “breach of the peace” raison d’etre, the only remaining justification was damage to reputation. It also quoted from the Model Penal Code the statement that “[i]t goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging in ways that entitle him to maintain a civil suit.” The criminal law should be reserved “for harmful behavior which exceptionally disturbs the community’s sense of security,” which mere “personal calumny” fails to do. MODEL PENAL CODE § 250.07, Comment (Tent. Draft No. 13, 1961). It noted that the drafters of the Code had rejected a general criminal libel provision and had recommended the adoption of only “narrowly drawn” statutes, such as the “fighting words” statute of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) and the group defamation statute upheld in Beauharnais v. Illinois, 343 U.S. 250 (1952). It held that the interpretation given the Louisiana statute by state courts precluded its designation as “narrowly drawn.” 379 U.S. at 70.

135. Id. at 66. His accusation of the judges was based upon the judges’ unanimous refusal, despite a statutory requirement of one or more of them to concur in expenditures for vice investigations, to authorize required expenditures and was made the day after one of the judges had publicly criticized Garrison’s official conduct. Id. at 66-67 & n.2. In “impugning their motives,” he stated that the judges had made it “eloquently clear where their sympa-
drawn by the Louisiana Supreme Court between "official conduct" (e.g., criticisms of a court trial or the manner in which one of the eight conducted his tribunal when in session)\(^{136}\) and attacks upon "[the] personal . . . integrity"\(^ {137}\) of the judges (which it had held included the accusations in question) as non-viable in a case like this which did not involve "purely private defamation."\(^ {138}\) The

thies lie" regarding aggressive investigations into closure of vice-ridden "clip joints" in New Orleans; their behavior raised "interesting questions about the racketeer influences on our eight vacation-minded judges." Id. Following the press conference, the defamed judges requested the Louisiana Attorney General to prosecute; the latter, apparently uncertain as to whether a grand jury would indict, filed an information against Garrison. Defense attorneys, quoting the Attorney General's statement that the "integrity of the entire judiciary . . . is at issue," requested that the trial judge recuse himself as an "interested party" (together with the entire judiciary). The motion was denied. See Deustch, supra note 32, at 411-14. 136. 379 U.S. at 76. 137. Id. In an important footnote, the Supreme Court stated that its result did not require it to decide "whether appellant's statement was factual or merely comment, or whether a State may provide any remedy, civil or criminal, if defamatory comment alone, however vituperative, is directed at public officials." Id. n.10 (emphasis added). In this case, the privilege had been deemed defeasible by "malice" or failure to use "reasonable care," not the infusion of fact; consequently, the issue of "fair comment" did not need to be reached. The footnote caveat has subsequently been explicated in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). See the discussion in note 110 supra. 138. 379 U.S. at 77. The Supreme Court noted that "different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned" and indicated that its views were not to be construed as "intimating any views" as to the effect of the Constitution on the "discrete area of purely private libels." Consequently, it took no position as to whether the "good motives" limitation of truth as a defense, which had expanded the common law rule rejecting truth as a defense, "serves a legitimate state interest to the extent that it reflects abhorrence that "a man's forgotten misconduct, or the misconduct of a relation, in which the public has no interest, should be wantonly raked up, and published to the world, on the ground of its being true."" Id. at 72. At the time of this decision, the Supreme Court had drawn no clear-cut distinction between "public men," "candidates for public office," and "matters of public concern" regarding application of the "actual malice" standard. New York Times Co. v. Sullivan, 376 U.S. 254, 283-84 (1964). During the next decade, it extended the standard to "public figures." Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), ambiguously applied it to matters of "general interest or concern," Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), and retracted upon the latter development in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), supplanting emphasis on the nature of the issue with an emphasis on the status of the claimant. It is clear that, in civil cases involving "private" plaintiffs and media defendants, simple negligence and preponderance of evidence standards meet federal constitutional standards. However, in suits by private individuals against non-media defendants, the Supreme Court has not spoken definitively and the state law decisions are divided; the majority of the latter have retained the common law approach, finding no constitutional issues in such "purely private" cases. See Elder, The Law of Defamation and Constitutional Privilege: A Contextual Analysis of Oklahoma Law in Light of Gertz v. Robert Welch, Inc. Through Hutchinson v. Proxmire, 4 OKLA. CTRY U.L. REV. 17, 50-57 (1979). Although the First Amendment standard in such cases might not be applicable, the void-for-vagueness due process issue would remain viable. See generally note 146 infra.
New York Times rule was not inapposite merely because both public and private reputations were impinged by criticism of official conduct since "anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." The Court concluded that the statements by the District Attorney qualified under this broad standard of relevancy concerning "fitness for office."

In the view of the Court, the statutory criminal libel offense suffered multiple, terminal deficiencies under the New York Times "actual malice" standard. First, it departed from the absolute protection accorded truthful criticism by permitting an action if "common law" "actual malice"—"hatred, ill will or enmity or a wanton desire to injure"—is proved. Second, the statute permitted conviction for false criticism of official conduct if motivated by common law "actual malice." In both these respects, the statute

139. 379 U.S. at 77 (footnote omitted). The court quoted Coleman v. MacLennan, 78 Kan. 711, 739, 98 P. 281, 291 (1908): "Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office." Id. This view applies with "special force" to a candidate for public office, since "whatever vitality the 'official conduct' concept may retain with regard to occupants of public office . . . is clearly of little applicability in the context of an election campaign. The principal activity of a candidate . . . consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him." Monitor Patriot Co. v. Roy, 401 U.S. 265, 274 (1971) (charge of being a former bootlegger against a candidate for a party nomination for the U.S. Senate). Rejecting the customary meaning of "official conduct," the Supreme Court in Monitor concluded that "it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks." Id. at 275. This was especially true where the test of relevance to "official conduct" is "unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks'" protected by the Constitution. Id. at 277. See also Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971) (mayor of city and candidate for county tax assessor), where the Supreme Court held that an imputation of criminal conduct (for alleged perjury in a federal civil rights suit) to a public official or candidate for public office, "no matter how remote in time or place, is always 'relevant to his fitness for office'" under the "actual malice" standard. Id. at 300. Indeed, candidates for public office present "probably the strongest possible case for application" of this standard. Id.


suffered from the same facial fatality, "permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood."\textsuperscript{142} Third, the statute rendered unprivileged a false statement made without reasonable belief in its truth (negligently), rather than the \textit{New York Times}-mandated "reckless-disregard-of-truth" criterion.\textsuperscript{143}

The combined effect of the \textit{New York Times Co. v. Sullivan} and \textit{Garrison v. Louisiana} decisions is to preclude any civil or criminal (or quasi-criminal)\textsuperscript{144} sanction for criticism of official conduct of a public official absent compliance with the requirement of "actual malice" or "calculated falsehood,"\textsuperscript{145} the latter "not enjoy[ing] con-

\textsuperscript{142} 379 U.S. at 73. The Court announced that "utterances, . . . contribute to the free interchange of ideas and the ascertainment of truth" even if motivated by hatred. \textit{Id.} Discussion of "public issues will not be uninhibited if the speaker must run the risk that it will be proved . . . he spoke out of hatred." \textit{Id.} Under the Louisiana definition of "malice based merely on an intent to inflict harm, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded, . . . [since] it may be almost impossible to show freedom from ill-will or selfish political motives." \textit{Id.} at 73-74 (accord, Noel, \textit{Defamation of Public Officers and Candidates}, 49 COLUM. L. REV. 875, 893 (1949)).

\textsuperscript{143} 379 U.S. at 78-79. \textit{See also} Commonwealth v. Armao, 446 Pa. 325, 337, 286 A.2d 626, 632 (1972). Under the invalid Louisiana statute, lack of "ordinary care" was in and of itself sufficient to defeat the privilege of "fair comment" even in the absence of common law malice in the sense of "ill-will." Justice Black (joined by Justice Douglas) concurred, reaffirming the "absolutist" view previously espoused in \textit{New York Times Co. v. Sullivan} regarding federal or state fines, imprisonment or assessment of damages where defendant has been "guilty of no conduct . . . other than expressing an opinion, even though others may believe that his views are unwholesome, unpatriotic, stupid or dangerous." 379 U.S. at 79 (citation omitted). He viewed as erroneous the majority's conclusion that the "actual malice" standard would "create any substantial hurdle to block public officials from punishing those who criticize the way they conduct their office" and would hold that there is "absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel." \textit{Id.} at 80 (Black, J., concurring). Justice Douglas made clear what was tacit in the majority opinion, and implied by Justice Black, "that seditious libel will lie" if either branch of the "actual malice" standard is met. \textit{Id.} at 81 (Douglas, J., concurring). He stated further that reckless disregard was a nebulous standard. Such a standard involves a "balancing" test, paralleling its British heritage and rendering one a "libeler who outraged the sentiments of the dominant party." \textit{Id.} at 82 (accord, Brant, \textit{Seditious Libel: Myth and Reality}, 39 N.Y.U. L. Rev. 1, 18-19 (1964)). He postulated a speech-conduct distinction for such cases, concluding that "[u]nless speech is so brigaded with overt acts of that [illegal] kind there is nothing that may be punished." \textit{Id.} Since there was "no semblance" of unprotected "conduct" in this case, the matter was absolutely protected. \textit{Id.} He concurred with Justice Black's view that nothing remained of the common law of criminal libel and stated that it is "disquieting that one of its [Star Chamber's] instruments of destruction is abroad in the land today." \textit{Id.} at 83.

\textsuperscript{144} It is clear that punitive damages are presently permissible as a matter of federal constitutional law if the "actual malice" or "calculated falsehood" standard is met. \textit{See note 182 infra.}

\textsuperscript{145} 379 U.S. at 75. \textit{See generally} Annot., 61 L. Ed. 2d 975, 993 (1980); R. PERKINS, CRIM-
In the only post-1964 criminal libel case
to arise under Kentucky common law, Ashton v. Commonwealth, 147 an out-of-state college student was indicted during a volatile labor controversy in Perry County for common law criminal libel of the chief of police (for acting as a private guard in violation of state law), 148 the sheriff (for alleged deliberate blinding of a juvenile with tear gas and beating the same while an inmate in a locked cell, bribery of a jury, indictment for manslaughter, escorting the "scabs" 149 into the mines and holding the strikers at gunpoint), 150 and co-owner of the local newspaper (for alleged misuse of money and materials of which he was custodian donated to the strikers). 151 The jury instruction requirement of known falsity was construed to be "more favorable" to the defendant than the law required, since reckless disregard of truth would have sufficed. 152

mining public figure status was "much like trying to nail a jellyfish to the wall." 411 F. Supp. 440, 443 (S.D. Ga. 1976). Similarly, the definition of "public official" has encountered controversy regarding its modern applicability. See note 180 infra, and accompanying text. Varying the nature of a criminal offense based upon such chameleon-like criteria would itself pose Ashton-style vagueness problems.

The fourth reason to reaffirm Garrison's application of "actual malice" to public controversies resides in the fact that the Kentucky Constitution in its defense of truth provision in article 9 commingles the status of "officers," "men in a public capacity," and "matter... published... for public information." Consequently, even if criminal libel of "private" individuals in "matters of public information" does not require compliance with the "actual malice" standard as a matter of federal constitutional law, the Kentucky Constitution appears to require identical treatment under state constitutional law.

147. 405 S.W.2d 562 (Ky. 1965), rev'd, 384 U.S. 195 (1966). Note that the United States Supreme Court categorized the source of Ashton's criminally libelous pamphlet as a "bitter labor dispute." Ashton v. Kentucky, 384 U.S. 195, 196 (1966). Although it is not exactly clear from either opinion what the nature of the labor dispute was, the Supreme Court has concluded in two cases that federal labor law requires the application of the "actual malice" standard, preempting state libel law to the contrary, in an action arising out of a pre-organizational campaign, Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966), and to post-recognition organizational activity. Old Dominion Branch No. 46, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974). The Ashton criminal libel conviction would now appear to be within the broad perimeter of these decisions and also invalid as a matter of federal labor law.

148. 384 U.S. at 196.
149. Id. at 197-98. The use of the epithet "scab" (or "traitor") in the context of a labor campaign has been considered protected "pure" opinion under federal labor law. Old Dominion Branch No. 47, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 282-83 (1974). It would also qualify under the rule for "pure" opinion, absolutely privileged under the first and fourteenth amendments. See note 110 supra.

150. 384 U.S. at 197.
151. Id.
152. 405 S.W.2d at 569. The court of appeals interpreted the New York Times and Garrison decisions not to require independent proof of malice, since, unless defendant informed a third party of an "evil motive or had voluntarily taken the stand and so testified", "actual malice" could be proved only as a state of mind made manifest by "the nature of the defam-
Indeed, the major battleground at the state and United States Supreme Court levels was the alleged indefiniteness and uncertainty of the common law offense. After citing the trial court jury definition of criminal libel "as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable," the Kentucky Supreme Court took some pains to explain away the "breach of peace" language contained in prior Kentucky case law as "obsolete." Controlling precedent had invalidated similar statutes on vagueness and free speech-press grounds. Next, after noting that the common law crime was countenanced and implemented widely throughout the
United States, it concluded that the present definition—the "publication of a defamatory statement about another which is false, with malice"—contained no constitutional infirmities in any of its requisite elements (publication, defamatory words, falsity, malice). Upon certiorari, the United States Supreme Court reversed on two grounds: the impermissibility of retroactively narrowing by construction a criminal offense unconstitutionally vague at the time of trial; the presence in the definition of criminal libel of substantially similar deficiencies to convictions for "breach of the peace"—"conviction for an utterance 'based on a common law concept of the most general and undefined nature.'

156. 405 S.W.2d at 566. This American "common law" crime was, however, substantially different from its English ancestor which permitted a finding of guilt without malice, falsity, publication, or a jury's finding of the libelous nature of the writing. Id. at 565. It noted the private ("breach of the peace") and public official ("scandalous attack on the government") distinction, concluding that most American prosecutions "seem to reflect shadows of this long since discredited ground of criminality." Id. Surprisingly, the court does not discern the parallel between the "scandal of government" cases and use of the action to sanction criticism of public officials.

157: 405 S.W.2d at 568.

158. Ashton v. Kentucky, 384 U.S. 195, 198 (1966) relying on Shuttlesworth v. Birmingham, 382 U.S. 87 (1965). In the latter, the ordinance (proscribing sidewalk loitering) had not been narrowly construed until after defendant's trial. A conviction based on an "unconstitutional construction" was voided. Such a standardless ordinance, with its "ever-present potential for arbitrarily suppressing" freedom of speech and expression, "bears the hallmark of a police state." Id. at 91. The second ground for reversal was the absence of any evidence to support defendant's conviction under the ordinance section dealing with failure to comply with the order of a police officer while engaged in directing vehicular traffic. The Court concluded that "it was a violation of due process to convict and punish a man without evidence of his guilt." Id. at 95.

159. The Court stated that "[v]ague laws in any area suffer a constitutional infirmity"; however, when First Amendment issues arise, courts scrutinize "more closely lest, under the guise of regulating conduct that is reachable under the police power, freedom of speech or of the press suffer." Ashton v. Kentucky, 384 U.S. 195, 200 (1966). "Breach of the peace" statutes (or definitions of other crimes in terms thereof) generally leave "wide open the standard of responsibility," since they require projections as to the "boiling point" of the recipient. Id. In the area of criminal libel, such a definitional substratum engenders criminality based on the inability of the recipient to exercise self-control. Id. (accord, Z. CHAFEZ, FREE SPEECH IN THE UNITED STATES 151 (1954)). See also State v. Browne, 206 A.2d 591, 596 (Super. Ct. N.J. 1965), where the court, after analyzing the "breach of peace" rationale, concluded that under such a justification there would be no criminal libel of persons to provoke a breach of the peace. The Supreme Court concurred in the terse (and ungrammatical) three-judge dissenting opinion of the state court of appeals:

[S]ince the English common law of criminal libel is inconsistent with constitutional provisions and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky.

384 U.S. at 198 (accord, 405 S.W.2d at 571).
In the fifteen years since the Supreme Court's reversal of Ash-nton's common law criminal libel conviction under the "breach of peace" definition used at trial, there have been no recorded Ken- tucky decisions redefining this crime to meet constitutional stan- dards. It is possible, and hoped, that this period of disuse portends the ultimate demise of this anachronistic offense. Though the United States Supreme Court has clearly and repeatedly reaffirmed that "calculated falsehood"149 ("subjective awareness of probable falsity" under the "actual malice" standard) is undeserv- ing of constitutional protection, and presumably will validate crim- inal libel convictions complying with the Garrison v. Louisiana and Ashton v. Kentucky constitutional standards, there are com- pelling reasons of policy for permitting this offense (common law or statutory)141 to die a deserved death. First and most important,
given the loose language of the definition of libel—"the publication of a defamatory statement about another which is false, with malice"—superimposed on Ashton's conviction by the Kentucky Supreme Court, the court's opinion that there was "no uncertainty" regarding the elements thereof appears very questionable.

The broad alternative definitions of libel utilized in the last pre-Ashton prosecution, Cole v. Commonwealth, illustrates the nature of the problem. Language is prosecutable which imputes to a public official "a want of integrity or misfeasance in his office, or a want of capacity generally to fulfill the duties of his office, or which is calculated to diminish public confidence in him as an officer, or charges him with a breach of some public trust. . . . 'Anything which assails the integrity or capacity of a judge.'" Such definitional problems have led one commentator to conclude that the "difficulty in framing a real definition is inherent in the nature of the subject matter; the very wide generality of a comprehensive definition renders it practically useless for the purposes for which a definition is sought." Recent decisional law in criminal libel and adjunctive areas illustrates the constitutional deficiencies of

make truth an absolute affirmative defense to criminal actions for libel or slander of a judge. Such is clearly impermissible under the Garrison decision and recent civil libel case law. The state in criminal libel (and the "public official" or "public figure" in civil libel) now have the burden of proving a minimum of recklessness-re-falsity. See note 120 supra, and accompanying text, and Herbert v. Lando, 441 U.S. 153 (1979).

162. 405 S.W.2d at 568.
163. 222 Ky. 350, 300 S.W. 907 (1927).
164. 222 Ky. at 358-59, 300 S.W. at 910. Even less exact is the more expansive general definition of the "offense at common law": "any false and malicious publication, which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive, or bring him in contempt, hatred, or ridicule, or which accuses him of any crime punishable by law, or of any act odious or disgraceful to society." Id. See notes 168-72 infra, and accompanying text. The difficulty in defining libel is in part attributable to its origin as a crime which "makes everything on form and neglects the substance." Veeder convincingly refutes the libel versus slander distinction (actionable only if per se or temporal damages) based on presumed greater dissemination, malice and tendency to "breach of the peace" as without basis or justification in modern law. Veeder I, supra note 1, at 571-73. See also Carr I, supra note 7, at 258-59, where the author criticizes as irrational the "stunted one-sideness" of the libel-slander distinction.

165. Veeder II, supra note 20, at 41.
167. Tollett v. United States, 485 F.2d 1087 (8th Cir. 1973). Noting the "ignominious history" of criminal libel, the court of appeals invalidated as vague and overly broad a conviction under 18 U.S.C. § 1718 (1976), which declared non-mailable "any delineation, epithet, term, or language of libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another." Id. at 1092-93.
any attempt to apply this “very wide generality of a comprehensive definition” and comply with due process (void-for-vagueness avoidance) criteria. In the most recent reported criminal libel decision, the Supreme Court of Alaska invalidated a criminal defamation statute, incorporating a common law definition of defamation, for failure to meet a standard of “reasonable precision” in apprising the public of what was “criminal conduct.” Relying on the decision of Gooding v. Wilson, overturning an “opprobrious words or abusive language” statute, it concluded that the definition of defamation was “certainly no less vague than ‘opprobrious.’”


169. “At common law, any statement which would tend to disgrace or degrade another, to hold him up to public hatred, contempt or ridicule, or to cause him to be shunned or avoided was considered defamatory.” Id. at 292.

170. Id. The defamatory nature of a communication is dependent on the “values of the listener”; even in an ethnically homogeneous culture, such relativity makes determinations of what is defamatory unpredictable. The problem is exacerbated in an ethnically diverse milieu like Alaska, where “there may be divergent views on what is, and what is not, disreputable.” Id. at 293. The court noted the difficulty of developing adequate standards in a society whose hallmark is pluralism, citing the decisions in which a publication was deemed defamatory because it diminished the complainant’s reputation in a substantial but atypical grouping in society. The court similarly animadverted to the temporal mutation of the definitional content of defamation. It referenced the changing liability for imputations of “marxist” or “communist” leanings, generally acknowledged to have fluctuated in accordance with the meanderings of American diplomatic policy. Id. at 293 n.11.

171. 405 U.S. 518 (1972).

172. In Gooding, the Supreme Court opined generally that a statute penalizing words alone “must be carefully drawn or authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.” Id. at 522. It then rejected the state’s contention that the statute was defensible under the “fighting words” exception, limited to “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Id. at 522, accord, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). After affirming the continued validity of the “fighting words” exception “under carefully drawn statutes not also susceptible of application to protected expression,” the Court concluded that the Georgia cases had not limited the statutes to words that “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed,” but had applied it to language “conveying . . . disgrace’ or ‘harsh insulting language.”’” Id. at 526. Moreover, the Georgia decisions defining “breach of the peace,” as “disturbing the public peace or tranquility enjoyed by the citizens of the community,” swept “too broadly” and ran afoul of the vagueness-overbreadth rational of Ashton v. Kentucky, 384 U.S. 195 (1966), and of Cox v. Louisiana, 379 U.S. 536 (1965), by permitting the jury to determine its own standards on an ad hoc basis. 405 U.S. at 528. The Supreme Court invalidated the statute on both vagueness and overbreadth grounds, the latter based on the defendant’s standing to raise the jus tertii of others who “may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.” Id. at 521.

173. 575 P.2d at 293.
A second reason favoring disuse of criminal libel prosecutions is the penchant, endemic to criminal libel with its inherent vagaries, for capricious enforcement. Kentucky decisions, emulating the flavor of precedents from other jurisdictions, reflect a willingness by those "firmly entrenched in public office" to punish their less successful opponents and the critics of their official conduct. This insidious weapon parallels its predecessor of the middle ages, *De Scandalis Magnatum*, which enabled "great men," enjoying positions of power and partaking of the sovereignty of the State, to silence their critics. As the historical evolution of criminal libel in England aptly demonstrates, it is only a short and almost imperceptible step from "scandal of magnates" or "great men" to "scandal of government" under the "good opinion" of government definition of criminal libel. The indirect use of criminal libel to implement the latter is reflected in the dearth of usage of this crim-

174. *Id.* at 294.

175. Leflar, in his statistical analysis of criminal libel cases from the years 1920 through 1955, concluded that exactly half of the cases were "basically political." Leflar, *supra* note 108, at 984. Kelly, *supra* note 13, suggests that "arbitrary and discriminatory prosecutions" are precipitated by the "unclear and little used" crime; as such, it is more easily used for "intimidating speech" than for protection of reputation, normally "more amenable" to civil libel actions.

176. *Id.* at 985. One of the common uses of criminal libel is to assuage the "outraged feelings of sensitive police officers" charged with improprieties in their official conduct. *Id.* at 995. See, e.g., the recent case of Weston v. State, 528 S.W.2d 412 (Ark. 1975) (criminal law conviction of newspaper editor for libeling a sheriff). The study likewise noted uniquely favorable position of a prosecuting attorney to ensure the commencement of criminal prosecutions for libelous statements made of and concerning him. *Id.* at 955-56. See, e.g., the case of Commonwealth v. Mason, 222 Pa. Super. Ct. 453, 295 A.2d 103 (1972), aff'd in part, rev'd in part, 322 A.2d 387 (1974) (criminal libel conviction for libel of two judges, district attorney and others). See also Yancy v. Commonwealth, 135 Ky. 207, 122 S.W. 123 (1909).


177. Leflar, *supra* note 108, describes libel of "great men" (*De Scandalis Magnatum*) as a proceeding designed "primarily to salve the wounded feelings of those, who having the ear of the court, enjoyed a power and prestige akin to that of the state itself." Consequently, punishment of their traducers was akin to sanctioning seditious, an offense at odds with the philosophy of government encouraging comment on public men and affairs. *Id.* at 1031-32. Modern criminal libel, implementing policy purposes similar to those behind the ancient statute, is, in essence, a type of reprisal against critics of official conduct. *Id.* at 1032. See also Comment, *Constitutionality of the Law of Criminal Libel*, 52 COLUM. L. REV. 521, 530 (1952). The views of Leflar are cited approvingly in Gottschalk v. State, 575 P.2d 289, 294-96 (Alas. 1978).
nal offense against the institutional powerbrokers themselves.\textsuperscript{177}

A third reason to allow the offense of criminal libel to die a deserved death is the recent liberalization of civil libel damage actions in "public person" ("public official" and "public figure") cases:\textsuperscript{179} the Supreme Court’s apparent rejection of the "governmental affiliation" test for public officialdom;\textsuperscript{180} authorization of discovery by the plaintiff into the defendant’s "state of mind" and "editorial process" in "actual malice" cases;\textsuperscript{181} the constitutional permissibility of punitive\textsuperscript{182} and presumed\textsuperscript{183} damages if the "actual malice" threshold is met; the suggested general inappropriateness of summary judgment\textsuperscript{184} in "actual malice" cases. These accord the libelled "public official" an adequate remedy at law\textsuperscript{185} to redress injury to reputation and to punish the malefactor and in future to deter him\textsuperscript{186} and others similarly situated. The additional

\textsuperscript{177} Leflar, \textit{supra} note 108, at 1032, suggests that criminal libel "practically could not have been" used against the authorities themselves.

\textsuperscript{178} See \textit{generally} Elder, \textit{The Supreme Court and Defamation: A Relaxation of Constitutional Constraints}, KY. BENCH \& BAR 38 (Jan. 1980). The pro-plaintiff decisions of the Supreme Court in the period from and after the \textit{Gertz} decision in 1974 constitute a counter-revolution of sorts, substantially expanding the likelihood of plaintiffs succeeding in their suits against the media.

\textsuperscript{180} In \textit{Hutchinson v. Proxmire}, 443 U.S. 111, 119 n.8 (1979), the Supreme Court acknowledged the failure in past precedents to draw "precise boundaries" around the designation "public official," but stated that the definition "cannot be thought to include all public employees." The "assumption-of-risk" and "access"-to-the-media rationale for "public figure" status, and the stringent application of such criteria, portend the narrowing of "public official" status. See Elder, \textit{The Law of Defamation and Constitutional Privilege: A Contextual Analysis of Oklahoma Law in Light of Gertz v. Robert Welch, Inc. Through Hutchinson v. Proxmire}, 4 OKLA. CITY U.L. REV. 17, 64-70 \& nn. 265, 274 (1979).

\textsuperscript{181} Herbert v. Lando, 441 U.S. 153 (1979).

\textsuperscript{182} Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974); 441 U.S. at 162 n.7.

\textsuperscript{183} The Supreme Court treats the punitive and "presumed" damage issues interchangeably in \textit{Gertz}, 418 U.S. at 349-50. See \textit{generally} Elder, \textit{supra} note 180, at 80 n.340. Of course, states may prohibit punitive or presumed damages as a matter of state law, even if the "actual malice" standard is met. See cases noted \textit{id.} at n.33. Also, states can attach additional requirements such as a "reasonable relation"-to-"actual damage" test. \textit{Id.}

\textsuperscript{184} \textit{Hutchinson v. Proxmire}, 443 U.S. 111, 120 n.9; Wolston v. Reader’s Digest Ass’n, Inc., 443 U.S. 157, 161 n.3 (1979).

\textsuperscript{185} See Elder, \textit{The Supreme Court and Defamation: A Relaxation of Constitutional Constraints}, KY. BENCH \& BAR 38 (Jan. 1980).

\textsuperscript{186} Presumably, in cases of "calculated falsehood," normal punitive damage rules and the underlying policies of punishment and deterrence will be applicable as in other cases. \textit{See} notes 182 and 183 \textit{supra}. Compare \textit{Model Penal Code} § 250.7, comment (Tent. Draft No. 13, 1961). The comment states that it "goes without saying" that penal sanctions are not justifiable because "evil or damaging to a person in ways that entitle him to maintain a civil suit." "[P]ersonal calumny" is "inappropriate for penal control," which is evidenced by the dearth of prosecutions and the "near desuetude" of criminal libel legislation in the United States. The comment noted only eleven cases in the period 1946 through 1960,
remedy of a criminal libel prosecution with its myriad potential abuses is unnecessary. Further, its potential social harm greatly countervails any conceivable beneficent function. Consequently, nearly all of which involved candidates for public office or public officials. It recommended that criminalization of the “ordinary case of defamation compensable in a civil suit” be deleted, except in “certain aggravated situations.” The “certain aggravated situations” included “narrowly drawn statutes” covering words tending to a “breach of the peace” (“fighting words”) and group defamation. *Id.* See also *State v. Browne*, 206 A.2d 591 (Super. Ct. N. J. 1965); *Garrison v. Louisiana*, 379 U.S. 64, 70 (1964).

187. Leflar, *supra* note 108, at 1033, states that criminal libel “dates back to medieval times” and unlike other conduct that doubles as tort and crime, has no clearly distinguishable “public” interest separate from the “private” interest in reputation.

One type of “public official,” a sitting judge, has an additional potent sanction against a member of the bar for libel or slander under a recent decision. *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980), *cert. denied*, 49 U.S.L.W. 3494 (1981). In that case, the Kentucky Supreme Court affirmed a public reprimand of an attorney for denunciation of a circuit judge during a “highly emotional” press conference emanating from the granting of an *ex parte* injunction against enforcement of a restrictive abortion ordinance drafted by the respondent. The court concluded that such an order was permitted by the civil rules and its granting in a “politically sensitive” matter was not “highly unethical and grossly unfair,” as charged by the respondent. In its opinion, the court made no reference to the *New York Times-Garrison* line of precedents, but relied primarily on the decision of *In re Sawyer*, 360 U.S. 622 (1959) and its progeny. Quoting extensively from the latter decision, it differentiated “fair criticism of the law itself” (or a judicial interpretation thereof) from “personal criticism” impugning judicial integrity. The former “‘attribution or honest error’...imputes no disgrace,” but the latter—suggesting that the judge was “‘corrupt, venal or stupid or incompetent’”—runs afoul of the ethical obligation assumed by members of the bar “not [to] bring the bench and bar into disrepute by unfounded public criticism.” *Id.* at 167-68.

A libel law analysis of the *Heleringer* decision suggests that expressions immune from civil (including punitive damage) liability and criminal prosecution may have substantially diminished protection in several respects in the context of professional disciplinary proceedings. First, the court’s emphasis on usage of the constitutional mechanism for judicial removal where an attorney had “reason to believe in good faith” judicial misconduct had occurred suggests that public criticism, even if true, outside such a forum might be impermissible. Truth is absolutely immune from sanction under the law of libel. Second, even if some quantum of fault-re-falsity is required by *Heleringer*, it is doubtful that the “actual malice” knowing-or-reckless falsity criterion is applicable. Despite the “good faith” language of the opinion, it appears clear that a minimum of “subjective awareness of probable falsity” was not required: It was sufficient that respondent “knew or should have known” (negligent non-knowledge) of the “unwarranted” nature of his allegations. 602 S.W.2d at 168. Third, the “pure” opinion privilege, based on expressed or assumed facts (see note 110 *supra*), would appear to be of no consequence under *Heleringer*. Respondent apparently made his comment following disclosure of the judge’s refusal to wait further for or to seek out the assistant commonwealth’s attorney charged with defending the ordinance’s constitutionality. Indeed, the “pure” opinion rule may be inappropriate in this case, since the “general lay public would not have been aware that a restraining order could be issued without an adversary hearing.” *Id.* at 166. Fourth, some language in the opinion (“‘criticism of the law is not, per se, impermissible criticism of the judicial system’”) can be construed as tacitly permitting professional discipline, including possibly suspension or disbarment. *Id.* at 167. [The court suggests that a continued pattern of such cases “would certainly indicate an unwelcome trend,” warranting a “stiffer penalty” for impersonal at-
the Kentucky courts and legislature should have a sanguine appreciation for the potentiality of abuse of this offense, should glean a perceptive lesson from the legislature's early, almost solitary opposition to the Sedition Act of 1798, and permit this anachronistic offense to lapse permanently into a state of innocuous desuetude. Witness the contrary example of England, which induced

tacks on the judicial system in general, rather than a specific judge. Id. The latter result is clearly at odds with the almost universal rule of absolute privilege in libel cases. See notes 123, 126 and 161 supra.] Fifth, the broad privilege libel cases afford relevant criticism of a public official, whereby "[a]nything which might touch on an official's fitness for office is relevant," is rejected by the Heleringer proscription of public allegations challenging judicial integrity or motivation. Id. See note 139 supra, and accompanying text. Query what result in the case of a public interest lawyer's comment, perhaps as opposing candidate to an incumbent judge, that Judge X in a close case on the facts or the law always decides against the poor or down-trodden?

The Kentucky Supreme Court correctly interpreted and applied the line of precedents following In re Sawyer, 360 U.S. 622 (1959). However, though extant and not overruled, that 5-4 decision, according the judiciary a special immunity from public criticism by their co-professionals, would appear to be inconsistent with the New York Times-Garrison line of precedents. In one recent decision, Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), invalidating a Virginia statute criminalizing accurate disclosure by non-parties (the press in this case) of the content of proceedings of a state judicial review commission, the Supreme Court concluded that "a major purpose" of the First Amendment was to "protect the free discussion of governmental affairs." Id. Though it assumed that "judges will ignore the public clamor" in reaching their decisions, and "by tradition will not respond to public commentary," it determined that the law accords "judges as persons, or courts as institutions, no greater immunity from criticism than other persons or institutions, the operations of the courts and the judicial conduct of judges [being] matters of utmost public concern." Id. at 838-39, accord, Bridges v. California, 314 U.S. 252, 289 (1941). Though admitting the state interest in protecting the reputation of judges and the judiciary, the Court, citing New York Times and Garrison, stated that "prior cases have firmly established, however, that an injury to official reputation is an insufficient reason for repressing speech that would otherwise be free. . . . The remaining interest . . ., the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales." 435 U.S. at 841-42. It quoted Justice Black's statements in Bridges v. California, 314 U.S. at 270-71, that the assumption that "respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion," and that "'enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect.'" Id. at 839. The Court also cited Frankfurter's dissent in Bridges, 314 U.S. at 291-92, which insisted that speech cannot be sanctioned where the purpose thereof, is "simply 'to protect the court as a mystical entity or the judges as individuals or anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed.'" Id. at 840. In Landmark Communications, the Supreme Court found these "well-established principles" "dispositive" of the issue before it. 435 U.S. at 841-42. For a general discussion of this topic, see Note, 56 N.D. Law Rev. 489 (1981).

188. See note 125 supra.

189. The status of the common law misdemeanor of criminal libel is not totally certain. In the post-Ashton period, in 1974, Kentucky adopted its Penal Code which includes a general
one recent critic to note the existence of a "good deal of bad and oppressive law"\(^{190}\) regarding this "monstrous offense"\(^{191}\) and to conclude that a couple of highly-publicized prosecutions for libel would bring it "right back into vogue."\(^{192}\)

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\(^{191}\) Spencer, *Criminal Libel—A Skeleton in the Cupboard (2)*, 1977 CRIM. L. REV. 465, 471. The author would concur with the views of an early dissenter in a "political" libel civil action brought by a public official who—likening such cases of "abuse and denunciation . . . mutual and reciprocal" as "much the same as when two boys go onto the street and commence a contest of slingling mud at each other, and the one gets the worst of it, commences to cry, and runs home to mama"—concluded that all such actions are "both a public and a private nuisance." Langer v. The Courier-News, 179 N.W. 909, 915-16 (N.D. 1920) [Robinson, J., dissenting].

WHAT YOU THINK YOU KNOW (BUT PROBABLY DON'T)
ABOUT THE FEDERAL RULES OF EVIDENCE: A LITTLE
KNOWLEDGE CAN BE A DANGEROUS THING.

By William O. Bertelsman*

INTRODUCTION

So, you're due in federal court next week to try a case there for the first time in several years. You are the attorney for the physician-defendant in a medical malpractice case involving some serious residual damages to the plaintiff. You dimly recall having heard something about a new set of evidence rules now being used in federal courts. You call one of your junior associates, and he tells you there is a new federal evidence code. He gives you a copy and asks if you would like him to do an analysis for you as the rules pertain to your upcoming case. You look over the rules, reading a few of them. No, you say, you can tell this is just a codification of the common law rules of evidence that you have been practicing with for years. Why, look right here: here's the good old hearsay rule with its twenty-four exceptions, just as you learned it when you were in law school. You'll just take the book to court with you so you can plug in the rule numbers if a problem arises, but that's all the indoctrination you need. This latter assumption is your first mistake.

The day of trial dawns; the jury is selected; you are confident. You figure the plaintiff probably will never get to the jury. If she does, you might have difficulty: the plaintiff is a winsome young woman whose condition has deteriorated considerably since she consulted your client. But I. M. Eager, the young lawyer representing the plaintiff, has no physician expert listed on his witness list. He can't get past a directed verdict. Or so you think.

The plaintiff's case proceeds. After putting his client on the stand, Eager calls your client, the defendant-doctor to cross-examine him. Eager directs your client's attention to Chapter Four in Smith on Obstetrics and asks whether he considers the work authoritative. Your client, having been prepared by you (you pat yourself on the back, figuratively speaking) says no, he doesn't. Also, as might have been expected, your client says his treatment

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of the plaintiff was not only proper, but exemplary in all respects.

Plaintiff next calls the librarian of the local medical school. The direct examination proceeds in this manner:

Q. Are you the librarian of the local medical school?
A. Yes.
Q. I will hand you this book. What is it?
A. That is Smith on Obstetrics.
Q. Is that a reliable medical treatise?
A. Oh, yes, we have it in our library. It is used in several courses. All the doctors and students consult it regularly.

MR. EAGER: Your Honor, I move the introduction of this volume into evidence. No further questions; you may ask.

What can you ask? Nothing. What's this all about, anyway? So you say, "No questions."

MR. EAGER: Your Honor, I would like to read Chapter Four of this work to the jury. It is entitled, "Circumstances Where a Caesarian Section is Indicated."

YOU: Objection. Your Honor, this is the rankest, grossest, hearsay I ever heard. How can I cross-examine a book?

THE COURT: (Looking patient but annoyed), overruled. Counselor, this is specifically permitted by Rule 803(18), the learned treatise exception to the hearsay rule.

You sit down. Before you can look up the Rule, you have to grab your pen and pad and start taking notes on the chapter from Smith on Obstetrics as it is read to the jury.

Plaintiff calls his next witness:
Q. Are you the administrator of Washington County Hospital?
A. Yes.
Q. Is that a public hospital?
A. Yes.
Q. Did the hospital make an investigation of plaintiff's case?
A. Yes.

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1. Fed. R. Evid. 803(18) specifically sets out treatises as exceptions to the hearsay rule: Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. (Emphasis added.)
Q. How was that done?
A. A committee of the doctors on the staff discussed the case with the defendant and filed a committee report.
Q. I'll hand you this document. Is that the report?
A. Yes.

MR. EAGER: Your Honor, I move that this report be intro-
duced into evidence.

YOU: Your Honor, I object. This hearsay is even more out-
rageous than the text that was admitted. Not a single member
of that committee is present in court to be cross-examined.

THE COURT: Overruled. Reports of official investigations
are admissible under Rule 803(8)\(^2\) of the Federal Rules of
Evidence.

YOU: But, your Honor, this report contains the opinions
and conclusions of the investigative committee.

THE COURT: That is not a sufficient objection. Cases have
admitted police reports\(^3\) and reports of the results of adminis-
trative investigations,\(^4\) even though they do contain evalua-
tions, opinions and conclusions.

At that point, the plaintiff rests. Plaintiff has not called a single
live medical witness to offer expert testimony that your client
failed to meet the prevailing standard of care. You move for a di-
rected verdict. Motion denied. The learned treatise and investiga-
tive report constitute substantive evidence sufficient to take the
case to the jury. To add insult to injury, the court remarks that
you could have argued that such evidence should have been ex-

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2. **Fed. R. Evid. 803(8)** excepts "Public records and reports" from the Hearsay Rule:
Records, reports, statements, or data compilations, in any form, of public offices, set-
ting forth (A) the activities of the office or agency, or (B) matters observed pursuant
to a duty imposed by law as to which matters there was a duty to report, excluding,
however, in criminal cases matters observed by police officers and other law enforce-
ment personnel, or (C) in civil actions and proceedings against the Government in
criminal cases, factual findings resulting from an investigation made pursuant to au-
thority granted by law, unless the sources of information or other circumstances indi-
cate lack of trustworthiness.

(1979). Comment, The Admissibility of Police Reports under the Federal Rules of Evi-

4. United States v. School Dist. of Ferndale, 577 F.2d 1339 (6th Cir. 1978). Comment,
The Admissibility of Evaluative Reports Under F.R.Ev. 803(8), 68 Ky. L.J. 197 (1979); S.
Supp. 1980) [hereinafter cited as Saltzburg & Redden].
cluded under Rule 403, which permits the court to exclude any otherwise admissible evidence because it is unduly prejudicial. The court holds, however, that since you failed to argue on the basis of that rule in making your objection, you waived it, your objection having lacked the specificity required by Rule 103(1).

During the overnight recess, you have a somewhat distressing interview with your clients, the doctor and his insurance company, whom you had advised that the plaintiff’s case would probably be dismissed on a motion for a directed verdict. The next morning, you are forced to settle for an amount several times greater than had been offered immediately prior to the trial. Although nothing is said specifically, you realize you may have lost one of your best clients.

The foregoing horror story is not at all unrealistic. Coming to federal court without at least a working knowledge of the Federal Rules of Evidence is like sitting in on a high-stakes poker game without knowing that three of a kind beats two pair. The writer has heard prominent trial attorneys say, “I don’t need to make a study of the Federal Rules of Evidence. I make a trial book with specific problems outlined and the rule numbers noted where I anticipate making an objection.”

Such a practice is not enough to give effective service to clients in federal court. Although superficially the Federal Rules of Evidence appear to be a rehash of the common law of evidence you learned in law school, many of the specific provisions are radically different from previously prevailing rules, as the examples above illustrate. The Rules must be read in relation to each other; a given problem may involve the interplay of several rules. Many of the Rules cannot be fully understood without a study of their background, and many have profound implications not readily apparent from the text. Further, evidentiary problems have a bad habit of coming up unexpectedly in the midst of a tense trial, when you have to stand up and argue on your feet without the rulebook. Every trial lawyer who comes to federal court should at least have

5. Fed. R. Evid. 403, “Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time,” provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

6. Fed. R. Evid. 103(1), “Rulings on Evidence,” provides: “Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.”
a knowledge of the approach of the Rules and how the various provisions fit together. As the foregoing example demonstrates, you might be able to resolve a hearsay problem by making an argument on the basis of a rule that appears under the heading of relevancy, or on the basis of a rule under another heading.

The purpose of this article is to help the practitioner begin to attain a familiarity with the Federal Rules of Evidence. The article in no way undertakes to be comprehensive, but only to highlight some salient features of the Federal Rules differing from the common law of evidence. It is an overview and does not treat the finer points and more abstruse questions that arise under the Federal Rules.

HISTORY OF THE FEDERAL RULES OF EVIDENCE

The process that culminated in the promulgation of the Federal Rules of Evidence began in March, 1961. After several preliminary steps, the Chief Justice of the United States, at the recommendation of the Judicial Conference, appointed an Advisory Committee to draft the Federal Rules of Evidence. The Report of this Committee appears in most compilations of the Rules, and provides an indispensable background source in interpreting them.

After a lengthy composing process, a final draft of the proposed Rules was approved by the Supreme Court in November, 1972. In the ordinary course of events, these rules would have become law, pursuant to the Enabling Act. Congress, however, by special legislation, exempted the Rules of Evidence from the operation of the Enabling Act, and provided that they should not be effective until expressly approved by Congress.

Congress subjected the proposed evidence code to exacting scrutiny for several years, and made many revisions in the draft proposed by the Supreme Court. In this process, numerous reports of legislative committees, individual senators, and members of Congress were filed. These reports also provide a valuable tool in interpreting the Rules. Frequently, a rule is very tightly drawn and a

7. For a fuller discussion of the history of the codification process, see Saltzburg & Redden, supra note 4, at 4 ff; C. Wright, Federal Courts § 93 (3d ed. 1976).
8. 28 U.S.C. § 2072 (1976). This is the Act under which the Federal Rules of Civil Procedure were adopted, after promulgation by the Supreme Court, and under which amendments to them continue to be made.
10. An excellent one volume work which contains legislative history, editorial comment, and a selection of the most important recent cases is Saltzburg & Redden, supra note 4.
knowledge of its history is necessary to interpret it. Often what has
been omitted or altered in the adoption process is just as impor-
tant as what appears in the text. A Congressional Bill\textsuperscript{11} enacting
the Federal Rules was finally signed into law on January 2, 1975.
The Rules became effective 180 days later.

As previously stated, the scope of this article does not permit a
comprehensive discussion of the Federal Rules of Evidence. The
discussion that follows emphasizes those rules which are most com-
monly used and which represent the most marked departure from
the common law.

**GENERAL APPROACH OF THE RULES**

Like the Federal Rules of Criminal and Civil Procedure, the
overriding purpose of the Federal Rules of Evidence is the ascer-
tainment of truth and the just determination of judicial proceed-
ings in as prompt and inexpensive a manner as possible.\textsuperscript{12} In
achieving these goals, the rules deemphasize technical objections to
admissibility and emphasize the discretion of the trial judge in im-
plementing the Rules. Many of the rules provide that evidence is
admissible unless the trial judge deems otherwise. A good example
is the rule pertaining to official reports, which was used in the in-
troductory example.\textsuperscript{13}

The cornerstone of the structure of the Federal Rules of Evi-
dence is Rule 403, which may be described as the "trial judge's
friend":

> Although relevant, evidence may be excluded if its probative value is
> substantially outweighed by the danger of unfair prejudice, confu-
> sion of the issues, or misleading the jury, or by considerations of
> undue delay, waste of time, or needless presentation of cumulative
evidence.\textsuperscript{14}

Rule 403 goes far beyond the problem of relevancy, and applies

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\textsuperscript{12} Fed. R. Evid. 102, "Purpose and Construction," reads: "These rules shall be construed
to secure fairness in administration, elimination of unjustifiable expense and delay, and pro-
motion of growth and development of the law of evidence to the end that the truth may be
ascertained and proceedings justly determined."
\textsuperscript{13} For a further discussion of some of the implications of Rule 102, see United States v.
Algie, 503 F. Supp. 783 (E.D. Ky. 1980). Initially, the writer determined to resist the tempt-
tation to cite his own opinions, but after a brief struggle yielded, rationalizing that what
they lack in authority is compensated by their familiarity.
\textsuperscript{14} An exhaustive discussion of the implications of Rule 403 may be found in Dolan, Rule
as Dolan].
to all admissible evidence.\textsuperscript{15} All of the other rules are subject to the provisions of Rule 403. Had the practitioner in our introductory example recognized this, he might have averted disaster by arguing that the manner in which plaintiff's counsel used the learned treatise exception and the official reports exception to the Hearsay Rule was unduly prejudicial. If the trial judge agreed, he could have excluded the evidence for that reason alone. Indeed, the broad exceptions to the Hearsay Rule and other broad provisions for admissibility were included in the evidentiary code with the idea that evidence admitted under them could be excluded under Rule 403, if the trial judge felt they were being used in an unfair manner.\textsuperscript{16} In applying Rule 403, however, it must be remembered that the only reason a party introduces evidence against his adversary is to help his own case and prejudice his opponent's. The mere fact that the evidence is prejudicial and damages the adversary's case for that reason is not a sufficient objection. The prejudice must be unfair for some specific reason.\textsuperscript{17}

Not only is unfair prejudice to the opposing party a ground for exclusion of evidence at the discretion of the trial court, but evidence may also be excluded if it is needlessly cumulative or presented in such a manner as to waste time. Courts today recognize that there is a party in every case who does not appear of record: the public. In the interest of this unnamed party and within their discretion, courts require that cases be presented in a reasonably expeditious manner.\textsuperscript{18} Alternatively, the trial judge may admit the evidence, conditioning its admission upon removal of the timewasting, unfairly prejudicial, or confusing aspects.\textsuperscript{19}

In utilizing Rule 403, it should be remembered that the Rule

\textsuperscript{15} Id.
\textsuperscript{16} See SALTZBURG & REDDEN, supra note 4, at 115-16.
\textsuperscript{17} Ranos v. Liberty Mutual Ins. Co., 615 F.2d 334 (5th Cir. 1980); Carter v. Hewitt, 617 F.2d 961 (3d Cir. 1980). One test that has been suggested is the balancing of the maximum probative value against the likely prejudicial effect. SALTZBURG & REDDEN, 1980 Supp., supra note 4, at 42. But see 1 WEINSTEIN'S EVIDENCE \(\text{\textcircled{1}}\) 403(03), advocating a test under which "maximum reasonable probative force" is balanced against "minimum reasonable prejudicial value."
\textsuperscript{18} See discussion in United States v. Algie, 503 F. Supp. 783 (E.D. Ky. 1980); SCM Corp. v. Xerox Corp., 77 F.R.D. 10 (D. Conn. 1977) (in protracted case, court set time limit for presentation of the parties' cases). The trial judge has no authority to exclude evidence merely because he or she does not believe it, however. United States v. Thompson, 615 F.2d 329 (5th Cir. 1980).
\textsuperscript{19} Thus, a statement of co-conspirator, which would be unduly prejudicial, may be sanitized. See Dolan, supra note 14, at 254.
may not be used to admit evidence excluded by another rule, but only to exclude evidence otherwise admissible upon the grounds previously specified. 20 Some of the factors properly used by the trial court in exercising its discretion under Rule 403 are the availability of other means of proof, and the utility of an appropriate limiting instruction under Rule 106. 21

Although Rule 403 has been said merely to codify the common law powers of the trial judge, 22 the fact that the principle of judicial discretion is expressly embodied in Rule 403 probably means that discretionary exclusion, on the grounds of undue prejudice or one of the other factors mentioned, will be requested more frequently than it has been in the past. A good tactical approach is to focus the trial court's attention on its discretionary power under Rule 403 by requesting a pretrial ruling, either at a pretrial conference or by a motion in limine. 23

The approach of the Federal Rules in implementing their goals by emphasizing the trial court's discretionary control of the proceedings is found in Rule 611(a), 24 which dovetails with Rule 403. 25 Many special evidentiary problems are treated by the Rules in the article on relevancy. 26

**EXPERT AND OPINION TESTIMONY**

Article VII of the Federal Rules of Evidence embodies several marked departures from the common law pertaining to expert and opinion testimony. Although there are one or two problem areas, the changes are on the whole salutary, eliminating bothersome

20. Salzburg & Redden, supra note 4, at 115.
21. Id. at 117.
22. Id. at 115.
23. Such a procedure is encouraged by Fed. R. Evid. 104(c): "Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests."
24. Fed. R. Evid. 611(a) reads: "Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."
technicalities so that the truth may be more readily ascertained and the issues clarified for the trier of fact.

**Lay Witnesses**

Rule 701 avoids constant unproductive hassles over the circumstances in which a lay witness may give an opinion. For instance, whether the plaintiff was mentally competent to give her informed consent to procedures suggested to her by the defendant-doctor might have been an issue in the introductory example. Prior to the adoption of the Federal Rules, the line of questioning would have gone something like this:

[The witness is the plaintiff's husband, a layman.]
Q. Did you visit your wife on the night of September 16th?
A. Yes.
Q. What time was that?
A. About 7:00 P.M.
Q. The defendant has testified that he explained to her the pros and cons of performing a Caesarian section about five minutes before that time. Could she have understood his explanation? [The expected answer is that the witness would testify that plaintiff could not have understood because she was too heavily sedated.]

DEFENSE ATTORNEY: Objection. It calls for an opinion of the witness.

At common law, this objection probably would have been sustained, after a time-consuming quibble about the difference between a fact and an opinion. The proponent of the witness might have had the evidence admitted by rephrasing the question, but not without further waste of time and irritating bickering.

The Federal Rules of Evidence recognize that people, in their ordinary ways of expressing themselves, tend to summarize groups of facts into opinions or summary statements. Such common observations as, “She was happy,” “He was drunk,” “She was busy,” “He was upset,” or, in this case, “She was too heavily medicated to understand the ramifications of a complicated medical explana-

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27. Fed. R. Evid. 701, “Opinion Testimony by Lay Witnesses,” reads:
   If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

tion," are all opinions. Rule 701 permits a lay witness to testify to an opinion of this kind if it is based on his perception and if it will be helpful to the trier of fact in understanding the testimony. The Rule contemplates that the weight of the opinion may be enhanced or diminished by direct or cross-examination concerning the underlying facts upon which it is based. In the example given here, further examination might reveal that the basis of the plaintiff's husband's opinion that the plaintiff was too heavily sedated to understand the doctor was that she could barely speak, did not recognize her husband, did not know where she was, or similar testimony.

**Expert Testimony**

Some of the most significant variations from the common law are made by those provisions of the Federal Rules of Evidence pertaining to expert testimony. Some of these changes (there are those who question whether they are improvements) have already been referred to.

The test whether expert testimony is appropriate, is whether, in the opinion of the court, it will assist the trier of fact in deciding a relevant issue. This is a more liberal test than that generally employed at common law, which determined whether the subject matter of the expert testimony was beyond lay comprehension. In departing from the common law, Rule 702 permits the expert to

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29. In this respect a lay opinion differs from an expert opinion, the facts underlying which may be supplied to the expert. Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399 (3d Cir. 1980). All witnesses except experts must testify from personal knowledge, according to Fed. R. Evid. 602. In one case, the ruling of a trial judge excluding lay testimony concerning the condition of a railroad crossing, was reversed. Young v. Illinois Cent. Gulf R.R. Co., 618 F.2d 332 (5th Cir. 1980). In another case, a lay witness was permitted to testify to her own experiences, where it did not involve expert knowledge to comprehend them.

30. SALTZBURG & REDDEN, supra note 4, at 409. This work also observes quite appropriately:

It is important to note that Rule 701 requires that the opinion be based on personal knowledge; the Rule is not designed to encourage speculation on the part of witnesses concerning events that they have not perceived. Moreover, the Rule implies that the judge may exclude opinion evidence if it is confusing or if it is not helpful in clarifying the testimony of the witness and in understanding the facts of the case.

31. Fed. R. Evid. 702, "Testimony by Experts" reads: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." It is required that the expert have specialized knowledge. The Rule stresses that he need not have acquired that knowledge by formal education.

32. SALTZBURG & REDDEN, supra note 4, at 413.
testify in the form of an opinion relating to the particular case, or to give a dissertation or exposition of scientific or other principles relative to the case and leave their application to the trier of fact.\footnote{It is not a sufficient objection that the opinion of the expert\footnote{or layperson} concerns an ultimate issue in the case.}

It should also be noted that Rule 706\footnote{authorizes the court to appoint its own experts and charge the resulting expense to the parties in its discretion. This provision of the Rules, though not widely used to date, may be expected to be resorted to more frequently in the future. Its use seems particularly appropriate in cases where the experts retained by the parties indicate they will

\begin{itemize}
  \item \textit{Appointment.} The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.
  \item \textit{Compensation.} Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
  \item \textit{Disclosure of appointment.} In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
  \item \textit{Parties' experts of own selection.} Nothing in this Rule limits the parties in calling expert witnesses of their own selection.
\end{itemize}

The court-appointed expert may not be used as a special master, where use of a special master would be inappropriate. Reed v. Cleveland Bd. of Educ., 607 F.2d 737 (6th Cir. 1979). The drafter of the Rule assumed that the cross-examiner would have adequate notice, through discovery, of the bases for the expert's opinion. Saltzberg & Redden, supra note 4, at 441-42. The writer does not permit an expert to testify without disclosing the bases for his opinion because he believes it to be inherently unfair, and productive of too much tactical maneuvering. He does not, however, require the use of a hypothetical question, leaving it to the discretion of the proponent of the expert witness, as the Rule contemplates.
testify to diametrically opposite opinions. The very fact that the court has appointed an expert and the parties know what his resolution of the matter will be may lead to a settlement.

The most radical departure of the Federal Rules from the common law restrictions on expert testimony relates to its presentation. This can best be illustrated by some examples. Suppose, elaborating further on the initial example, the plaintiff calls a clinical psychologist, qualifies him in the traditional manner, to testify on damages. The following is the entire direct examination of the witness. The reader is again asked to assume the role of the attorney for the defendant-doctor.

Q. [after qualifying the witness] Doctor, do you have an opinion concerning the present condition of this plaintiff?
YOU: Objection; the witness has indicated no basis for forming such an opinion. It has not even been shown that he has examined the plaintiff.
THE COURT: Overruled.
A. Yes.
Q. What is that opinion?
YOU: [voice dripping with sarcasm] Same objection.
THE COURT: [unintimidated] Same ruling.
A. In my opinion, the plaintiff is totally and permanently disabled from any gainful employment by reason of a traumatic neurosis, and will require psychological or psychiatric treatment for the rest of her life at an average cost of $5,000 per year.
Q. Do you have an opinion as to the cause of this situation?
A. Yes, it was caused by treatment she received from the defendant.
YOU: [hysterically] Objection; move to strike.
MR. EAGER: [smugly] No further questions.

You are chagrined, not to say nonplussed, outraged and amazed. The judge must have broken down from overwork. There has been no hypothetical question based on facts in evidence. There are no underlying facts in evidence. There is no showing that the expert has examined the plaintiff or has any knowledge of her, much less any other basis for his devastating opinions concerning her situation.

Fortunately, the court takes the luncheon recess at that point, and you put in a hurried call to the same young associate with
whom you discussed the case last week. He tells you that, had you read and studied the implications of Rule 705 of the Federal Rules of Evidence, you would have seen that the hypothetical question is now optional.

While you might have asked the court to prohibit the witness from offering the opinions he did without revealing the bases for them, which you could have done had you been familiar with the Rule, it is now probably too late. You face the dilemma of letting the testimony stand, or taking the appalling risk of asking the witness, who is a reputable psychologist, on what he bases his opinion. You recall that the senior partner of the firm you joined immediately after leaving law school, who was a seasoned trial veteran, gave you two pieces of advice on your first day in the office after passing the bar exam. One was always get your fee in advance in a criminal case, and the second was never on cross-examination ask a witness, especially an expert witness, a question to which you do not know the answer.

After considering this unhappy dilemma during the lunch hour (you have lost your appetite), you decide that you must take the risk. On the resumption of the trial that afternoon, your cross-examination proceeds:

Q. Doctor, have you ever subjected the plaintiff to a psychological examination?
A. No.
Q. Have you ever interviewed the plaintiff?
A. Once for fifteen minutes. She found it so upsetting that we could not continue.
Q. On what then do you base the opinion you have given as to her condition and its cause?
A. I have been present in court during the trial, assisting the plaintiff's attorney, and have made personal observa-

37. Fed. R. Evid. 705, "Disclosure of Facts or Data Underlying Expert Opinion," reads: "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

38. This is permitted in the discretion of the court by Fed. R. Evid. 615, "Exclusion of Witnesses," which reads:
   At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its repre-
tions of her during that time. I have also interviewed her family and friends.\textsuperscript{39}

YOU: Your Honor, I move to strike the testimony of this witness. The bases of his opinion are, for the most part, not in evidence, and he has not considered all of the facts that are in evidence.

THE COURT: [to the witness] Do you rely on this type of data in making diagnoses in your particular field?

THE WITNESS: Yes.

THE COURT: Overruled: Rule 703 of the Federal Rules of Evidence.\textsuperscript{40}

Rule 703, contrary to the common law, permits an expert to base his opinion either upon information obtained by personal observation or examination, or upon facts made known to him at the hearing, or upon the traditional hypothetical question, or upon testimony heard at the trial or, indeed, on any other matter upon which professionals in his field reasonably rely in forming opinions, whether or not such data is admissible, or has been admitted, in evidence.

No competent trial attorney should undertake to try a case in federal court involving expert testimony, without thoroughly studying the rules relating to that testimony and recent cases interpreting them. We have only skimmed the surface here. The Rules provide many new methods, which are designed to save time and further the search for truth. But they may also lead to abuse and

\textsuperscript{39} Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life and death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Advisory Committee's Note to FED. R. EVID. 703.

\textsuperscript{40} FED. R. EVID. 703, "Bases of Opinion Testimony by Experts," reads:
The facts of data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

In the last analysis, it is the duty of the trial judge, with the informed and educated assistance of counsel, to see that the goals of the Rules are fulfilled. It is the duty of counsel to his client to be prepared to render that informed assistance to the court.

**HEARSAY**

Article VIII of the Federal Rules of Evidence substantially increases the likelihood of evidence being admitted over a hearsay objection. This is possible because of the Rules' narrow definition of hearsay, and by the broad rendering of hearsay exceptions. An example will best serve to illustrate the operation of the Hearsay Rules, since all of their implications, especially of the definitional sections, are not immediately apparent.

Returning once again to the hypothetical malpractice case used throughout this article, imagine that your adversary, the plaintiff's attorney, undertakes to introduce the following testimony:

[The witness is a hospital orderly.]

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41. *See Saltzburg & Redden, supra note 4, at 425 ff.; Bauman v. Centex Corp., 611 F.2d 1115 (5th Cir. 1980) (accountant testifies in part from library research); United States v. Genser, 582 F.2d 292 (3d Cir. 1978), cert. denied, 444 U.S. 928 (1979) (IRS agent could testify as expert to opinions based on other agents' audit).*

42. *Fed. R. Evid. 801 reads:*

Definitions. The following definitions apply under this article:

(a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A “declarant” is a person who makes a statement.

(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.
Q. Were you present on September 10, 1979, when the defendant-doctor examined the plaintiff and then had a discussion about her with some other doctors?
A. Yes, in the hall of the hospital outside of the plaintiff's room. The defendant was talking to a group of doctors, after he had seen the plaintiff. I was nearby mopping the floor.

Q. Was Dr. Smith among that group?
A. Yes.

Q. Who is Dr. Smith?
A. He is one of the obstetricians on the staff.

Q. What did you hear the defendant say?
A. I heard him describe the plaintiff's condition and then say he was not going to perform a Caesarian section.

Q. Did you comprehend what he was saying?
A. Not fully, but I understood that much.

Q. What did Dr. Smith say or do?
A. He just stood there shaking his head. He had a disgusted look on his face, and he kept muttering to himself, "No, no, no."

Q. Did the defendant or anyone else see Dr. Smith shaking his head or hear him muttering to himself?
A. The defendant was talking to other doctors, and Dr. Smith was to one side. He was not talking to them. My impression was that his shaking his head was a more-or-less subconscious or involuntary reaction.

YOU: Objection, your Honor. Dr. Smith is not present to testify, and this is the rankest hearsay. This statement contains an opinion of the witness as to what Dr. Smith was thinking.

From our previous discussion you know that the objection based on the opinion of the witness would not be well taken. The Federal Rules of Evidence permit lay witnesses to express opinions within their competence. What about the hearsay objection, however? The objection must be overruled. According to the definitions given in the Federal Rules of Evidence, the words and actions of Dr. Smith in the example given are clearly not hearsay which must be excluded under Rule 802. Rule 801(c) defines hearsay as a

43. See note 27 supra, and accompanying text, discussing Fed. R. Evid. 701.
44. Fed. R. Evid. 802, "Hearsay Rule," reads: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statu-
“statement” of an out-of-court declarant offered to prove the truth of the matter asserted. The word “statement” is a term of art, an understanding of which is necessary to a basic understanding of hearsay under the Rules.

Certainly, you say, the words and nonverbal conduct of the doctor in shaking his head and looking disgusted are offered to prove their truth: that the doctor disapproved of the defendant-doctor’s decision not to perform a Caesarian section. Though this is correct, the conduct and words of Dr. Smith are not a “statement” as defined in Rule 801(a). Under that definition, a “statement” comprises only words or conduct intended by the declarant as an assertion. Since Dr. Smith was not attempting to convey anything to anyone, but merely reacting, his words and conduct were not intended as an assertion, even though this indicated his opinion on the point at issue. Therefore, his words and nonverbal conduct were not hearsay.

The key question asked in determining hearsay under the Federal Rules is, “Did the declarant intend what he said or did as an assertion?” If he did not, what he said or did is not a “statement,” and therefore is not hearsay under the Federal Rules of Evidence. This is contrary to the common law.

Of course, it has always been true that utterances by an out-of-court declarant are not objectionable hearsay, unless offered for the truth of the matter contained therein. Thus, if in our hypothetical case a nurse is asked, “How did you happen to be with the plaintiff for several hours on a particular night,” and the answer is, “Because the head nurse told me to stay with her,” the statement of the nurse is merely background, and there could be no objection to including it, since it is not offered for the truth of any point in the case.

Similarly, some words have an independent legal significance. For example, suppose that the defendant-doctor in the hypothetical case is asserting a defense of assumption of the risk:

Q. Doctor, did you explain to the plaintiff’s mother the attendant risks of not performing a Caesarian section, since plaintiff was under sedation and her husband was not present.


46. Id. at 465-66.
A. Yes.
Q. What did plaintiff’s mother say?
A. She directed me not to perform a Caesarian section.

Even if the mother is not present as a witness, the utterance would be admissible, because it is not offered to prove the truth of any matter asserted in it (indeed, it is not an assertion at all), but is offered to prove the independent fact that someone authorized to speak for the plaintiff prevented defendant from performing the procedure it is now claimed he should have used. 47

HEARSAY EXCEPTIONS

In addition to the narrow definition of hearsay used in the Federal Rules of Evidence, which has the effect of making more evidence admissible over objection, the Rules set forth numerous exceptions even to those matters coming under the definition. Thus, Rule 803 contains twenty-four exceptions to the Hearsay Rule which may be used whether or not the declarant is available as a witness. Rule 804, in addition, enumerates five exceptions useable only when the declarant is unavailable. Both Rules contain a rather broad catch-all exception which permits the court to admit any evidence which would otherwise be hearsay, which it believes has a similar degree of reliability equivalent to any of the enumerated exceptions. 48

47. Similar examples are “I offer” or “I accept” in a contract case, “I cancel” in an action on an insurance policy, or “He is a thief” when offered in a slander action to show the slander was published. See discussion in United States v. Zenni, 492 F. Supp. at 467.

48. FED. R. EVID. 803 is too lengthy to quote in its entirety; it contains these hearsay exceptions:

(1) Present sense impression.
(2) Excited utterance.
(3) Then existing mental, emotional, or physical condition.
(4) Statements for purposes of medical diagnosis or treatment.
(5) Recorded recollection.
(6) Records of regularly conducted activity.
(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).
(8) Public records and reports.
(9) Records of vital statistics.
(10) Absence of public record or entry.
(11) Record of religious organizations.
(12) Marriage, baptismal, and similar certificates.
(13) Family records.
(14) Records of documents affecting an interest in property.
(15) Statements in documents affecting an interest in property.
(16) Statements in ancient documents.
Among the enumerated exceptions are those which are familiar because they existed at common law. Some of them, however, are considerably broader than the common law exceptions. For example, Rule 803(6) comprises a particularly expansive business records exception, which permits opinions placed in business records by an absent declarant to be introduced into evidence, if the other requirements of the Rule are met. The custodian of the records is not required to be called, but someone who is familiar with how they are kept may authenticate them. Some cases have held that it is sufficient if a particular document is to be found in business records of an entity other than the one which made the record, for instance, in the records of the recipient of a copy

(17) Market reports, commercial publications.
(18) Learned treatises.
(19) Reputation concerning personal or family history.
(20) Reputation concerning boundaries or general history.
(21) Reputation as to character.
(22) Judgment of previous conviction.
(23) Judgment as to personal, family or general history, or boundaries.
(24) Other exceptions.

Fed. R. Evid. 803(24) provides for "Other exceptions":
A statement not specifically covered by any of the foregoing exception but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

A similar exception is found in Fed. R. Evid. 804(5). Fed. R. Evid. 804 contains these exceptions to the hearsay rule: "(1) Former testimony; (2) Statement under belief of impending death; (3) Statement against interest; (4) Statement of personal or family history; (5) Other exceptions."

49. Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

50. Rosenberg v. Collins, 624 F.2d 659 (5th Cir. 1980).
Another broad exception is made in Rule 803(8) for public records and reports. It may be that some courts have interpreted this exception too liberally, using it in civil cases to allow into evidence the opinion testimony of policemen or government investigators, without affording the adverse party the protections of cross-examination.

In the last analysis, the question whether an official report should be permitted to be used in this manner is committed to the discretion of the trial judge in determining its trustworthiness. It is not an automatic ground for the exclusion of such a report, however, that it contains facts, conclusions, or evaluations. Factual portions of such a report may be admitted and evaluative portions excluded.

A final example of the federal Hearsay Rule's divergence from the common law is the learned treatise exception of Rule 803(18). It may be used with great effectiveness by the skilled advocate as demonstrated at the outset of this article.

**DOCUMENTS AND REAL EVIDENCE**

The Federal Rules which concern the introduction of documents and similar kinds of evidence recognize that more and more cases involve great volumes of documentary evidence. They also take into account the modern development of photocopying and computers. The overall approach of the Rules with regard to such evidence simplifies the technical requirements for authentication and emphasizes the prevention of undue waste of time in the manner in which the evidence is presented to the trier of fact.

**Authentication**

Article IX of the Rules eliminates many of the annoying techni-

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51. See United States v. Flom, 558 F.2d 1179 (5th Cir. 1977); United States v. Reese, 568 F.2d 1246 (6th Cir. 1977).
52. Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
qualities traditionally associated with the authentication of documents and real evidence. According to the general principle, stated in Rule 901(a), a document is authenticated by a showing that it is what its proponent claims. Rule 901(b) lists ten illustrations, as examples only and not as limitations. The mention of a few of them will suffice to demonstrate the simplicity of the Rule. The most commonly used method of authentication is the testimony of a witness with knowledge, set out in Rule 901(b)(1). For example, counsel says to the witness, “I’ll hand you a document; tell the jury what it is,” and the witness replies, “That is a letter I wrote to the defendant.”

Even if a witness cannot testify to personal knowledge of a document, if it appears to be what it purports to be, it is admissible under Rule 901(b)(4). A letter may be sufficiently authenticated by reason of the fact that it is on a particular letterhead and makes references to events with which the writer was concerned, even though the writer is not called. Rule 901(a) has also been held to ameliorate the traditional strict requirement of showing a “chain of custody” for certain kinds of evidence. Rule 902 specifically enumerates ten categories of documents and records which are “self-authenticating” and require no extrinsic evidence of their authenticity. It should be noted, nevertheless, that merely because

55. What is said here concerning documents also applies to real evidence.
56. Fed. R. Evid. 901(a) provides: “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”
57. Fed. R. Evid. 901(b) reads, in part:
By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

58. See United States v. Stearns, 550 F.2d 1167 (9th Cir. 1977) (photographs).
59. See, e.g., United States v. Coades, 549 F.2d 1303 (9th Cir. 1977); United States v. White, 569 F.2d 263 (5th Cir. 1978), cert. denied, 439 U.S. 848 (1978) (chain of custody said to go to weight rather than admissibility).
60. Space does not permit full quotation of the rule but only a listing of its ten headings: (1) Domestic public documents under seal; (2) Domestic public documents not under seal; (3) Foreign public documents; (4) Certified copies of public records; (5) Official publications;
a document is authenticated, does not make it *per se* admissible. A hearsay, privilege, relevancy, or other objection may still be lev-elled at it.

**BEST EVIDENCE RULE**

There is perhaps no more prevalent misnomer in the entire body of jurisprudence, and certainly none in the law of evidence, than the so-called "best evidence rule." In a case tried by the writer, a party testified that because he was illiterate, all of his business mail was screened for him by his wife or son. When asked if he had received a notice of cancellation of an insurance policy, he testified that he had not, because if he had, either his wife or son would have called it to his attention, and they had not done so. The objection was made that this was not the best evidence, that the testimony of his wife or the son would have been the best evidence, and therefore the testimony of the witness should not have been received.

As another illustration, suppose that in the hypothetical case used in this article the following occurs:

Q. And after the defendant-doctor released you from treat-ment, what was the amount of the bill that he sent you?

YOU: Objection, your Honor. The bill itself is the "best evidence."

The above objection is not well taken. There is no requirement in the law of evidence, either in general or relating to documents, that the "best" evidence on a particular point be introduced. If there is better evidence that could have been produced, such as the testimony of the wife and son in the example in the first paragraph of this section, that fact goes to the weight of the evidence. The opponent may properly argue that the evidence is not credible. But this does not prevent the evidence from being admitted.61

The so-called "best evidence" rule pertains solely to documents and certain real evidence and is better thought of as the "requirement of the original," because that is all it means: if a document, tape recording, et cetera is to be introduced, ordinarily the original

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61. This principle is well illustrated by United States v. Rose, 590 F.2d 232, 236-37 (7th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979) (conversation could be proved without introducing existing tape recording of it).
must be offered, unless its absence can be explained. Article X of the Federal Rules of Evidence is drafted to make this clear, to avoid the confusion attendant upon the use of the term "best evidence." Thus, Rule 1002\(^2\) requires that where the content of a writing, recording or photograph is sought to be proved, the original is generally required.

It must be emphasized that the original writing is required only if the content of the exhibit is sought to be proved. In the example given above, the witness may testify from her own recollection what she paid the defendant-doctor. As long as she is not trying to prove the content of his bill, as such, that document need not be produced, and the Rule is inapplicable.\(^8\) The Advisory Committee specifically notes "an event may be proved by non-documentary evidence, even though a written record of it was made."\(^6\)

Were Rule 1002 read in isolation, it would seem to have taken an over-technical approach by making a universal requirement of the production of the original, where the content of the document is sought to be proved. However, such an effect is prevented by the fact that "duplicates" are admissible in lieu of the original.\(^6\) "Duplicate" is broadly defined by the Rules, and includes photocopies and printed or mimeographed copies made from the same matrix as the original.\(^6\) Rule 1004\(^7\) sets forth several circumstances in

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62. FED. R. EVID. 1002, "Requirement of Original," reads: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress."

63. SALTZBURG & REDDEN, supra note 4, at 676, observe:

The fact that a writing is made to describe or record an event or a condition does not prevent testimony by knowledgeable witnesses as to the same event or condition. One familiar example relates to the question whether "A" paid "B" a certain sum of money at a specified time. "B" may have given "A" a written receipt, but that does not prevent oral testimony concerning an alleged payment. Whether or not a payment is made is an issue; the content of the writing is not in issue. The same can be said of the use of most photographs, a point made by the Advisory Committee. Ordinarily a witness takes the stand and states that a photograph represents the scene as he saw it. The contents of the picture are not then in issue; the scene is in dispute. Hence, the Rule seldom applies to ordinary photographs.

See also Advisory Committee Note to FED. R. EVID. 1003; United States v. Rose, 590 F.2d 232 (7th Cir. 1978), cert. denied, 442 U.S. 929 (1979).

64. Advisory Committee Note to FED. R. EVID. 1002.

65. FED. R. EVID. 1003, "Admissibility of Duplicates," reads: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

66. FED. R. EVID. 1001(4) defines "Duplicate" as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including
which the original, even under the broad definition given, is not required. Rule 1005 provides simplifies the introduction of public records, permitting use of certified copies or other evidence of their contents.

A special word should be said concerning Rule 1006 which, if properly used, can save substantial amounts of time in the trial of cases, especially complex ones. This Rule permits a summary of voluminous writings, recordings, or photographs to be introduced, if the underlying documents are admissible in evidence and have been made available for inspection by the opposing party. You, as attorney for the defendant-doctor in the example used throughout this article, might effectively use Rule 1006 to introduce a summary of hospital records:

[Your client, acting as his own medical expert, is testifying.]

Q. Doctor, you have stated that you did not employ a Cae-sarian section in the delivery of the plaintiff's baby. Can you tell the jury why you did not do so?

A. Yes, because on many occasions there were findings and

enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original."

67. FED. R. EvID. 1004, "Admissibility of Other Evidence of Contents," provides:

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue."

68. FED. R. EvID. 1005, "Public Records," reads:

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by a copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complied with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

69. FED. R. EvID. 1006, "Summaries," reads:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.
symptoms which contra-indicated use of a Caesarian section.

Q. Doctor, I will show you defendant's first exhibit and ask you to tell the jury what it is.

A. That is a chart I prepared from the hospital records, which shows every instance in which such a symptom or finding appears.

You can have your client document his position with regard to the inappropriateness of the Caesarian section by using the chart. Note that the chart is based on the hospital records, which are in evidence, and opposing counsel has had the opportunity to verify the accuracy of the summary. Nevertheless, the mere fact that records are summarized under Rule 1006 does not make them admissible. The records must themselves be admissible for the summary to be admissible. 70

In order to save everyone's time, use of Rule 1006 is recommended, and sometimes insisted upon. It is the tool of an effective advocate. Your client's testimony in the instant example is much more persuasive, by reason of the fact that the chart highlights the points he is trying to make, than if he had sat on the witness stand leafing through voluminous nurse's notes and other records and read them to the jury. By creative use of Rule 1006, you will also endear yourself to the court, because you will have saved large amounts of its precious time.

CONCLUSION

It must be emphasized that this article is only an overview of the Federal Rules of Evidence, and is in no way exhaustive. If it makes the practitioner aware of some of the pitfalls lurking in the Rules, it will have served its purpose.

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70. See United States v. Seelig, 622 F.2d 207 (6th Cir. 1980). It is conceivable that a summary used by an expert might not contain only matters admissible in evidence, since in testifying to his opinion, the expert may employ matters that are not so used.
Much scholarly and judicial attention has recently focused upon the Surface Mining Control and Reclamation Act of 1977. This legislation was designed to prevent water pollution, soil erosion, destruction of ecosystems, and social and economic disruption attendant to uncontrolled or underregulated surface mining.

Title V of the SMCRA sets forth a wide variety of environmental protection requirements, including restoration of surface mined land to its previous use or a higher and better use; restoration of mined lands to their approximate original contour; stabilization of all surface areas; segregation and restoration of topsoil or other soil suitable for revegetation; protection of hydrologic systems;
establishment of postmining vegetative cover; and proper disposal of spoil material. Some of these requirements, such as return to approximate original contour, are subject to variances or exceptions, but the Act sets undeniably strict standards. The Act also provides, in some instances, for the removal of certain lands from all or certain types of surface mining.

The Act has been challenged on several constitutional grounds, but perhaps the most intriguing challenge arises from its focus on land use. Two federal district courts have found the Act's land use restrictions unconstitutional as violative of the Tenth Amendment. Two others have disagreed, and the matter is now before the Supreme Court of the United States. This article will examine the basis and merit of a Tenth Amendment challenge to the SMCRA.

A. Basis for Tenth Amendment Challenge

The essence of the Tenth Amendment argument is that the SMCRA constitutes an unconstitutional federal intrusion into areas traditionally within the sphere of state control; that is, land use planning control and state property law. Such an intrusion, it is argued, falls outside Congress' power to legislate under the Commerce Clause, the legislatively declared authority for the Act.

B. Congressional Power Under the Commerce Clause

From the New Deal era until 1976, the Supreme Court protected Congressional power to legislate under the Commerce Clause from a broad range of challenges. In 1976, however, in a controversial

7. Id. at § 1265(b)(19)-(b)(20).
8. Id. at § 1265(b)(22).
9. Id. at § 1272.
10. See Hemenway, supra note 1.
13. See Hemenway, supra note 1 at 261-65. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.
15. See, e.g., United States v. Darby, 312 U.S. 100 (1941), wherein the Court stated: "Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Com-
plurality opinion in National League of Cities v. Usery, the Supreme Court held that the imposition upon the States and their political subdivisions of federal wage and hour requirements infringed the States' Tenth Amendment rights and was not within the reach of Congressional power under the Commerce Clause.

C. National League of Cities v. Usery as Precedent for a Challenge to Section 522 of the SMCRA

Because National League of Cities dealt with federal wage and hour guarantees, one might question whether it is apposite to the regulation of surface mining. Nevertheless, in limiting the reach of Congressional power under the Commerce Clause, the Court couched its decision in terms of state sovereignty. Thus, Justice Rehnquist, speaking for a plurality of the Court, framed the issue as "whether these determinations [as to wages and hours of governmental employees] are 'functions essential to separate and independent existence,' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them." The Court,


17. To date, National League of Cities has found rather limited application in the courts. Courts have rejected the claim, for example, that National League of Cities precludes application of the Equal Pay Act of 1963 to state governments. See Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977); Usery v. Charleston County School Dist., 558 F.2d 1169 (4th Cir. 1977); Marshall v. A & M Consol. Independent School Dist., 605 F.2d 1161 (5th Cir. 1979); Marshall v. City of Sheboygan, 577 F.2d 1 (7th Cir. 1978); Marshall v. Owensboro-Davies County Hospital, 581 F.2d 116 (6th Cir. 1978). See also Shawer v. Indiana Univ. of Pennsylvania, 602 F.2d 1161 (3d Cir. 1979); Ar-ritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977). See discussion in Texas Landowners' Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978). It should be noted that Justice Blackmun's swing vote concurrence in National League of Cities "does not outlaw Federal power in areas such as environmental protection, where the federal interest is demonstrably greater." 426 U.S. at 856.

18. 426 U.S. at 845-46.
therefore, focused on federal interference with traditional aspects of state sovereignty. Imposition of wage and hour controls on state and local government employees would significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which States have traditionally afforded their citizens.

But the precise holding of the Court was a narrow one: "[I]nsofar as the challenged amendments operate to displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3 (Commerce Clause)." A Tenth Amendment challenge to the Act must of necessity be grounded upon the National League of Cities plurality's emphasis on "traditional [state] governmental functions." The argument is that since land use control has traditionally been regulated by the States, Congress has reached too far when it seeks to impose upon the States' legislation which in effect dictates federal notions of proper land use controls.

Such a constitutional attack, though superficially appealing, has several significant flaws. First, it neglects an important aspect of National League of Cities. In that case Congress was imposing its will directly upon the States, in their sovereign capacity. The Court emphasized that its holding does not apply to the regulation of private activities:

Congressional power over areas of private endeavor, even when its express exercise may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the require-

19. Id. at 852.
20. Id. at 851.
21. Id. at 852.
23. The Court uses the word "directly" repeatedly. 426 U.S. at 841, 847, 848 ("speaking directly to the States qua States"), 849 ("directly penalizes the States"), 852 ("directly displace the States' freedom").
ment that 'the means chosen by [Congress] must be reasonably adopted to the end permitted by the Constitution."

Surface coal mining falls within the notion of private activity left untouched by National League of Cities.

A review of the SMCRA reveals that, unlike the Act challenged in National League of Cities, the Federal Surface Mining Act does not impose any requirements on the States which impact in a direct manner upon their sovereignty. Rather, the SMCRA invites States to assume primary jurisdiction to enforce the Act within their borders by establishing, subject to approval by the Secretary of the Interior, a state program which must include the means to carry out the substantive and procedural requirements of the Act.

It is true that one of the requirements for federal approval of a state surface mining reclamation and enforcement program is that it comply with a variety of strict environmental requirements. The state is under no obligation to implement such a program, however, and cannot be "penalized" in any traditional sense for choosing not to participate.

24. Id. at 840.
25. The federal district court, in Virginia Surface Mining and Reclamation Ass’n v. Andrus, acknowledged the requirement of direct impact on the state, 483 F. Supp. at 432, but in its later analysis completely ignored it, focusing instead on the impact on Virginia’s economy. In Indiana v. Andrus, another federal district court wrestled with the problem and concluded that:

   [e]ven if a State program is instituted in Indiana, the Federal Government cannot do indirectly that which is unconstitutional to accomplish directly. In National League of Cities, had the Federal Government not legislated that the States pay certain minimum wages to employees which indirectly altered the States' choices as to the delivery of certain governmental services to their citizens, but attempted to directly usurp the delivery of these governmental services, it would have been an even clearer violation of the Tenth Amendment.

14 ENVIR. REP. (BNA) at 1778 (emphasis added). The problem with the hypothetical posited by the Indiana court is that any regulation directly usurping the activities described in National League of Cities would necessarily be direct regulation of the States, since all the enumerated activities—fire prevention, police protection, sanitation, public health, etc., were performed by the state. Had the federal government, through a scheme of cooperative federalism, attempted to directly regulate shift assignments for policemen by asking states to set up a state police shift assignment plan complying with federal requirements, the conduct regulated would be state conduct. By contrast, the SMCRA regulates only private conduct.

27. Id.
28. This distinguishes the instant problem from that encountered in Environmental Protection Agency [hereinafter EPA] transportation control cases. Those cases involved provisions of the Federal Clean Air Act which required states to include in each air pollution
If a state fails to promulgate a program which satisfies federal

control State Implementation Plan a program for the control of air pollution from
automobiles. See 42 U.S.C. § 1857c-5(a)(2)(b), et seq. (1976). In addition to providing emis-
sion controls, such programs were supposed to regulate indirect pollution sources such as
parking facilities and other areas of heavy automobile concentration, to improve public
transportation through bus lanes and car pooling, and to reduce total mileage of auto use. If
a state failed to create an acceptable Transportation Control Program that state was re-
quired to enforce a program promulgated by EPA. According to EPA regulations, failure to
enforce such a program subjected a state to both civil and criminal liability. Id.

In Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), vacated and remanded per curiam, 431
U.S. 99 (1977), the Court of Appeals responded to California's challenge to the constitution-
ality of the EPA regulation which subjected the state to such direct sanctions for failure to
implement an EPA plan as "injunctive relief, imposing a receivership on certain state func-
tions, holding a state official in civil contempt with a substantial daily fine until compliance
is secured, and requiring a state to allocate funds from one portion of its budget to another
in order to finance undertakings required by the Agency." Id. at 831. The Court of Appeals
agreed with the state, holding that such a federal scheme was not within the commerce
power. Id. at 839.

It is important to note that the court indicated that there would have been no problem
absent the sanctions:

We merely hold that under the Act a state may decline, without becoming liable to
sanctions, to undertake a program of control suggested by the Administrator . . .
Our interpretation is in no way inconsistent with the recognition that Congress has
the power to authorize the Administrator to obtain the consent of a reluctant state by
conditioning certain federal expenditures within that state on the granting of such
consent.

Id. at 840. In District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975) vacated and remanded per curiam sub nom. EPA v. Brown, 431 U.S. 99 (1977), the court struck down
EPA regulations insofar as they provided for sanctions against a state for failure to imple-
ment and enforce an EPA promulgated program. The holding was premised in part on a
finding that the regulations violated the Tenth Amendment. In Maryland v. EPA, 530 F.2d
(1977), the Fourth Circuit similarly rejected the EPA's power to impose sanctions upon the
state for failure to implement an EPA promulgated transportation plan, again noting that
other types of pressure upon the states would be acceptable, 530 F.2d at 228. In Penn-
sylvania v. EPA, 500 F.2d 246 (3d Cir. 1974), however, the court upheld the imposition of sanctions against a state, relying on Maryland v. Wirtz, 392 U.S. 183 (1968). Wirtz was later
overruled, as mentioned above, in National League of Cities v. Usery, 426 U.S. at 852-55.

The Supreme Court granted certiorari in all three cases, but subsequently vacated the
respective Courts of Appeals judgments and remanded for consideration of mootness when
the EPA regulations needed modification. EPA v. Brown, 431 U.S. 99 (1977). One can only
speculate as to what position the Supreme Court would have taken with regard to these
cases. See Justice Blackmun's concurring opinion in National League of Cities, 426 U.S. at
856. See also Note, Protection of the Environment and Protection of the States: The Con-
stitutional Issue Raised by EPA Action under the Clean Air Act, 7 ENV'TL L. 383 (1977).

But see Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977), stay denied sub nom.
Beame v. Friends of the Earth, 434 U.S. 1310 (1977), wherein the court upheld an enforce-
ment proceeding against the city and its officials for failure to implement a transportation
plan. Brown v. EPA, supra, and Maryland v. EPA, supra, were held inapposite since the
program in question had been promulgated by the state with EPA approval, rather than by
EPA.
standards, the Secretary of the Interior is required to promulgate and implement a federal enforcement program for the state. In such a situation, the Department of the Interior is the regulatory authority and has exclusive jurisdiction; the state is not-compelled to do anything. Thus, the most important aspect of National League of Cities, direct impact on the States qua States, is absent.

It may be argued that withholding or withdrawal of approval of a state program (and the federal funding that accompanies it) amounts to "direct" interference with traditional state functions. Proponents of this view must, however, come to grips with Steward Machine Co. v. Davis. In that case, the Supreme Court upheld imposition of a state unemployment tax under the Social Security Act of 1934 against a challenge that it involved the coercion of the States in contravention of the Tenth Amendment. Justice Cardozo, speaking for the Court, proceeded to "draw the line . . . between duress and inducement." The Court found that while the Social Security Act undoubtedly shaped state programs, it did not do so by duress: "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties."

In a recent decision, Texas Landowners' Rights Association v. Harris, the United States District Court for the District of Columbia rejected a Tenth Amendment challenge to the National Flood Insurance Act. That Act, as amended in 1973, denies direct federal financial assistance and federally related financing by private lenders for construction upon or acquisition of properties located in certain communities unless the property is covered by flood insurance. In order to obtain such coverage, however, flood prone communities were required to adopt local flood plain management measures to reduce or avoid flood damage. Relying on Steward Machine, the District Court drew a line between induce-

32. Id. at 586. Virginia Surface Mining acknowledged the "induced-coerced distinction," but held it only relevant "to determine the validity of legislation affecting nontraditional governmental functions." 483 F. Supp. at 432 n.6 (emphasis added).
33. Id. at 589-90. In National League of Cities, the court noted the coercive nature of the federal requirement. 426 U.S. at 850.
35. 42 U.S.C. § 4012(a), (b) (1976).
ment and coercion, and found no Tenth Amendment violation.\textsuperscript{36}

It might reasonably be argued, notwithstanding the distinction discussed above, that \textit{National League of Cities} simply stands for the proposition that the federal government has no authority to intrude into those areas traditionally under the supervision and regulation of state and local governments. Under this theory, land use planning, a classic example of a traditional state and local government function,\textsuperscript{37} is exempt from federal regulation.

The pitfalls of this approach are obvious. A "traditional state function" limitation on the commerce power could arguably apply any time Congress seeks to regulate an activity formerly controlled by the States. Certainly there is no constitutional principle which prevents the federal government from entering into new areas of regulation.\textsuperscript{38} Any attempt to designate certain areas of private activity as matters traditionally of state concern, therefore, would require the application of a standard so elusive that it defies principled explanation.\textsuperscript{39}

Even assuming that land use planning falls within the definition of "traditional state function," it is apparent that a number of activities affecting commerce are currently regulated in a manner that constitutes land use control.\textsuperscript{40} Air and water pollution are subject to regulation under the Commerce Clause, yet their regulation certainly controls land use. Regulations preventing the significant deterioration of clean air, for example, require state and local governments to adjust drastically, if not sacrifice, industrial growth plans; yet the District of Columbia Circuit easily disposed of the contention that such regulation offended the doctrine of \textit{National League of Cities}.\textsuperscript{36}

\textsuperscript{36} 453 F. Supp. at 1030.


\textsuperscript{38} The mere fact that Congress has failed to legislate in areas within the scope of the powers granted it by the Constitution, here the Commerce Clause, in no way diminishes its power to do so. When Congress does act with regard to a matter within the scope of its power, conflicting state law is preempted. See De Canas v. Bica, 424 U.S. 351 (1976); Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

\textsuperscript{39} There could hardly be a better illustration than the \textit{Virginia Surface Mining} opinion. Aside from the court's objections to the forced relinquishment of state control of land use planning, the court also found the state's rights violated by federal government interference with state control of its economy and the state's choice of how best to protect its environment. 483 F. Supp. at 433.

\textsuperscript{40} See, \textit{e.g.}, South Terminal Corp. v. EPA, 504 F.2d 646, 677 (1st Cir. 1974).
League of Cities.\textsuperscript{41}

It is also unduly simplistic to preclude federal regulation upon finding that it intrudes into areas of traditional state function. The \textit{National League of Cities} decision includes an element of balancing.\textsuperscript{42} Thus, those who would assert the Tenth Amendment challenge to environmental legislation such as the SMCRA should first consider the swing-vote concurrence of Justice Blackmun in that case: "I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."\textsuperscript{43}

Finally, it is important to note the restraint with which the SMCRA regulates land use. Aside from the fact that SMCRA-controlled mining is only one of many land uses, the Act itself leaves much to state discretion. All reclamation plans submitted under the Act must reflect consideration of state and local land use plans and programs.\textsuperscript{44} States may grant variances from the approximate original contour requirement in appropriate circumstances, and a mountaintop removal variance is also permitted.\textsuperscript{45} Determination of unsuitability of land for surface coal mining is in part a question of state needs and therefore must be integrated as closely as possible with present land use planning and regulation processes at the federal, state and local level.\textsuperscript{46} It is conceivable, of course, that a federal land use plan could be so pervasive and detailed as to truly eliminate any kind of local choice in land use decision-making, but the SMCRA surely does not reach such extremes.

In sum, the constitutional issue may be reduced to the question whether the limitation of prohibition of surface mining in certain areas is within the scope of the Commerce Clause. It need hardly be reiterated that the Commerce Clause has undergone continued


\textsuperscript{42} The balancing test is set out in Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1082 (5th Cir. 1979).

\textsuperscript{43} 426 U.S. at 856. Note that he refers to \textit{state facility} compliance, not \textit{state plan} compliance. This reinforces the theory that \textit{National League of Cities} deals only with direct federal regulation of state activity. See notes 23 to 29, supra.


\textsuperscript{45} Id. at § 1265(c), 1265(e).

expansion since Justice Marshall first addressed the issue of its scope in *Gibbons v. Ogden.* Yet even in that seminal opinion, it appeared that Congressional power to regulate interstate commerce was broad, governing not only activity which is actually transacted in more than one state, but also that activity which "concerns more states than one." Only activities which are purely local in effect were considered exempt:

The genius and character of the whole government seem to be, that its action is to be applied to all the . . . internal concerns [of the Nation] which affect the states generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of government. 48

The narrowness of the exemption set forth in *Gibbons* is more fully shown in recent cases where businesses as insignificant as "Ollie's Roadside Barbeque" were held to be proper subjects of the commerce power. 49 Perhaps the most revealing Supreme Court pronouncement on the breadth of the commerce power is found in *Wickard v. Filburn,* 50 in which the government's power to regulate the production of agricultural goods was extended to production which was earmarked for consumption on the farm, *i.e.*, for home use. The Court found that home consumption affected the economies of the market by restricting the amount produced for market and by forestalling resort to the market by the home consumer. Moreover, although the individual home consumer's effect on commerce may have been *de minimis,* combined with the similar actions of others it was "far from trivial." 51 On the basis of these

47. 22 U.S. (9 Wheat.) 1 (1824).
50. 317 U.S. 111 (1942).
51. Id. at 128.

The legislative history of the SMCRA lists side effects of coal mining in the humid areas of the East and Midwest detailed in previous committee reports:

Acid drainage which has ruined an estimated 11,000 miles of streams; the loss of prime hardwood forest and the destruction of wildlife habitat by strip mining; the degrading of productive farmland; recurrent landslides; siltation and sedimentation of the river systems; the destructive movement of boulders; and perpetually burning mine waste dumps—these, constitute a pervasive and farreaching ambience. Tragically, coal mining in America has left its crippling mark upon the very communities which labored most to produce the energy which once impelled the Nation's indus-
findings, the Court upheld the exercise of the commerce power:
But even if appellee's activity be local and though it may not be
regarded as commerce, it may still, whatever its nature, be reached
by Congress if it exerts a substantial economic effect on interstate
commerce, and this irrespective of whether such effect is what might
at some earlier time have been defined as "direct" or "indirect."\textsuperscript{59}

In light of the breadth of these prior holdings, it can scarcely be
argued that Congress may not exercise its power under the Com-
merce Clause to control and, if necessary, prohibit surface mining
in certain areas. First, it is obvious that surface coal mining opera-
tions affect interstate commerce by their mere participation in it.\textsuperscript{58}
Moreover, Congress has found that "surface mining and reclamation
standards are essential in order to insure that competition in
interstate commerce among sellers of coal produced in different
States will not be used to undermine the ability of the several
States to improve and maintain adequate standards on coal mining
operations within their borders."\textsuperscript{54}

Finally, it is well documented that unreclaimed surface mines
often have tangible impacts which extend far beyond the immediate
mining area. Testimony during legislative hearings on the SM-
CRA dramatically illustrated this:

Maj. Gen. Ernest Graves of the U.S. Army Corps of Engineers ad-
dressed the corps' experience with loss of the utility of corps water
projects—amounting to hundreds of millions of dollars of wasted tax
money—due to siltation attributable to poorly reclaimed coal min-
ing operations:

The most widespread damages resulting from the effect of min-
ing upon the water resource are environmental in nature.
Water users and developers incur significant economic and
financial losses as well.

Reduced recreational values, fish-kills, reductions in normal
waste assimilation capacity, impaired water supplies, metals
and masonry corrosion and deterioration, increased flood fre-
quencies and flood damages, reductions in designed water stor-

\textsuperscript{52.} Id. at 125.
\textsuperscript{53.} "The Congress finds and declares that: . . . (j) surface and underground mining oper-
ations affect interstate commerce, contribute to the economic well-being, security, and gen-
eral welfare of the Nation and should be conducted in an environmentally sound manner."
\textsuperscript{54.} Id. at 1201(g).
In some small watersheds, other indirect economic and social problems can be related to the overall adverse consequences of mining. In others, mining has posed serious threats to life and property in the form of hazardous flooding conditions or potentially dangerous pollutants.

The instream problems, primarily sedimentation and chemical pollution, are related not just to surface mining, but to various other aspects of the industry as well. Land disturbances caused by underground mining are equally as significant as surface mining in some locations, and even more so in others. 55

To put it bluntly, it is ridiculous to characterize surface mining reclamation as a purely local activity, removed from the regulatory sweep of the commerce power. 56 Our knowledge of the vast devastation resulting from unreclaimed and poorly reclaimed surface mining and the more subtle effects of such mining where it is ecologically inappropriate makes it impossible to accept such a characterization. To ask the federal government to mind its own business or to leave such “local” matters to local government reveals


(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources; . . .

(h) there are a substantial number of acres of land throughout major regions of the United States disturbed by surface and underground coal on which little or no reclamation was conducted, and the impacts from these unreclaimed lands impose social and economic costs on residents in nearby and adjoining areas as well as continuing to impair environmental quality.


56. The Virginia Surface Mining court found that Congress had a rational basis for enacting the SMCRA to protect commerce and the national interest, but concluded that the Tenth Amendment limited the reach of the commerce power because of the intrusion on the state's land use control prerogatives. 438 F. Supp. at 431. Indiana v. Andrus, in contrast, arrived at the astonishing conclusion that strip mining prime farmland has no appreciable effect on commerce. 14 Envir. Rep. (BNA) 1771-75 (S.D. Ind. 1980).
an extraordinary naivety, which is all the more difficult to accept from a body as sophisticated as the American mining industry.
COMMENTS

THE CORPORATE OPPORTUNITY DOCTRINE IN THE CONTEXT OF PARENT-SUBSIDIARY RELATIONS

INTRODUCTION

The aim of the corporate opportunity doctrine is to protect a corporation from the self-dealing of those persons who, by virtue of their relation to that corporation, should act in its best interests. The doctrine simply requires that these persons refrain from usurping a business opportunity which belongs to the corporation. This comment will discuss the application of this doctrine to the various relationships which are created when one corporation forms or acquires a subsidiary corporation.

GENERAL PRINCIPLES

The duty inherent in the doctrine usually is imposed upon the directors and officers of the corporation because they occupy a fiduciary position as to the corporation. The classic statement of the doctrine is found in Guth v. Loft, Inc., in which the Supreme Court of Delaware said:

It is true that when a business opportunity comes to a corporate officer or director in his individual capacity rather than in his official capacity, and the opportunity is one which, because of the nature of the enterprise, is not essential to his corporation, and is one in which it has no interest or expectancy, the officer or director is entitled to treat the opportunity as his own, and the corporation has no interest in it, if, of course, the officer or director has not wrongfully embarked the corporation's resources therein.

On the other hand, it is equally true that, if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the

1. In a recent case, the Illinois Supreme Court found that an employee of an investment banking company, who acquired certain stock for himself, was liable for breach of the fiduciary duty he owed the company. The plaintiff argued that the corporate opportunity doctrine was applicable. The court stated that "it is a breach of fiduciary obligation for a person to seize for his own advantage a business opportunity which rightfully belongs to the corporation by which he is employed." The court pointed out that the cases upon which it relied involved corporate officers and directors but that "they do not so limit the rule." Mullaney, Wells & Company v. Savage, 78 Ill. 2d 534, 545-46, 402 N.E.2d 574 (1980).

2. 23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939).
line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. 3

Predictably, the basic question in cases involving the doctrine is whether a corporate opportunity did in fact exist. In order to limit the applicability of the doctrine, some courts find that a corporate opportunity exists only when the plaintiff establishes that the corporation had an actual expectancy or interest in the particular opportunity. Thus, a plaintiff must show that the corporation already had an existing interest in the property or that it had an expectancy growing out of an existing right. 4 On the other hand, most courts use the line of business test 5 which gives these courts greater latitude in making such a determination. These courts may consider, inter alia, the relation between the opportunity and the stated corporate purpose, 6 the current activities of the corporation 7 and the ability of the corporation to easily, naturally and logically expand or adapt its activities so as to take advantage of the opportunity. 8 Other factors which these courts may examine include the financial ability of the corporation to pursue such an opportunity 9 and the reaction of the corporation to the opportunity. 10 The findings of the courts are also influenced by the conduct of the defendant. Courts have been reluctant to exonerate those defendants who, solely by virtue of their relation to the corporation, knew of such opportunity 11 or those defendants who used corporate facili-

3. Id. at 271-73, 5 A.2d at 510-11.
4. E.g., Weigel v. Shapiro, 608 F.2d 268 (7th Cir. 1979) (applying Illinois law); Abbott Redmont Thinline Corp. v. Redmont, 475 F.2d 86 (2d Cir. 1973) (applying New York law); Burg v. Horn, 380 F.2d 897 (2d Cir. 1967) (applying New York law); Cox and Perry, Inc. v. Perry, 334 So. 2d 867 (Ala. 1976).
5. Guth v. Loft, 23 Del. Ch. at 280-81, 5 A.2d at 514.
11. E.g., Equity Corp. v. Milton, 43 Del. Ch. 160, 221 A.2d 494 (1966); Mullaney, Wells &
ties or personnel to acquire the opportunity for themselves.\textsuperscript{12}

The defendants in a corporate opportunity case usually attempt to show that the opportunity did not belong to the corporation,\textsuperscript{13} that the corporation, for any number of reasons, was unable to avail itself of any such opportunity\textsuperscript{14} or that, after full disclosure, the corporation rejected the opportunity\textsuperscript{15} or ratified the actions of the defendants.\textsuperscript{16}

**PARENT SUBSIDIARY SITUATIONS**

The corporate opportunity doctrine is clearly applicable to certain situations involving a parent corporation and its subsidiary. In general, the courts that have been presented with cases involving these entities have adhered to the general principles of the doctrine. The fact patterns in these situations, however, have required the courts to make policy decisions concerning the breadth of the doctrine. Thus, some courts have chosen to impose the duties embodied in the doctrine upon the parent corporation itself as well as upon directors of the parent and subsidiary corporations. Furthermore, the determination as to whom the opportunity belonged has been more complex in the parent-subsidiary context.

The first case to apply the corporate opportunity doctrine in the parent-subsidiary context, *Warshaw v. Calhoun*,\textsuperscript{17} focused on the duty of one who serves as a director of both a parent and a subsidiary. The plaintiff was a shareholder in a personal holding company whose major asset was shares of stock in an insurance company and whose only income was dividends received on that stock.\textsuperscript{18} Due

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17. 43 Del. Ch. 148, 221 A.2d 487 (Sup. Ct. 1966).

18. *Id.* at 151, 221 A.2d at 489.
to the insurance company's need for capital and its desire to broaden the ownership of the company, a stock split was proposed. The holding company did not subscribe to the stock that was offered to it under the terms of the stock split. Rather, the holding company sold its rights to the underwriter involved in the transaction.\textsuperscript{19}

The plaintiff, realizing that the holding company's ownership and, therefore, her ownership in the insurance company had been diluted, instituted a suit against the directors and officers of the holding company. All three defendants were also directors and officers of the insurance company.\textsuperscript{20} The plaintiff alleged that the defendants had structured the transaction in a manner that violated the fiduciary duties they owed to the shareholders of the holding company.\textsuperscript{21}

The court found that there was no breach of a fiduciary duty in that the defendants had acted in the best interest of both corporations. It pointed out that "[i]ndividuals who act in a dual capacity as directors of two corporations, one of whom is parent and the other subsidiary, owe the same duty of good management to both corporations. This duty is to be exercised in the light of what is best for both corporations."\textsuperscript{22} The duty of the directors to the holding company was fulfilled when they decided not to subscribe to the stock since such action had the effect of preserving the value of the company's sole asset.\textsuperscript{23} The court held that the decision concerning the subscription rights was a matter to be resolved in accordance with the sound business judgment of the defendants. Since the plaintiff had failed to show bad faith or gross abuse on the defendants' part, the court refused to interfere in a decision that it found to be in accordance with sound business judgment.\textsuperscript{24} Although the facts in \textit{Warshaw} did not sustain the allegation that the directors had breached a fiduciary duty, the court did state the standard, albeit idealistic, by which it would judge the actions of directors who serve both a parent and a subsidiary.

The duty of the parent itself to the subsidiary was first analyzed by a court in the same jurisdiction in \textit{David J. Greene & Co. v.}

\begin{itemize}
\item \textsuperscript{19} \textit{Id.} at 152-53, 221 A.2d at 489-90.
\item \textsuperscript{20} \textit{Id.} at 150, 221 A.2d at 488.
\item \textsuperscript{21} \textit{Id.} at 154, 221 A.2d at 490-91.
\item \textsuperscript{22} \textit{Id.} at 156, 221 A.2d at 492.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.} at 157, 221 A.2d at 492-93.
\end{itemize}
The plaintiff company was a shareholder of A. G. Spalding & Co., a subsidiary of the defendant. The defendant corporation was a conglomerate which owned eighty percent of the shares of its subsidiary, Spalding. The plaintiff sued to prevent the parent corporation from carrying out a proposed merger whereby the subsidiary would be eliminated. In its complaint, the plaintiff alleged that the exchange ratio to be used in the merger was unfair in that it failed to take into account a previous diversion of a corporate opportunity by the parent to the detriment of the subsidiary.

The plaintiff's allegations stemmed from the defendant's acquisition of Child Guidance Toys, Inc. Prior to this acquisition, the defendant owned no toy division while its subsidiary, Spalding, manufactured Tinker Toys. The plaintiff alleged that the opportunity to acquire the toy company belonged to Spalding, that Spalding was financially able to acquire such a company and that such an acquisition would have increased the value of Spalding's stock.

In discussing the duties of the parent to its subsidiary, the Chancellor explained that

[while our law on corporate opportunity has developed around the duty owed by directors and officers, I am of the view that comparable duties and standards should be imposed when the party whose conduct is in question is a shareholder. ... We are concerned with circumstances in which a stockholder by virtue of his control of corporate functions, makes a choice advantageous to himself and against the corporate interest.]

The Chancellor found that the defendant had acquired a corporate opportunity belonging to Spalding and enjoined the merger until a showing that such action would be fair to Spalding.

The same issue was addressed in *Levien v. Sinclair Oil Corporation,* in which the plaintiff was a minority shareholder in Sinclair Venezuelan Oil Company, a subsidiary of the defendant. Venezuelan was involved in petrol operations and exploration and development of oil and gas concessions. The plaintiff alleged that the defendant's development of certain similar operations was a

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25. 249 A.2d 427 (Del. Ch. 1968).
26. Id. at 429-30.
27. Id. at 435.
28. Id. at 434.
29. Id. at 435-36.
diversion of a corporate opportunity rightfully belonging to Venezuelan. The defendant claimed that it had no duty to offer the alleged opportunity to Venezuelan. The defendant stated that "directors of a controlling parent must be afforded discretion to decide the manner in which opportunities presented to enterprises should be taken (when all are in the same line of business and the opportunity was not developed or offered to a specific subsidiary)."

The court agreed that it should be aware that we are dealing with an international enterprise with a multiple and complex system of corporate affiliates. But we have not, as yet at least, divided our standards according to size. The quality of the duty is not strained, it is single and so falls the same on all corporations similarly situated, without regard to assets, sales or profits.

Sinclair voluntarily took on a fiduciary duty. To meet that obligation it could have installed a truly independent board and having done so the business judgment test might have been dispositive of most of this case.

The court concluded that, at all relevant times, the directors of Venezuelan were not independent of Sinclair and, as such, were not in a position to make judgments as to what was in Venezuelan's best interest without reference to Sinclair's position. The Chancellor ordered the parent to account to the subsidiary for damages sustained as a result of the diversion.

In addition to its conclusions concerning the facts of this case, the court set forth one method by which a parent corporation can protect itself from a claim that it has diverted an opportunity belonging to its subsidiary. It is clear that the Supreme Court of Delaware will not interfere in the decisions of the parent or subsidiary concerning corporate opportunities if the subsidiary is governed by a truly independent board of directors. Presumably, the court would find that, if an independent board rejected a corporate opportunity on behalf of the subsidiary corporation, the parent could seize such an opportunity with little worry. Nonetheless, the court reiterated that persons who are directors of both the parent and

31. Id. at 918-19.
32. Id. at 919.
33. Id.
34. Id. at 914.
35. Id. at 915.
the subsidiary owe a duty of good management to both companies. Furthermore, the court rejected the defendant's claim that it generally had been fair to the subsidiary and, thus, should not be accountable for a breach of its fiduciary duty.

The attitude of the courts of another jurisdiction is illustrated in the reasoning set forth in Maxwell v. Northwest Industries, Inc. The plaintiff in this case was a shareholder in a subsidiary of the defendant corporation. The subsidiary was a conglomerate holding company whose own subsidiaries operated in various fields of business. The parent and the subsidiary had common officers and directors.

The parent corporation decided to attempt to gain control of an insurance company by purchasing a block of shares of the insurance company's stock and subsequently making an exchange offer. In order to make this acquisition, the parent borrowed from the subsidiary money which it later returned.

The plaintiff contended that the acquisition of the insurance company was a diversion of a corporate opportunity by the parent. The court found that the opportunity did not belong to the subsidiary because 1) the opportunity came to the parent not the subsidiary and 2) it was impracticable for the subsidiary to acquire the insurance company. Moreover, the court found that it was not the goal of the subsidiary to acquire a minority interest in a company.

The plaintiff claimed that it was entitled to any acquisition that came to the attention of its officers and that "the world of business is the boundary of the conglomerate's area." In response, the...

36. Id. at 927.
37. Id. at 921.
39. Id. at 351.
40. Id. at 351-54.
41. Id. at 351, 354. The suggestion to acquire the insurance company was made to the Chairman of the Board of the parent who was also serving as Chairman of the Board and President of the subsidiary. He resigned as President of the subsidiary on the day he first learned of the opportunity.
42. Id. at 351-52. The court concluded that it was impracticable for the subsidiary to engage in an exchange offer because it had only a small amount of public securities outstanding, there probably was no ready public market for a new issue and a loan agreement to which the subsidiary was a party contained restrictions on the issuance of new debt securities.
43. Id. at 354-55.
44. Id. at 355.
court chose to apply the expectancy test to limit the possible area of corporate opportunity. It agreed with an earlier Delaware case which concluded:

It is one thing to say that a corporation with funds to invest has a general interest in investing those funds; it is quite another to say that such a corporation has a specific interest attaching in equity to any and every business opportunity that may come to any of its directors in his individual capacity . . . . Such a sweeping extension of the rule of corporate opportunity finds no support in the decisions and is, we think, unsound. 46

The court opined that “[n]o company can claim a superior right to go into all businesses of any nature that may come along.” 46

In reaching this conclusion, the court considered the fact that ninety-seven percent of the conglomerate’s shareholders had exchanged their stock, thus creating the parent-subsidiary relationship. The court found that this response to the exchange offer was evidence of a decision by the shareholders that the subsidiary should cease making acquisitions of unrelated businesses for its own benefit. 47 This holding suggests two methods of preventing a subsidiary from making a successful claim of diverted corporate opportunity. First, the board of directors of the parent may seek ratification from the shareholders of their decisions in the matter. Second, the shareholders may without solicitation by the directors decide to forego future opportunities. It should be noted that, in this case, less than a unanimous decision by the shareholders was sufficient.

Such was not the conclusion of the court in Bryan v. Schreiber. 48 The defendant corporation formed an affiliate corporation for the purpose of exploring for oil and gas in the Gulf of Mexico and of participating in a lease sale of offshore drilling sites. The defendant corporation retained forty percent of the equity in the affiliate; public investors owned sixty percent of the equity. 49 Subsequently, the defendant corporation formed a second affiliate to acquire additional offshore leases. A shareholder in the first affli-

45. Id. (quoting Johnston v. Greene, 35 Del. Ch. 479, 488, 121 A.2d 919, 924 (Sup. Ct. 1956)).
46. Id.
47. Id.
49. Id. at 514 n.12.
ate complained that this affiliate had been denied an opportunity to expand by the formation of the second affiliate.\textsuperscript{50} The defendant corporation responded that the first affiliate was unable financially to take advantage of such an opportunity and that the shareholders of the affiliate had ratified the actions of the defendant.\textsuperscript{51}

The court rejected the ratification argument since the vote was not unanimous.\textsuperscript{52} It found that the affiliate had an interest in additional offshore sites and that the defendant was able to form a second affiliate to acquire such sites by virtue of its control of the first affiliate.\textsuperscript{53} It remanded the case for resolution of the question of financial ability, an essential element for the application of the corporate opportunity doctrine in this court's view.\textsuperscript{54} The court also placed the burden upon the defendant to show that its transactions with the affiliate were intrinsically fair; the business judgment rule was specifically rejected.\textsuperscript{55} It is unclear, however, whether the court would have applied the intrinsic fairness test to a mere claim of diverted corporate opportunity. It is possible that it chose this evidentiary test because it found that the corporate opportunity claim was inextricably linked to the allegation of corporate waste.

\textbf{CONCLUSION}

The significance of these decisions remains to be seen. They represent the philosophy of a limited number of courts. Nonetheless, they are in the mainstream of the decisions of a majority of courts concerning corporate opportunity. They are fair warning that not only the directors of the subsidiary but also the directors of the parent and the parent itself may be liable for diversion of a corporate opportunity from the subsidiary. The usual tests concerning existence of corporate opportunity will be applied; the necessary proof may be more difficult to muster especially when both parent and subsidiary are engaged in conglomerate or holding company activities. Rejection of the opportunity by the independent board of directors of the subsidiary may well be a valid defense but solid evidence will be required to show true independence. Ratification by the shareholders may or may not relieve the defendant of liabil-

\textsuperscript{50} \textit{Id.} at 518.
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.} at 519.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
ity; in order to assure the adequacy of this defense, a unanimous vote should be obtained. Lastly, the business judgment rule seems to be the standard by which the courts will judge the decisions of the directors of either corporation. However, if a corporate opportunity is coupled with other breaches of fiduciary duty, the courts may require the defendant to show intrinsic fairness.

Karen McLaughlin
DEUTSCH V. SHEIN: OLD AND NEW ATTITUDES IN KENTUCKY NEGLIGENCE LAW

I. INTRODUCTION

On January 22, 1974, complaining of nausea and weakness, Patricia Deutsch visited Dr. Melvin Shein. From January 23 to 29, consonant with Dr. Shein's efforts to find the source of these symptoms, she submitted to numerous diagnostic x-rays and other radiological tests. An examination on February 18 by an obstetrician-gynecologist disclosed that Deutsch was about ten weeks pregnant. Recalling articles she had read advising pregnant women to avoid x-ray exposure, Deutsch immediately became fearful that the tests she had undergone had damaged her fetus. Her gynecologist shared this fear after he inquired into the radiological treatment Deutsch had received.¹

The family pediatrcian with whom Deutsch also consulted agreed that the likelihood of injury to the fetus was significant. Though neither recommended a therapeutic abortion, both doctors presented that possibility to Deutsch as one of her choices in the circumstances. On February 22, after much discussion with relatives and her priest, and much anguished deliberation, Deutsch decided to terminate the pregnancy.²

Deutsch sued Dr. Shein in the Jefferson Circuit Court to recover for mental and physical suffering before and after the abortion. The suit culminated in jury findings that Dr. Shein had been negligent in submitting Deutsch to x-rays without first conducting a pregnancy test, but that his negligence had not been a substantial factor in causing her damages. At trial, Dr. Shein erected a bulwark of medical testimony, alleging the negligible risk of fetal damage posed by x-rays. He interposed the advice given Deutsch by her gynecologist and pediatrician to block the causal connection between his failure to administer a pregnancy test and Deutsch's mental distress.³

On appeal, Deutsch sought to dismantle these arguments by asserting the irrelevance and inadmissibility of evidence controverting her doctors' consensus that her exposure to x-rays had subjected the fetus to a high risk of injury. Nonetheless, impressed by

¹. Deutsch v. Shein, 597 S.W.2d 141, 142-43 (Ky. 1980).
². Id.
the seeming strength of Dr. Shein's defense, the court of appeals found Dr. Shein's negligence created only the capability of mental distress. It deemed the advice of the Deutsch's doctors the actual cause of her trauma. The court indicated Deutsch "might be" entitled to compensation for "immediate mental distress," but posited that the damages she claimed, incurred in deciding to undergo the abortion, were too "remote" from Dr. Shein's negligence for it to have been a substantial factor in causing them.

Contrary to the court of appeals' narrow view of the relation between Dr. Shein's behavior and Deutsch's damage, the Kentucky Supreme Court perceived causation along the broad lines of the Restatement of Torts. The court adopted the Restatement test of proximate cause, which designates an actor's negligent conduct the "legal cause" of another's harm if 1) his negligent conduct is a substantial factor in bringing about the harm, and 2) there is no rule of law to relieve him of liability due to the manner in which the harm occurred.

The court found in the evidence clear indications that Dr. Shein's negligence was a substantial factor in causing Deutsch's irradiation and resultant physical and mental suffering. Since the causal connection was undisrupted by the intervening advice of her doctors, Dr. Shein was the "legal cause" of her harm. The court's adoption of the Restatement legal cause test evinces a more expansive attitude to proximate cause than has heretofore been operative in Kentucky negligence law.

II. PROXIMATE CAUSE IN KENTUCKY

Proximate cause comprises the most elusive and often the crucial aspect of a negligence cause of action, and according to one legal scholar, produces more confusion than any other legal concept. Its leading authorities describe it in horrific images, as "a bogey, the sort of thing found only in children's story books," and as a "ghost to be exorcised." One depicts its intricacies through a
gruesome illustration involving exploding rat poison. However, the concept need not dismay. It may be reduced to two straightforward inquiries: one determines whether defendant’s conduct is so factually connected to plaintiff’s injury that he is the actual cause of it, another determines whether any policy of law circumscribes his accountability and in the absence of which he is said to be the proximate cause of the injury.

To find actual cause, or cause in fact, courts usually employ two tests, the “but for” or *sine qua non* test whereby an act is said to cause a result if the event would not have occurred without it, and the substantial factor test whereby an act is said to cause a result if it is a material element in producing it. More recently, the latter has been preferred over the former, and in Prosser’s thinking, “no better test has been devised” for finding causation, due to the ease with which the substantial factor test may be applied to convoluted fact patterns, while the impossibility of isolating a single cause of any event limits the value of the “but for” test.

The second of the two inquiries necessary to find whether an actor has proximately caused an injury requires the application to the facts of a policy test, a legal principle that circumscribes the limits of liability. These tests and rules vary from era to era and jurisdiction to jurisdiction, reflecting the heterogeneity of judicial philosophies. At one time or another Kentucky has employed all of the major policy tests.

The tests may be divided into two general categories according to the amount of stress placed on the negligent actor’s ability to anticipate the results of his negligence. Some courts and authorities have questioned the efficacy of foreseeability as a component...

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13. Prosser, supra note 9, at 238-39.
15. Prosser, supra note 9, at 239-40.
of proximate cause and have insisted it be used only as a factor in ascertaining fault. In a negligence cause of action, before the causal issue is reached, the defendant's fault, in having a duty which he failed to fulfill, must be shown. The existence of that duty depends upon whether defendant could have foreseen and, thus, guarded against the risk to which he exposed plaintiff. Though inevitably necessary in establishing negligence, requiring evidence of foreseeability in determining cause imposes an additional, often insupportable weight of proof on plaintiff.

An ironic backwash of the controversy about the requirement of foreseeability in the tests for both duty and causation has been adoption of the duty analysis as a test of proximate cause. The hapless initiator of this practice, Dean Leon Green, had recommended the entire negligence cause of action revolve around the element of duty. At the outset of his case, plaintiff would prove cause in fact, that defendant's behavior was a substantial factor in causing her harm. Then, in lieu of proving proximate cause through application of one of the policy tests predicated on foreseeability, plaintiff would address the duty issue, showing that defendant exposed her to an unreasonable—because foreseeable and consequently avoidable—risk. Hence, defendant would become liable for damages directly caused by his breach of duty. Once his conduct was shown to be a substantial factor in causing the harm, it would be immaterial whether the extent and manner of the harm were foreseeable. Green intended the formula to focus attention on duty and to dispense with the proximate cause concept. However, when the Restatement incorporated the formula into the topic entitled "Legal Cause," it was used as a proximate cause

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18. L. GREEN, JUDGE AND JURY 29-31 (1930). Prosser suggests that '[i]t is quite possible ... to state every question in connection with proximate cause" by asking whether "the defendant was under a duty to protect the plaintiff." Supra note 9, at 244.
20. Restatement, supra note 7, § 435 states:
   (1) If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.
   (2) The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.
policy test, applied after duty was proven.21

Kentucky employed the Green approach in *Lexington Hospital v. White*,22 where a delirious patient, left unattended, had jumped from a second story window. Rather than decide the case in terms of proximate cause, which would have required the application of a restrictive liability-limiting policy test geared to foreseeability, the court focused on duty. Though at variance with the court’s earlier insistence that negligent actors were not liable where “the event [has] exceeded their expectations due to causes that could not be foreseen,”23 the court adopted the Restatement incarnation of Green’s duty test, which relegates foreseeability to a minor role.24 Because foresight only comes into play to relieve an actor of responsibility where the occurrence is highly extraordinary,25 this test constitutes one of the most expansive approaches to liability.26

Another policy test, comparable in substance to the Green test in that it permits liability for unforeseeable consequences, is the natural and ordinary, or direct, consequences test. Its proponents reject foreseeability as central to proximate cause. According to the direct consequences test, an actor whose negligent behavior is the cause in fact of harm becomes liable for all consequences that directly result, however unforeseeable their extent and nature.27 The Kentucky court adopted this test in *Louisville and Nashville Railroad Co. v. Stephens*28 where a brakeman in escaping an exploding boiler knocked a fireman from a train. Finding the railroad liable for the fireman’s death, the court stated, “the proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the in-

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Comment C. on Subsection (2) notes the test pertains to duty.

21. See cases cited in note 26 infra.
22. 245 S.W.2d 927 (Ky. 1952).
24. 245 S.W.2d at 929.
28. 298 Ky. 328, 182 S.W.2d 447 (1944).
The limitation of the direct consequences test is the absence of a precise definition of natural and direct consequences. Though an unbroken sequence of events produces an injury, the harm may still be found an indirect and unnatural result of negligence, for which there is no liability. For example, in *Nunan v. Bennett*, it was said to be neither a foreseeable nor direct result of negligence that, when defendant landlord turned off the water to prevent freezing of the pipes, a tenant would leave his faucets open, drenching plaintiff's apartment when the water was turned on again. *Nunan* has been criticized as epitomizing the arbitrariness of the direct consequences test. The vagueness of the test grants judge and jury too much latitude in the test's application.

Probably the most famous use of the direct causation rule occurs in the English case *In re Polemis*, in which defendants were held liable for the destruction of an entire ship which was found to have directly resulted from the negligent dropping of a board. The English Court later thought better of abandoning foreseeability as a requisite of proximate cause and reinstated it. The American courts have likewise wrestled with foreseeability, most notably in *Palsgraf v. Long Island Railroad Co.*, where the majority used it to limit liability to "[t]he risk reasonably to be perceived." The *Palsgraf* minority favored a more limited role for foresight, as in direct causation, feeling *In re Polemis* "states the law as it should be."

The doctrine of *Palsgraf*, that "the orbit of the danger ... [is] the orbit of the duty," was intended as a test of duty and not of proximate cause. However, it became a liability limiting policy

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29. *Id.* at 339, 182 S.W.2d at 454. As to intervening causes, the court notes that a negligent actor "is answerable for all the consequences which are immediate and directly brought about by an intervening cause if it was set in motion by him as the original wrongdoer." 298 Ky. at 340, 182 S.W.2d at 454.

30. 184 Ky. 591, 212 S.W. 570 (1919).

31. One legal scholar has said that though the Nunan court "states that an act is the 'proximate cause' of all direct injuries, whether foreseen or not; yet the actual decision is to the contrary," and that "[t]he case illustrates the uncertainty of a test which turns on directness." Edgerton, *Legal Cause*, 72 U OF PA. L. REV. 211, 221 n.41 (1924).

32. [1921] 3 K.B. 560.


34. 248 N.Y. 339, 162 N.E. 99 (1928).

35. *Id.* at 344, 162 N.E. at 100.

36. *Id.* at 350, 62 N.E. at 103 (Andrews, J., dissenting).

37. *Id.* at 343, 62 N.E. at 100.
rule, referred to as the orbit of the risk test. This test assumes that liability may be restricted to a carefully circumscribed area of risk. Foreseeable risk creates the duty to which defendant must adhere. He is only responsible for harm transpiring within the ambit of predictable dangers set by his conduct.\(^\text{38}\)

In creating the orbit of the risk concept, the *Palsgraf* majority drew upon Baron Pollack’s view that foreseeability should determine both negligence and extent of liability, with liability limited to foreseeable consequences and responsibility for negligence judged by the same test as duty.\(^\text{39}\) Baron Pollock’s ideas are in the background of another American case, *Milwaukee and St. Paul Railway Co. v. Kellog*,\(^\text{40}\) which spawned the most venerable and widely proliferating liability limiting test of proximate cause, the natural and probable consequences rule. Inherent in this rule is the limitation of liability to the foreseeable risk, the crux of *Palsgraf*.\(^\text{41}\)

In *Kellog*, the Court held that in order to find that negligence “is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in light of the attending circumstances.”\(^\text{42}\)

This language has been repeated for seventy years in numerous Kentucky cases professing allegiance to the test,\(^\text{43}\) though crediting defendants with differing amounts of foresight. In one case, it was a jury question whether the inundation of plaintiff in a lumber pile toppled by another’s negligently driven wagon was a natural and probable consequence of defendant’s initial negligent stacking.\(^\text{44}\) In another case, however, it was held, as a matter of law, that plaintiff’s electrocution by a wire fence which a power line had touched was a natural and probable consequence of defendant’s negligent failure to follow safety regulations.\(^\text{45}\)

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40. 94 U.S. 469 (1876).
41. See Bohlen, *The Probable or the Natural Consequences as the Test of Liability*, 49 Am. L. Reg. 79 (1901).
42. 94 U.S. at 475.
43. See, e.g., *Spivey v. Sheeler*, 514 S.W.2d 667 (Ky. 1974); *Johnson v. Kosmos Portland Cement Co.*; 64 F.2d 193 (6th Cir. 1933), cert. denied, 290 U.S. 641 (1933); *Logan v. Cincinnati N. O. & T. P. Ry. Co.*, 139 Ky. 202, 129 S.W. 575 (1910). The test was first used in *Snydor v. Arnold*, 122 Ky. 551, 92 S.W. 281 (1906), and the statement is made in Ohio Casualty Ins. Co. v. Commonwealth, 479 S.W.2d 603 (Ky. 1972), that “[i]n Kentucky we always have determined proximate cause on the basis of whether the injury is a natural and probable consequence of the negligent act.” 479 S.W.2d at 605.
when the pole carrying the line was struck by a car, was not the 
natural and probable consequence of defendant's having previously 
allowed the pole to lean and the wire to sag.45

Most often the natural and probable consequences test favors 
the defendant since "the fact that an injury is the natural conse-
quence of negligence is not enough, it must also be its foreseeable 
consequence."46 This means the manner of occurrence and the ex-
tent of the harm must be within the actor's reasonable anticipa-
tions despite the direct succession of the negligence and its result. 
The test emphasizes the normalcy of the mishap, necessitating 
that "the consequences be such as in the ordinary course of things 
would flow from the acts."47

Offshoots of the natural and probable consequences test rep- 
represent opposite reactions to its foreseeability requirement. A re-
strictive variant, the same hazard rule, narrowly confines liability 
to a specific risk beyond which it is presumed the actor's anticipa-
tion of the consequences of his misbehavior could not have ex-
tended.48 In one instance, injury caused by defective safety valves 
was excused because the result of the defect was fire and the risk 
against which the valves were meant to protect was explosion.49

The antithesis of the same hazard doctrine is the foreseeable 
consequences, or foreseeability, test. Though derived from the nat-
ural and probable consequences rule, it more closely resembles the 
duty formula devised by Leon Green, discussed earlier.50 The focus 
of the rule is foresight but it often allows recovery for results of 
negligence that are unforeseeable in extent and manner of 
ocurrence.

The foreseeable consequences rule, which posits that, where 
some harm is foreseeable, "it is not necessary that the precise form 
of the injury should have been anticipated,"51 also bears likeness to 
the direct consequences test, resorted to in early Kentucky cases.52 
Thus, the foreseeable consequences rule, which Deutsch v. Shein 
approves, revives an earlier policy attitude to negligence that

46. Johnson v. Kosmos Portland Cement Co., 64 F.2d 193, 194 (6th Cir. 1933), cert. de-
nied, 290 U.S. 641 (1933).
47. Louisville & N. R.R. Co. v. Wright, 183 Ky. 634, 640, 210 S.W. 184, 186 (1919).
48. Prosser, supra note 9, at 253.
49. 296 S.W.2d 740 (Ky. 1956).
50. See note 30 supra, and accompanying text.
52. See Louisville Home Tele. Co. v. Gasper, 123 Ky. 128, 93 S.W. 1057 (1906).
KENTUCKY NEGLIGENCE LAW

stresses correction, making a defendant liable for far-reaching, dire, unforeseeable results of negligence because he failed to alter his conduct to prevent the near, less calamitous, foreseeable results. In Eaton v. Louisville and Nashville Railroad Co., where plaintiff, while servicing a rail car felt it move, stuck out his head to tell someone to stop it, and was hit by an obstruction, the Court declared that, while defendant could not have foreseen the manner of plaintiff's injury, it could have anticipated an effort to stop the car would result in "some injury." Another case explains that "it is sufficient if the probability of injury of some kind to persons within the natural range of effect of the alleged negligent act could be foreseen."

The farthest reach of the test is best illustrated by Glasgow v. Metcalfe, in which plaintiff was permanently disabled after being knocked over in a stampede of customers attending a sidewalk sale in front of defendant's store when a negligently maintained window in the store's upper floor was pushed out by a child and fell into the crowd below. The court held that since an injury of some kind within the general range of the negligence could have been anticipated, defendant would not be excused because the nature and extent of the harm could not be.

The intricate facts of Glasgow characterize the complications presented by intervening causes. The intervening cause doctrine provides a policy rationale for fastening responsibility on a defendant who precipitates an injury consummated by a later independent cause. The tort-feasor's ability to anticipate the completion by other causes of the harm his negligence triggers fixes his responsibility. If the negligence "set[s] in force a chain of events which the original negligent actor might have reasonably foreseen would . . . lead to the event which happened [he] is not relieved of liability by the intervening act" unless "the ultimate injury is brought about by an intervening act or force so unusual as not to have been reasonably foreseeable," in which case the intervening act becomes the superseding cause and negates liability.

53. 259 S.W.2d 29 (Ky. 1953).
54. Id. at 31.
55. Miller v. Mills, 257 S.W.2d 520, 522 (Ky. 1953).
56. 482 S.W.2d 750 (Ky. 1972).
57. Id. at 758.
58. PROSSER, supra note 9, at 270.
59. Hines v. Westerfield, 254 S.W.2d 728, 729 (Ky. 1953).
Under this rule, defendants have been credited with the capacity to predict that parents who were not provided a crib would push a bed against a wall to enclose their child's sleeping place and that the child would fall from the bed against a radiator pipe, or that a deliveryman would leave unlocked a basement door identical to an adjacent entry door and that a plaintiff sent from the beauty shop across the street to deliver a message would enter the wrong door and plunge down the stairs, or that a gawker observing from a distance of twenty-five feet the aftermath of an accident in which a gasoline tanker was overturned would discard a lighted cigarette, ignite the gas and explode the other truck involved in the accident. While in the foregoing cases defendants were required to foresee intervening negligence of third parties, they have also been required to foresee intervening natural forces, disease, improper medical treatment, the capricious behavior of children, and the ordinary machinations of adults.

On the other hand, unforeseeable intervening negligence and intervening intentional acts are usually found to be superseding causes. A typical explanation is that the defendant "could not have foreseen or deemed it probable that one would maliciously or wantonly do such an act," though a defendant might foresee that one of its patients suffering delirium tremens would attack another patient, or that, if its bus driver fought with two drunken passengers, one would strike a third passenger with a whiskey bottle. Why certain intervening negligent and intentional acts are said not to be foreseeable involves a policy consideration. Even if the defendant could have anticipated the conduct as an incident of the risk he created, the thinking goes, his blameworthiness may be annulled by the greater culpability of the third person who had later opportunity to deal with the negligence and whom the defendant

60. Seelbach v. Cadick, 405 S.W.2d 745 (Ky. 1966).
64. Hazlewood v. Hodges, 357 S.W.2d 711 (Ky. 1961).
71. Miller v. Mills, 257 S.W.2d 520 (Ky. 1953).
could expect to behave reasonably.\textsuperscript{72} The doctrine of intervening causes serves to limit liability for unforeseeable consequences much the same as any other policy test, gauging whether a defendant’s negligent acts are so connected with a result that he should be held responsible even though other causes subsequent to his negligence helped to produce it.

III. \textit{Deutsch v. Shein}

A discussion of cause in fact and the various causation policy tests as applied in Kentucky provides a background which throws into sharper relief the significance of the treatment of proximate cause in \textit{Deutsch v. Shein}. Although the opinion, written by Justice Lukowsky, principally devotes itself to the proximate cause issue, two peripheral issues, the role of the judge and jury in negligence cases and the impact requirement in negligent infliction of emotional distress, play important parts and deserve attention.

Several aspects of the handling of proximate cause signify changes in judicial philosophy. Most meaningful is the adoption of the \textit{Restatement} analysis of “What Constitutes Legal Cause,”\textsuperscript{73} which Kentucky has never before expressly utilized. As the opinion points out, however, “\textit{sub silentio}, this court has followed the \textit{Restatement (Second)} approach to proximate cause employing ‘substantial factor’ to find cause in fact and therefore proximate cause where there is no substantive rule of law liability limitation.”\textsuperscript{74} Using the “but for” test infrequently,\textsuperscript{75} Kentucky has returned repeatedly to the substantial factor concept in establishing cause in fact,\textsuperscript{76} though confessing dissatisfaction with it and perplexity in defining proximate cause.\textsuperscript{77}

The \textit{Deutsch} opinion reveals a changed attitude toward proxi-

\textsuperscript{72} \textsc{Prosser, supra} note 9, at 283.

\textsuperscript{73} \textit{Restatement}, \textsc{supra} note 7, § 431 states:

\begin{quote}
The actor’s negligent conduct is a legal cause of harm to another if
\begin{enumerate}
\item his conduct is a substantial factor in bringing about the harm, and
\item there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.
\end{enumerate}
\end{quote}

\textsuperscript{74} \textit{Deutsch v. Shein}, 597 S.W.2d 141, 144 (Ky. 1980).

\textsuperscript{75} See \textit{Berry v. Jorris}, 303 Ky. 799, 199 S.W.2d 616 (1947); \textit{Overton’s Adm’x v. City of Louisville}, 221 Ky. 289, 298 S.W. 968 (1927); \textit{Tolin v. Terrell}, 133 Ky. 210, 117 S.W. 290 (1909).

\textsuperscript{76} Since \textit{Hines v. Westerfield}, 254 S.W.2d 728, 729 (Ky. 1953), the test has seen service in nearly forty cases, having been recommended for use in jury instructions in \textit{Claycomb v. Howard}, 493 S.W. 2d 714, 718 (Ky. 1973).

\textsuperscript{77} \textit{Dale v. E.R. Knapp & Sons, Inc.}, 433 S.W.2d 880, 883 (Ky. 1968).
mate cause, from confusion to clarity. It envisions the determination of causation as an uncomplicated process consisting of the resolution of the cause in fact issue, by the jury if reasonable minds could differ and by the court if they could not, and the examination by the court of any public policy rules of law which might operate on the defendant’s conduct and limit his liability. The opinion reproves other jurists for not admitting that public policy plays a part in formulating causation, and for concealing their equivocation in phrases such as “foreseeability of injury” and “orbit of the risk.” As should be apparent from the foregoing survey of proximate cause, Kentucky has assumed similar disguises for public policy. For the future, however, the court proposes “a more flexible approach” that Kentucky remove the camouflage from proximate cause and concede “[t]he use of ‘public policy’ in the raw.”

The court’s endorsement of unadorned public policy should not be misinterpreted to mean that any of the policy tests employed in the past to define foreseeability of consequences are now acceptable, or that all of them are discarded. The court tacitly approves one test, which it includes with other examples of the “collective substantive policy rules which limit responsibility for a negligent act.” The rule, from Dale v. E.R. Knapp and Sons, Inc., is said to demonstrate the “relationship of foreseeability to proximate cause,” and according to it “so far as foreseeability enters the question of liability for negligence, it is not required that the particular precise form of injury be foreseeable—it is sufficient if the probability of injury of some kind . . . could be foreseen.”

Dale articulates the foreseeable consequences rule, which permits recovery where the extent of harm and its manner of occurrence are unforeseeable, if harm of some sort was foreseeable. This rule encompasses a much wider sphere of liability than the natural and probable consequences rule. The natural and probable consequences rule, used in Kentucky more than any other policy test, requires not only that the scope of the injury be foreseeable, but

78. 597 S.W.2d at 144.
79. Id.
80. Id.
81. Id.
82. 433 S.W.2d 880 (Ky. 1968).
83. 597 S.W.2d at 144.
84. 433 S.W.2d at 883 (accord, Miller v. Mills, 257 S.W.2d 526, 522 (Ky. 1953)).
85. See note 51 supra, and accompanying text.
that it occur in an expectable way.\textsuperscript{86} The emphasis given Dale in Deutsch indicates that the foreseeable consequences rule will now govern the range of effects a tort-feasor may be said to have caused, holding him accountable for results which he could not have foreseen from the vantage point of his initial act.

In choosing the foreseeable consequences rule to define the function of foreseeability in proximate cause, the Kentucky Supreme Court rejects the Court of Appeals' declaration that "[t]he doctrine of foreseeability as applied to causation relates to whether or not the injury was the natural and probable result of the wrongful act."\textsuperscript{87} The authority for this statement, Ohio Casualty Insurance Co. v. Commonwealth,\textsuperscript{88} which asserts that the natural and probable consequences test has "always" been the basis of proximate cause in Kentucky, documents the test's inadequacy by finding "that the going out of control of an automobile upon its hitting a hole in the street is [not] natural and probable."\textsuperscript{89} The Court of Appeals' decision in Deutsch demonstrates even better the limits of the natural and probable consequences test. The Court of Appeals concluded that although Dr. Shein might have foreseen some distress on Deutsch's part upon her discovery that she was pregnant, he could not have foreseen her distress in making the decision to undergo, and in undergoing, abortion, due to the unexpected manner of occurrence (her discussions with her doctors and others) and extent (the abortion) of her injury.\textsuperscript{90}

The Kentucky Supreme Court mildly rebukes the Court of Appeals' narrow perception that for Deutsch to recover, her entire damages must have been "anticipated in the light of the circumstances,"\textsuperscript{91} by saying that it was "not necessary that Dr. Shein have anticipated the precise injury."\textsuperscript{92} The Kentucky Court appears willing not merely to entertain more comprehensive liability, but to give recovery where the nature of the harm is wholly unpredictable, as long as the actor could foresee even a minor risk from his negligence. At least, that is the implication of a Prosser excerpt which supports the decision, and which concerns liability beyond

\textsuperscript{86} See cases cited in notes 40-42 supra, and accompanying text.
\textsuperscript{88} 479 S.W.2d 603 (Ky. 1972).
\textsuperscript{89} Id. at 605.
\textsuperscript{90} Deutsch v. Shein, slip op. at 12.
\textsuperscript{91} Id. at 17.
\textsuperscript{92} 597 S.W.2d at 145.
the risk of initial negligence: "it is as if a magic circle were drawn about the person, and one who breaks it, even by so much as a cut on a finger, becomes liable for all resulting harm to the person although it may be death."\textsuperscript{93}

Along with the rule relating to foreseeability, \textit{Deutsch} makes reference to two other liability-limiting rules, one having to do with intervening causes, the other with aggravation of injuries. Concerning intervening cause, the court reiterates the \textit{Restatement}\textsuperscript{94} definition of superseding cause adopted in \textit{Donegan v. Denny}.\textsuperscript{95} Whether a later cause has superseded a prior one is viewed by hindsight. If an intervening cause is "normal to the situation" created by a tort-feasor's negligence, recovery may be had though he could not have foreseen its intervention.\textsuperscript{96} Such a rule harmonizes well with the court's adherence to the foreseeable consequences test. Hence, the court implicitly rejects Dr. Shein's contention that the allegedly negligent advice given Deutsch by her doctors, in reaction to his failure to administer a pregnancy test, was unforeseeable and thus a superseding cause of her injury.\textsuperscript{97} Even if Dr. Shein did not anticipate the distress associated with the abortion, it was a normal incident of the situation he created.

The court also includes as a policy test the rule of law pertaining to aggravation of injuries by subsequent medical treatment, Deutsch's theory of the case.\textsuperscript{98} The rule ascribes liability to a tortfeasor for increased injuries resulting from his victim's normal and reasonable endeavors to alleviate the original harm.\textsuperscript{99} The Court of Appeals found the rule inapplicable because it arose from cases involving an initial physical injury and the evidence was in conflict as to whether the x-rays had damaged Deutsch bodily.\textsuperscript{100} Deutsch argued for a broader definition of "harm" that embraced the trauma of seeking further professional help to correct negligent medical treatment.\textsuperscript{101} The Kentucky Supreme Court agreed with Deutsch, finding that once Dr. Shein put her "in a position from

\textsuperscript{93. Accord Prosser at 261 cited in Deutsch v. Shein, 597 S.W.2d 141, 145 (Ky. 1980).}
\textsuperscript{94. Restatement, supra note 7, § 440.}
\textsuperscript{95. 457 S.W.2d 953 (Ky. 1970).}
\textsuperscript{96. Id. at 958.}
\textsuperscript{97. Deutsch v. Shein, slip op. at 4.}
\textsuperscript{98. Brief for Appellant at 22, Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980) [hereinafter cited as Brief for Appellant].}
\textsuperscript{99. See Brown Hotel Co. v. Marx, 411 S.W.2d 911, 915 (Ky. 1967).}
\textsuperscript{100. Deutsch v. Shein, slip op. at 14.}
\textsuperscript{101. Brief for Appellant at 26.}
which it was reasonable to seek the medical services of other doctors, [he became] responsible for any injury to her resulting from her exposure to the risk involved in these medical services.\textsuperscript{102}

The Court of Appeals refused to apply the aggravation of injuries rule for another reason. The rule requires the victim’s efforts to mitigate the harm be normal. Since Dr. Shein’s experts had testified that the x-radiation Deutsch had received would not have damaged her fetus, the Court of Appeals concluded the advice of Deutsch’s doctors concerning abortion was abnormal and negligent.\textsuperscript{103} Deutsch maintained that no evidence should be admitted on fetal damage because medical opinion was divided as to the effects of x-radiation on pregnant women, and because, under the rule, whether subsequent treatment was negligent was irrelevant.\textsuperscript{104} Approving this argument, the Kentucky Supreme Court found that the divergence of medical opinion made the advice Deutsch received expectable, but that its correctness was immaterial to the question of causation since improper treatment is a normal risk of negligent injury.\textsuperscript{105}

A peripheral issue of great importance relating to the adoption of the Restatement legal cause analysis, and upon which Deutsch briefly comments, is the disposition of the respective duties of judge and jury in negligence cases. Deutsch lists among the policy rules affecting liability the holding of House v. Kellerman\textsuperscript{106} that whether an act is a superseding cause is a matter of law. Up until the House decision, superseding cause, relative to proximate cause, had been considered a question for the jury upon facts about which reasonable minds could differ.\textsuperscript{107} Prosser\textsuperscript{108} and the Restatement\textsuperscript{109} share this position. The House court, however, pointing to the “complexity and abstract nature of the various criteria for intervening and superseding causation,” determined that the question “cannot be practically fitted into instructions to juries” and is thus more appropriately “a legal issue for the court to resolve and

\begin{footnotesize}
\begin{enumerate}
\item[102.] 597 S.W.2d at 145.
\item[103.] Deutsch v. Shein, slip op. at 14.
\item[104.] Brief for Appellant at 24.
\item[105.] 597 S.W.2d at 145.
\item[106.] 519 S.W.2d 380 (Ky. 1975).
\item[107.] In the classic superseding cause case, Watson v. Ind. Bridge & Ry. Co., 137 Ky. 619, 126 S.W. 146 (1910), the court declared, “The question of proximate cause is a question for the jury.” 137 Ky. at 630, 126 S.W. at 150.
\item[108.] PROSSER, supra note 9, at 289.
\item[109.] RESTATEMENT, supra note 7, § 453.
\end{enumerate}
\end{footnotesize}
not a factual question for the jury."\textsuperscript{110}

Along with this procedural break with the past, other language in \textit{House} hinted strongly that a reanalysis of the entire subject of causation in negligence was under consideration. The \textit{House} court, lamenting that "[i]t is enough to tax jurors with the problems of what an ‘ordinary prudent person’ would have done under similar circumstances, and whether a party’s failure to meet that standard was a ‘substantial factor’ in causing the accident,"\textsuperscript{111} notes that "there is much to be said for the proposition that basic causation itself should be treated as a question of law, the jury deciding only the issues of negligence."\textsuperscript{112} Until this remark, the Kentucky court had repeatedly asserted that "[t]he issue of proximate cause, where facts are in dispute, is for the jury."\textsuperscript{113}

In \textit{Deutsch}, the court goes one step further in the direction of making proximate cause a matter for the court alone. After recalling its remark in \textit{House}, and indicating that upon the arrival of a suitable occasion basic causation will be ordained a matter of law, the court declares “that legal cause currently presents a mixed question of law and fact.”\textsuperscript{114} This statement suggests that for the present the jury’s part in determining causation will be at least partly curtailed, in that it will now only address the issue of cause in fact. Such a reduction in the jury’s participation in evaluating proximate cause has long been advocated by Leon Green.\textsuperscript{115} The court’s adoption of the two branch \textit{Restatement} legal cause test appears to compel a division of duties between judge and jury. Since ascertaining cause in fact necessarily involves a factual determination, the handling of that branch of legal cause seems appropriately a job for the jury. Since manipulating the second branch requires divination of any rules of law which might limit liability, that task seems more suited to the court. Thus, in the typical case, once the jury finds defendant breached a duty of care and concludes he was the cause in fact of plaintiff’s harm in that he was a substantial factor in producing it, the court then scrutinizes applicable policy rules that might limit responsibility for the

\textsuperscript{110} 519 S.W.2d at 382.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 382 n.2.
\textsuperscript{113} Carruba v. Speno, 418 S.W.2d 398, 401 (Ky. 1967); State Contracting and Stone Co. v. Fulkerson, 288 S.W.2d 43, 46 (Ky. 1956); Louisville and Nashville R.R. Co. v. Powers, 255 S.W.2d 646, 649 (Ky. 1952); Berry v. Jorris, 303 Ky. 803-04, 199 S.W.2d 616, 618 (1947).
\textsuperscript{114} Deutsch v. Shein, 597 S.W.2d 141, 144-45 (Ky. 1980).
\textsuperscript{115} L. Green, THE RATIONALE OF PROXIMATE CAUSE 122 (1927).
negligent act. If none does, defendant is deemed the legal cause of the injury and is liable.

However, when the court acts on the proposal put forward in *House* and *Deutsch* to treat both branches of legal cause, it will evaluate both cause in fact and any potential limitations on liability, "leaving the issues of negligence only to the jury." Since the rule is universal that proximate cause is a question for the jury if reasonable minds could differ, such a move will be truly unprecedented and perhaps open to constitutional challenge. Nevertheless, *Deutsch* manifests plainly what might have been doubted after *House*: that treating basic causation as the province solely of the court is contemplated.

Its willingness to change its former attitude to causation in negligence, the *Deutsch* court counterbalances by holding tenaciously to the nearly obsolete requirement of physical impact in proving negligent infliction of emotional distress. Traditionally, the general rule has been that an actor is not liable when the single result of his negligence is mental disturbance. The principal rationales for such a stance are that mental serenity is not independently deserving of legal protection, that the courts cannot properly assess or compensate such invasions, and that the scales of justice will be permanently unbalanced by an overload of spurious claims.

Over the years, legal scholars and forward-looking jurists

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116. 597 S.W.2d at 144.
120. Prosser, supra note 9, at 327-28.
121. See e.g., Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497 (1922); Green, "Fright" Cases, 27 Ill. L. Rev. 761 (1933); Hallen, Damages for Physical Injuries Resulting from Fright or Shock, 19 Va. L. Rev. 253 (1933); Smith, Problems of Proof in Psychic Injury Cases, 14 Syracuse L. Rev. 586 (1963); Smith, Relation of Emotions to Injury and Disease, 30 Va. L. Rev. 193 (1944); Throckmorton, Damages for Fright, 34 Harvard L. Rev. 260 (1921).
have chipped away at this lapidary rule. The granite obstacle to recovery has eroded slowly but steadily, with ever-lessening demands being made upon the plaintiff who seeks reparation for psychic damage. The disintegration has progressed along the following lines: recovery only where another tort was committed to which parasitic damages for fright could be attached;\textsuperscript{123} recovery for intentionally caused mental shock accompanied by physical injury but without physical impact,\textsuperscript{124} without resultant physical injury or impact;\textsuperscript{125} recovery for fright caused by intentional misbehavior toward a family member,\textsuperscript{126} a third person;\textsuperscript{127} recovery for negligently caused fright when accompanied by physical impact and injuries,\textsuperscript{128} accompanied by physical injuries but without impact,\textsuperscript{129} accompanied by neither physical injuries nor impact;\textsuperscript{130} recovery for emotional distress caused by negligent endangering of a family member, when plaintiff is in the zone of danger but suffers no impact,\textsuperscript{131} when plaintiff is outside the zone of danger.\textsuperscript{132}

Incursions against the rule in Kentucky have resulted in the allowance of damages "for the physical pain and suffering as well as mental suffering resulting from fright caused by the willful wrong of another."\textsuperscript{133} Damages are also permitted for fright caused by witnessing intentional misconduct toward a family member, as long as plaintiff suffers consequential physical effects.\textsuperscript{134} But when plaintiff's mental distress proceeds from defendant's negligent misconduct, the general rule is that plaintiff may not recover, despite serious physical consequences, unless there has been some physical impact on plaintiff incident to the negligence.\textsuperscript{135}

The court cleaves to this rule in \textit{Deutsch}, willing to travel a solitary path in its approach to causation, unwilling to join the throng

\begin{enumerate}
\item \textsuperscript{124} See Wilkinson v. Downton, [1897] 2 Q.B. 57.
\item \textsuperscript{125} See Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930).
\item \textsuperscript{126} See Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924).
\item \textsuperscript{127} See Rogers v. Willard, 144 Ark. 587, 223 S.W. 15 (1920).
\item \textsuperscript{128} See Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).
\item \textsuperscript{129} See Dulieu v. White, [1901] 2 K.B. 669.
\item \textsuperscript{131} See Bowan v. Williams, 164 Md. 397, 165 A. 182 (1933).
\item \textsuperscript{132} See Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
\item \textsuperscript{133} Brown v. Crawford, 296 Ky. 249, 253, 177 S.W.2d 1, 3 (1944).
\item \textsuperscript{134} See McGee v. Vanover, 148 Ky. 737, 147 S.W. 742 (1913); Chesapeake & Ohio R.R. v. Robinett, 151 Ky. 778, 152 S.W. 976 (1913).
\item \textsuperscript{135} See Hetrick v. Willis, 439 S.W.2d 942, 943 (Ky. 1969).
\end{enumerate}
departing from the impact requirement. Kentucky does recognize two traditional exceptions to the rule, which allow recovery when emotional distress is negligently inflicted by the mishandling of dead bodies and by negligent communication of death announcements. It also recognizes an exception when a tort-feasor "take[s] improper familiarities with a female resulting only in fear, humiliation, or mental anguish without immediate physical injury." Exemptions such as these where the rule is still employed have been cited as "demonstrations of [its] absurdity."

Another objection to the rule, the attenuated contacts that have sufficed as impacts, is repeated by the court of appeals in Deutsch. Inclined to abandon the impact requisite, or at least to create a new exception to it, the court of appeals remarks that "the impact rule has been criticized as being arbitrary and unjust," and syllogizes that "a negligent failure to conduct a pregnancy test which results in negligent infliction of mental distress is actionable in Kentucky." Unconvinced of the ineffectiveness of the old rule, the supreme court holds fast to it. The court notes that as long as the distress is causally "related to" the impact, "the amount of physical contact or injury that must be shown is minimal." It finds "no difficulty" in designating Deutsch's x-ray bombardment ample contact to support her claim.

The court's chief rationale in continuing to demand plaintiff demonstrate some contact is that it serves a "corroborating purpose." As support the Court repeats a statement from Prosser that the value of the requirement lies in the opportunity it affords the defendant "to testify that there was no impact," fairly putting

142. Deutsch v. Shein, slip op. at 8.
143. Id. at 7-8.
144. Deutsch v. Shein, 597 S.W.2d 141, 146 (Ky. 1980).
145. Id.
in issue the genuineness of the claim.\textsuperscript{146} In the same passage, however, Prosser points out that "so far as substantial justice is concerned," it ought to be equally possible to certify a claim's authenticity by evidence of a narrow escape, or of the "physical consequences themselves or the circumstances of the accident."\textsuperscript{147}

Additional traditional justifications for the impact rule enunciated in Deutsch are that mental distress "damages are too remote and speculative, are easily simulated and difficult to disprove, and there is no standard by which they can be measured."\textsuperscript{148} Other courts have refused to allow the spectre of fraud and the difficulties of proof to frighten them into continued compliance with the rule, recognizing that these same problems exist in any personal injury suit,\textsuperscript{149} and relying on medical tests and physical phenomena which usually manifest mental injury to validate claims.\textsuperscript{150}

How the presence of a speck of dust in the eye\textsuperscript{151} may assuage fears of fraud and solve perplexities of proof confounds logic. Given the questionable reasoning that accompanies denial of recovery for negligent infliction of emotional distress absent physical contact, the strong policy factors such as scientific advances in appraising mental injury favoring recovery,\textsuperscript{152} and the small and steadily shrinking minority of states retaining the impact requirement,\textsuperscript{153} Kentucky's adherence to the rule is hard to understand.

IV. \textit{Deutsch} and Its Counterparts

The peculiar facts of Deutsch make it difficult to fit into a theoretical context any more specific than malpractice negligence or
negligent infliction of emotional distress. The trial court vaguely placed the case "within very elementary tort law."\(^{154}\) The court of appeals aligned it with a case in which an overdose of radiation resulted in cancerphobia.\(^{155}\) The supreme court locates it among cases governed by the *Restatement* rule entitled "Additional Harm Resulting From Efforts to Mitigate Harm Caused by Negligence."\(^{156}\) Two factually similar cases from other jurisdictions convey an even greater sense of the courts' uncertainty in fixing on a conceptual basis of decision.

*Salinetro v. Nystrom*\(^{157}\) refuses to recognize any wrong. Recovery is denied, ostensibly because of inadequate proof of causation, though the court's superficial analysis suggests the operation of silent policy considerations. Plaintiff's insurer had required her to submit to x-radiation by defendant radiologist after an automobile accident. The defendant made no effort to discover if she were pregnant. When plaintiff told her doctor of the x-rays upon learning she was pregnant, her doctor, fearing damage to the fetus, advised and administered a therapeutic abortion. At trial, where plaintiff's doctor was not allowed to testify concerning the requisite standard of care because he was not a radiologist, defendant received a directed verdict. The Court of Appeals affirmed the lower court, finding that even if it had been proved that defendant was negligent, this negligence was not the proximate cause of plaintiff's injury.\(^{158}\)

The court's evaluation stops short of addressing the real issue in the case: whether defendant should have conducted a pregnancy test. The only potential for negligence it finds in defendant's behavior was his omission to ask plaintiff if she were pregnant before subjecting her to x-rays. Since plaintiff did not know of her pregnancy and would have answered negatively if the defendant had inquired about it, the court concludes defendant could not have caused plaintiff's injury, the abortion.\(^{159}\) Defendant is excused of responsibility for discovering plaintiff's pregnancy apparently, in part, because she came to him only for an x-ray and had no right to expect more.

\(^{154}\) Brief for Appellant, Appendix A at 1a, Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980).
\(^{155}\) Deutsch v. Shein, slip op. at 9-10.
\(^{156}\) Deutsch v. Shein, 597 S.W.2d 141, 145 (Ky. 1980).
\(^{158}\) Id. at 1059-60.
\(^{159}\) Id. at 1060.
The obvious and compelling question—why defendant radiologist, who should have had special knowledge of the risk of harm of x-radiation to pregnant women, failed to routinely conduct pregnancy tests before x-raying women of child-bearing age—goes unanswered. The decision, in effect, makes a layperson’s understandable ignorance of her medical condition a superseding cause of her injury where a physician fails to use general medical knowledge and skill to discover that condition.

The same shortsightedness affects the decision in *Cox v. Dela Cruz.* The appellate court affirms the lower court’s granting of a judgment notwithstanding the verdict. The apparent basis of the decision is plaintiff’s failure to present expert testimony to establish the appropriate standard of care and defendant’s departure therefrom as the proximate cause of her harm. Plaintiff, a thirty-year-old mother of four, had visited defendant neurosurgeon complaining of lower back pain and, without inquiring into the possibility of pregnancy, defendant ordered x-rays. Three days later when plaintiff discovered she was five weeks pregnant, her obstetrician-gynecologist recommended a therapeutic abortion.

As the court of appeals did in *Deutsch,* the *Cox* court mistakenly seizes upon the disputed likelihood of fetal damage from x-radiation and, contrary to the Kentucky Supreme Court’s finding that such testimony is relevant only to the issue of negligence, allows it to disprove both negligence and causation. The *Cox* court rejects plaintiff’s argument that expert testimony is unnecessary because the risk of fetal injury from x-rays is so obvious it is within common knowledge that a physician exercising ordinary care will determine whether a woman of child-bearing age is pregnant before ordering x-rays. Defendant’s evidence showing disagreement about the fetal effects of x-radiation is permitted to vitiate plaintiff’s contention.

Plaintiff’s failure in *Cox* to provide expert testimony concerning the proper standard of care should not have prevented affirmance of the jury verdict. In *Deutsch,* the court asserts the rule that “[n]ecessary expert testimony to establish that the defendant failed to conform to the required standard of care may consist of

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160. 406 A.2d 620 (Me. 1979).
161. Id. at 621.
163. 406 A.2d at 622.
164. Id. at 622-23.
admissions by the defendant doctor." Following this reasoning, the defendant doctor's testimony in *Cox* that the fetal effect of x-ray radiation is debated and that there is at least some risk of injury, ought to have confirmed his negligence in failing to obtain a pregnancy test before x-raying plaintiff.

*Cox* and *Salinetro* both contain the core of facts deemed decisive in *Deutsch*: defendant neglected to give a pregnancy test prior to plaintiff's x-ray radiation causing her to seek medical advice that resulted in abortion. The contrast in resolution of these cases may reflect differing policy rationales. Perhaps the courts hesitate to attack the complex, emotion-charged abortion issue in this form when the reverberations might echo unrecognizably in other areas of law. They may also dread computing moral elements in calculating damages.

V. Conclusion

What emerges with some clarity from *Deutsch v. Shein*, in comparison with similar cases from other jurisdictions, is Kentucky's willingness, in traveling legal terrain shrouded in mists of policy, to use fundamental tort principles in confronting problematic issues. The court's reliance on the firm ground of the causal element to determine liability, rather than becoming bogged down in the case's peculiar facts, best evinces this willingness. The court explains its approach to causation by describing a metaphoric snowball rolling down a hill, the "initial consequence of [which] may be slight" but which by increases in size and momentum may eventually "cause injury of a magnitude far beyond the imagination of the one who set the snowball in motion." Despite the unimaginable nature of the eventual injury, "the law is that between the negligent actor and the injured innocent, the innocent should re-

165. 597 S.W.2d at 143.
166. 406 A.2d at 622.
167. For an explication of the theory of compensation for impaired moral choice, see Berman v. Allan, 80 N.J. 421, 434, 404 A.2d 8, 15 (1979)(Handler, J., concurring in part and dissenting in part). Justice Handler confronts a concern the Deutsch court chose not to address directly: compensating the plaintiff for "being thrust into a choice between the precepts of her religion and the medical advice." Brief for Appellant at 10. The Deutsch court does implicitly accept plaintiff's being forced to make a harrowing moral choice as an element of damages in finding Dr. Shein responsible for "any injury" to Deutsch resulting from her exposure to the risk involved in seeking other medical services. 597 S.W.2d at 145 (emphasis supplied).
cover compensation.” Following this basic precept of tort law, the court notes that at some point the law may “cut off the expansion of the negligent actor's liability as a matter of public policy.” Inherent in these statements is the most significant aspect of the case, the notion that in the absence of any other liability limiting factors, lack of foreseeability of the consequences of negligence will not hamper a plaintiff's recovery.

Due to the importance of causation in many areas of tort law, the impact of the Deutsch snowball could have wide repercussions. It should certainly affect future negligence litigation in Kentucky, increasing the chances of success in cases that might earlier have failed for insufficiency of causation. Even stronger vibrations may be felt if another snowball set rolling in Deutsch—the court's intention to eventually assume the jury's task of determining basic causation in negligence actions—ultimately collides with the constitution. The case gives little hope, however, that the court will relinquish the requirement of physical contact in cases of negligent infliction of emotional distress, though Deutsch teaches that an impact ephemeral and invisible as a stream of photons may satisfy the rule.

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169. Id.
170. Id.
171. See note 118 supra, and accompanying text.
THE LEGAL CONSEQUENCES OF A DELIBERATE AIR TRAFFIC CONTROLLER SLOWDOWN

The Federal Aviation Administration employs approximately seventeen thousand air traffic control specialists to provide for the safe, orderly and expeditious flow of civil and military air traffic. As federal employees, the air traffic controllers are prohibited from participating in a strike against the United States government. For the decade ending in 1978, however, five deliberate slowdowns or job actions by controllers can be identified. The economic consequences of the resulting delays to aircraft and passengers were significant and are well documented. Because the legal considerations are less frequently discussed, one might ask: what are the legal consequences of a deliberate air traffic controller slowdown?

This study briefly recounts each of the five slowdowns or job actions taken by air traffic controllers since the first occurrence in 1968. It identifies the nature of and the parties to the litigation and the legal and administrative sanctions which ensued. The paper concludes with an estimate of the likely legal consequences should air traffic controllers engage in unlawful job actions in the future.

Background

In addition to the public at large, three separate organizations are typically involved in or affected by a deliberate air traffic controller slowdown. These are the Federal Aviation Administration, the Air Transport Association of America, and the Professional Air Traffic Controllers Organization.

The Federal Aviation Act of 1958 established the Federal Aviation Agency.¹ The Department of Transportation Act of 1966² reorganized this regulatory body, renamed it the Federal Aviation Administration (hereinafter FAA), and made it a sub-part of the newly created Department of Transportation. The Federal Aviation Act of 1958 provides, inter alia, that "The Administrator is authorized, within the limits of available appropriations made by the Congress . . . to provide necessary facilities and personnel for the regulation and protection of air traffic."³ To accomplish this goal, the FAA devotes $1.4 billion of its annual budget and approx-

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imarily one third of its employees to the staffing, operation, and maintenance of the twenty-five air route traffic control centers, 427 air traffic control towers, and 323 flight service stations presently commissioned.4

The Air Transport Association of America (hereinafter ATA) was founded in 1936 as a trade association and a service organization for the United States scheduled airlines.5 Its twenty-four scheduled air carrier members are required by FAA regulation,6 as well as by practical necessity, to rely upon air traffic clearances for nearly every phase of flight between departure and destination airports. When a labor dispute involving air traffic controllers arises, the ATA reports the impact on and advocates the interests of the major consumers of air traffic services.

The Professional Air Traffic Controllers Organization (hereinafter PATCO) is the exclusive labor representative of the federal air traffic control specialists. This trade association was organized by seven controllers on January 11, 1968. During its formative period, PATCO competed with four other trade associations which sought to represent a portion of the air traffic controller work force. PATCO was recognized as the exclusive national bargaining agent for all federal civilian controllers on October 20, 1972. PATCO now has approximately 14,500 members or eighty-five per cent of all federal air traffic control specialists employed in 452 control towers and centers.7

Legal Environment

Executive Order 11,491, as amended, provides that "[e]ach employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity and each employee shall be protected in the exercise of this right."8 From this executive mandate, PATCO, like other trade associations representing federal employees, draws its authority to represent air traffic controllers. Compared to similar labor organizations in the private sector, PATCO and its members are nar-

rowly constrained in the types of coercive job actions they may employ. Executive Order 11,491 defines “labor organization” as

a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees; but does not include an organization which . . . (2) assists or participates in a strike against the Government of the United States or any agency thereof, or imposes a duty or obligation to conduct, assist, or participate in such a strike.9

This Order mandates that “A labor organization shall not . . . (4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it.”10

Accordingly, 5 U.S.C. § 7311 provides that “An individual may not accept or hold a position in the Government of the United States . . . if he . . . (3) participates in a strike, or asserts the right to strike, against the Government of the United States.”11 The Labor Management Relations Act of 1947 defines “strike” as any strike or other “concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.”12

In National Association of Letter Carriers v. Blount,13 a three judge district court for the District of Columbia ruled that portion of section (3) of the statute, which prohibits a federal employee from asserting the right to strike against the government of the United States, and all of section (4) of the statute, which prohibits a federal employee from belonging to an organization of other federal employees that he knows asserts the right to strike, are an unconstitutional abridgement of the employee’s first amendment right to freedom of speech. Thus, in the District of Columbia, a federal employee may lawfully assert his right to strike, though he may not lawfully act upon that assertion.

In United Federation of Postal Clerks v. Blount,14 the U.S. Dis-
District Court for the District of Columbia held that the right to strike is not fundamental but a privilege conferred by statute.

At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers. Indeed, such collective action on the part of employees was often held to be a conspiracy. When the right of private employees to strike finally received full protection, it was by statute, Section 7 of the National Labor Relations Act, which “took this conspiracy weapon away from the employer in employment relations which affect interstate commerce” and guaranteed to employees in the private sector the right to engage in concerted activities for the purpose of collective bargaining.

... It seems clear that public employees stand on no stronger footing in this regard than private employees and that in the absence of a statute, they too do not possess the right to strike. 15

Furthermore, the court found that use of the terms “strike” and “participates” does not make the statutes unconstitutionally vague or overbroad, nor is the prohibition against federal employee strikes repugnant to the Equal Protection Clause. 16

The executive, legislative and judicial branches are in accord that federal employees do not possess the right to strike. To enforce this prohibition, 18 U.S.C. § 1918 provides:

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States... if he... (3) participates in a strike... against the Government of the United States... shall be fined not more than $1000 or imprisoned not more than one year and a day, or both. 17

Under federal statute, a strike or slowdown by an air traffic controller is a felony, for it is an offense “punishable by... imprisonment for a term exceeding one year.” 18

Comparison of Coercive Job Actions and Resultant Legal Consequences

There have been five distinct occasions during the decade ending in 1978 when some portion of the air traffic controller work force

15. Id. at 882.
16. Id. at 883.
deliberately created or contributed to air traffic delays.19 These five periods are July 8, 1968 through August 7, 1968; June 18, 1969 through June 19, 1969; March 25, 1970 through April 13, 1970; July 28, 1976 through August 3, 1976; and May 25, 1978 through June 7, 1978. Each of these periods is reviewed below, in comparing the coercive job actions of air traffic controllers with the legal consequences that resulted.

First Job Action of
July 8, 1968 through August 7, 1968

Six months after the Professional Air Traffic Controllers Organization (PATCO) was formed, the union publicly decried the antiquated air traffic control system. It alleged that some FAA supervisors were sacrificing air safety by requiring controllers to reduce separation minima between aircraft to make up for other systemic deficiencies. The union announced "Operation Air Safety," encouraging controllers to conduct a "by-the-book" slowdown until the system was modernized to accommodate growing user demand.20 PATCO said that its members would no longer expedite traffic by taking the improper shortcuts which they were allegedly being forced to do.

Delays during this thirty day period occurred predominantly in the New York City, Chicago, and Washington, D.C. terminal areas. The FAA and the ATA were unable to attribute the proportionate share of these delays to the controller slowdown versus true systemic inadequacies. Because the FAA and ATA could not determine whether controllers had acted outside the law, they took no legal action against PATCO or against individual members.

Second Job Action of
June 18, 1969 through June 19, 1969

By 1969, PATCO represented approximately 6,000 of the 13,500 federal air traffic controllers, or 44% of the work force. On June 18 and 19 of that year, an estimated 477 controllers conducted a "sickout." Subsequent examination revealed that working condi-

19. No litigation resulted from the first, second and fourth job actions (July 8, 1968 through August 7, 1968; June 18, 1969 through June 19, 1969; and July 28, 1976 through August 3, 1976) so there have been no judicial findings of air traffic controller slowdowns during these dates. I base my opinion that job actions occurred on information I acquired from such sources as Aviation Daily, Government Employee Relations Report (BNA), and the Federal Aviation Administration Office of Labor Relations.

tions had not substantially improved since the previous year's slowdown. On August 8, 1969, Secretary of Transportation John A. Volpe appointed a committee to inquire into various aspects of the job of an air traffic controller. This study, termed the Corson Report, reviewed compensation, work environment, and labor-management relations. During the course of its investigation, the committee met with nearly 400 controllers and 100 supervisors in twenty-seven air traffic facilities. Among its findings, the committee reported: 1) that controllers bore "a heavy burden in making an understaffed and underfinanced system work," and 2) that "employee management relations within FAA are in a state of extensive disarray, due to ineffective internal communications, to failure on the part of FAA management to understand and accept the role of employee organizations, and to illconsidered and intemperate attacks on FAA management by certain unions."21

While PATCO denied that it had sponsored the two day sickout, an FAA investigation concluded that there was a concerted job action supported by the union. Although the duration of this slowdown was shorter than that of the previous year, the response taken by FAA against PATCO and against individual strike participants was more severe. FAA ultimately suspended eighty controllers for periods ranging from three to fifteen days.22 On July 27, 1969, FAA terminated its dues withholding agreement with the union. Pointing out that the dues check-off arrangement is based on mutual interest, FAA Administrator John H. Shaffer said he ended PATCO's check-off because "it is clearly no longer in the public interest to assist an organization which is involved in a work stoppage."23 Three months later, FAA rejected PATCO's request for recognition as the federal controllers' national bargaining agent. FAA announced that the "traffic in threats and continued defiance of the clear statutory and regulatory prohibitions leaves us with no course of action other than denial of the PATCO [sic] application."24 FAA cited as examples of PATCO's intransigence, 1) work slowdowns, 2) concerted effort to withhold services, 3) failure to comply with standards of conduct and code of fair labor

22. Letter from E.V. Curran, Director of Labor Relations, Federal Aviation Administration, to Gregory L. Karam (Sept. 11, 1979).
practices, and 4) issuance of instructions to members which were inimical to good supervisory-employee relations. Thus, the legal consequences of this second job action were suspensions by FAA of individual controllers and efforts by FAA to threaten the security of the controllers' trade association.

Third Job Action of March 25, 1970 through April 13, 1970

In February 1970, PATCO advised the Secretary of Defense that on March 25, 1970, members of PATCO "would commence withholding their services from FAA."\(^{25}\) PATCO called for a national "sickout" to begin March 25, 1970, at 8 a.m., to cause a "swift, severe dissipation of air traffic services."\(^{26}\) The union said its members were fatigued due to understaffing of facilities and were medically entitled to a period of respite from the job. To avert this strike, PATCO demanded: 1) amnesty for all members participating in the sickout, 2) immediate recognition of PATCO as bargaining agent for all controllers, and 3) immediate restoration of PATCO dues check-off.

The strike lasted a total of twenty days. Absenteeism varied around the country, but rose from the normal 4% to as much as 60% in the New York area. FAA reported 17% absenteeism nationwide on the second day of the sickout. Most adversely affected were the air route traffic control centers in Cleveland, Denver, Kansas City, Oakland, and New York. FAA said approximately 2,200 controllers called in sick between March 25 and April 6. PATCO estimated the number at 3000. ATA President Stuart G. Tipton said the sickout collectively cost member airlines "at least $50 million in lost revenues and other costs directly related to the strike."\(^{27}\) This large scale, overt job action sponsored by PATCO precipitated motions for injunctive relief by FAA and ATA, administrative punishment of individual strikers by FAA, and a serious threat to the security and integrity of the labor organization by FAA and the Department of Labor.

Temporary Injunctive Relief

In federal district courts throughout the country, the FAA and the ATA sought and obtained temporary restraining orders and

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27. 188 Aviation Daily 257 (April 13, 1970).
preliminary injunctions against PATCO and its individual members.\textsuperscript{28} In \textit{Air Transport Association v. Professional Air Traffic Controllers Organization},\textsuperscript{29} the ATA sought an injunction against PATCO in the U.S. District Court, Eastern District of New York, on March 30, 1970. Two days later, the United States filed a similar motion. The court issued a temporary restraining order which enjoined the continuance of the work stoppage and directed individual defendants to return to work. In \textit{United States v. Professional Air Traffic Controllers Organization}, the U.S. District Court, District of Minnesota, issued a restraining order on March 31, 1970, which enjoined PATCO "from continuing, encouraging, ordering, aiding or engaging in any work stoppage or slowdown or interfering in any way with or obstructing the movement or operation of any aircraft at any air traffic facility operated by the Federal Aviation Administration."\textsuperscript{30} On March 31, 1970, the U.S. District Court, District of Alaska, issued a similar order restraining air traffic controllers from continuing to encourage or take part in a slowdown and requiring them immediately to notify their supervisors of their mental and physical conditions, and to furnish supporting medical data.\textsuperscript{31}

PATCO and its striking members violated many of these restraining orders, and the FAA and the ATA soon returned to the courts. Upon motion by ATA, the U.S. District Court, Eastern District of New York, issued a preliminary injunction against PATCO on May 5, 1970.\textsuperscript{32} The injunction provided a penalty of $250 per man for the first day of any violation, and $125 per man for any subsequent days. On April 9, 1970, the FAA returned to the U.S. District Court, District of Minnesota, "for an order to show cause why individual defendants and certain named members of [PATCO] should not be cited for contempt for violation of the [March 31] Temporary Restraining Order."\textsuperscript{33} On April 14, the court ruled that 1) the named defendants and others acting in concert with them had engaged in a massive organized work stoppage since March 25; 2) the work stoppage had significantly impaired

\textsuperscript{30} 312 F. Supp. 189, 189-90 (D. Minn. 1970).
\textsuperscript{31} United States v. Robinson, 449 F.2d at 928.
\textsuperscript{32} Air Transp. Ass'n v. Professional Air Traffic Controllers Org., 313 F. Supp. at 186.
\textsuperscript{33} United States v. Professional Air Traffic Controllers Org., 312 F. Supp. at 190.
the operations of the U.S. Government; 3) such a strike was in violation of the law; and 4) the court’s restraining order had been violated by defendants.\textsuperscript{34} The court cited two PATCO officials in contempt and fined each $50 per day beginning April 15, 1970, until each fully complied with the court’s restraining order; the court fined four controllers $20 per day, imposing identical conditions.\textsuperscript{35} On April 7, 1970, the government moved for an order to show cause in the U.S. District Court, District of Alaska.\textsuperscript{36} FAA supplied affidavits stating that two PATCO officials, in violation of the March 31 restraining order, had failed to report for work and furnish adequate medical information showing they were ill. On April 10, the court entered a preliminary injunction and on April 27, the court found the two defendants guilty of violating that injunction. The District Court fined each $300, and sentenced them to thirty days imprisonment. The sentence was suspended.

Permanent Injunction

In \textit{Air Transport Association v. Professional Air Traffic Controllers Organization}, the ATA, representing thirteen member airlines who had suffered losses as a result of the slowdown, filed a complaint in the U.S. District Court, Eastern District of New York, on March 30, 1970.\textsuperscript{37} The complaint alleged “an illegal conspiracy to violate the United States statute which forbids anyone to hold a position with the United States government while he participates in a strike.”\textsuperscript{38} ATA claimed collective damages in excess of $50 million.

After striking air traffic controllers returned to work on April 13, 1970, the ATA and PATCO sought to resolve this claim. On September 9, 1970, the parties entered into a Stipulation of Settlement which provided that ATA would waive its claims for damages caused by the Spring 1970 slowdown.\textsuperscript{39} In exchange, PATCO agreed to a permanent injunction issued by the U.S. District Court which provided:

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} 449 F.2d at 927.
\textsuperscript{37} 188 Aviation Daily 185 (March 31, 1970). The thirteen member airlines represented by ATA in this litigation were Allegheny, American, Braniff, Continental, Delta, Eastern, Mohawk, Northeast, Northwest, Pan American, Trans World, United and Western Airlines.
\textsuperscript{38} 313 F. Supp. at 183.
PATCO, its officers, agents, employees and members, its successors or assigns, and any other person acting in concert with it or them, is permanently prohibited and enjoined from, in any manner, calling, causing, authorizing, encouraging, inducing, continuing or engaging in any strike (including any concerted stoppage, slowdown, or refusal to report to work) by air traffic controllers employed by an agency of the United States, or any other concerted, unlawful interference with or obstruction to the movement or operation of aircraft or the orderly operation of any air traffic control facilities by any agency of the United States.  

The Stipulation of Settlement further provided:

In the event the defendant PATCO shall itself engage or participate in any action which violates the terms of paragraph '1' of this judgment, PATCO shall be required to pay to the plaintiff Air Transport Association of America, Inc., or to its assignee or assignees, the sum of twenty-five thousand dollars ($25,000) for each day, or part thereof, during which such violation by said defendant continues, said obligation to be in addition to and without prejudice to any other rights which plaintiffs or any of them, may have in respect of such violation, provided, however, that any payment by PATCO pursuant to the terms hereof shall be credited against any other sums payable by PATCO on account of such violations to said plaintiff or to any other plaintiff herein, the manner in which said credit to be applied to be determined by the Court as the equities shall then appear.

The Stipulation of Settlement acknowledged that PATCO could apply to the court to vacate or revise the final judgment in the event Congress made job actions lawful. No motion for vacator or revision has ever been made. In the Stipulation of Settlement, in the form of a permanent injunction, the ATA acquired a powerful legal tool which it would use against PATCO eight years later.

Punishment of Individuals

Immediately upon the cessation of the slowdown, the FAA began to take administrative disciplinary action against some of the strike participants. Disciplinary measures included both suspensions and dismissals. The number of controllers subject to sanctions increased as the FAA pursued its investigation. On June 9, 1970, FAA announced that it would fire nine air traffic controllers. By April 1971, the FAA had fired fifty-nine controllers and had

40. Id. at 1291.
41. Id.
suspended approximately two thousand others.

PATCO turned to the courts to enjoin FAA from terminating or suspending its members until their cases could be judicially reviewed. Resultant decisions around the country were not uniform because federal judges differed as to the propriety of judicial intervention before controllers had exhausted their administrative remedies.

In *United States v. Moore*, PATCO's motion for protective orders and a stay of administrative action was granted by the U.S. District Court, District of Colorado, on April 27, 1970. The court ruled that the indefinite suspensions of three employees and the removal of a fourth must be rescinded by the FAA, and that the FAA could take no further administrative disciplinary action pending the outcome of civil actions by PATCO seeking a permanent injunction. The government objected, arguing that for such relief to be granted, PATCO should be required to show: 1) that PATCO would likely prevail on the merits, 2) that without relief it would be irreparably injured, 3) that the issuance of the stay would not substantially harm other parties, and 4) that the public interest would be furthered by the issuance of a stay. The Tenth Circuit Court of Appeals upheld the decision, finding it was necessary to preserve the status quo and maintain the court's jurisdiction over the dispute. The court quoted from the United States Supreme Court in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co.*: "If the District court is free to exercise the typical powers of a court of equity, it has the power to impose conditions requiring maintenance of the status quo." Referring to the instant case, the Court of Appeals ruled:

The effect of the preliminary injunction was to order the defendants back to work pending determination of the complaint brought by the F.A.A. The action of the F.A.A. in indefinitely suspending certain defendants and removing others has the effect of placing the cart before the horse, thereby circumventing the orderly process chosen by them to determine the real issues."

Contra is *United States v. Professional Air Traffic Controllers Organization*. On May 5, 1970, the U.S. District Court, Eastern District of New York, entered a preliminary injunction which, *inter
alia, directed FAA "to restore all defendants in the action who have returned to work to the performance of the duties to which they were assigned prior to March 25, 1970 [and] . . . to withhold any further administrative actions in respect of suspensions, removals or any other sanctions based upon the alleged work stoppage." On December 10, 1970, the Second Circuit Court of Appeals vacated this portion of the injunction. The Court of Appeals noted the decision in United States v. Moore, but declined to agree that judicial intervention was required to maintain the status quo and to preserve the court's jurisdiction. The court quoted from its decision in McTiernan v. Gronouski:

The taking of disciplinary action against government employees, including the invocation of the sanction of dismissal is a matter of executive discretion, and is subject to judicial supervision only to the extent required to insure substantial compliance with pertinent statutory procedures provided by Congress . . . and to guard against arbitrary or capricious action.

The court observed that no ground was suggested for holding that the FAA was acting arbitrarily or capriciously in disciplining its employees.

Nationwide, the FAA fired a total of sixty-seven air traffic controllers who had participated in the 1970 sickout. In February 1972, Secretary of Transportation John A. Volpe announced that the government would rehire those controllers, approximately forty in number, who had not previously been reinstated. Secretary Volpe emphasized that his decision in "no way diminished the gravity of striking against the federal government."

Loss of Union Security

One of PATCO's foremost goals was certification as the exclusive bargaining agent for air traffic controllers. FAA opposed this even before the 1970 slowdown. As a result of the latest job action, Assistant Secretary of Labor William J. Usery, Jr. issued orders barring PATCO from using the procedures of Executive Order 11,491. Usery further dismissed PATCO's pending application for exclusive national recognition. The Department of Labor ordered

46. Id. at 80.
47. 427 F.2d 1020 (10th Cir. 1970).
48. 337 F.2d 31 (2nd. Cir. 1964).
49. Id. at 34.
50. 199 Aviation Daily 221 (Feb. 9, 1972).
PATCO to cease and desist from conduct violative of Executive Order 11,491 and to take certain affirmative action to effectuate the purposes and provisions of that order. Mr. Usery ruled that at such time that PATCO believed it could meet the requirements of a labor organization which represented federal employees, but in no event sooner than the expiration of sixty days, it could furnish a specific account of steps it had taken to comply.\footnote{1}

PATCO quickly responded. The Stipulation of Settlement between PATCO and ATA which was incorporated into a permanent injunction on September 9, 1970, was drafted by PATCO's attorneys. The U.S. District Court, Eastern District of New York, observed in subsequent litigation between these parties: "PATCO may well have bargained for its very existence in consenting and entering into the permanent injunction."\footnote{2} During February 1971, PATCO notified its members that it would not strike against the federal government nor engage in a work stoppage or slowdown under any circumstances. On April 14, 1971, the union sent a letter to the Department of Labor outlining the steps it had taken. PATCO's reconciliatory response to this organizational crisis prompted the Department of Labor to rule in June 1971, that the trade association, after this 126 day disqualification, was again eligible to seek recognition.\footnote{3}

Of the five job actions taken by air traffic controllers during the eleven year history of their union, the 1970 sickout was the most costly to all parties involved. As a result of the strike, the FAA and ATA obtained temporary restraining orders and preliminary injunctions against PATCO. The ATA secured a permanent injunction against such future misconduct, the FAA suspended hundreds of errant employees, and the Department of Labor disqualified PATCO as a federal sector labor organization for more than four months.

Interim Period

The longest period of relative labor peace between FAA and PATCO occurred between the end of April 1970, and the end of July 1976. Although PATCO made isolated threats of slowdowns or "strict compliance with procedures" there were no significant increases in controller absenteeism nor delays to the airspace user.

\footnote{2}{Air Transp. Ass'n v. Professional Air Traffic Controllers Org., 453 F. Supp. at 1292.}
\footnote{3}{Gov't Empl. Rel. Rep. (BNA), supra note 51.}
These interim years witnessed important changes in the trade association. On June 1, 1970, John F. Leyden was elected president of the union, and served in that capacity until he resigned on January 9, 1980. Union members ratified a proposal to affiliate with the Marine Engineers Beneficial Association, a unit of the AFL-CIO.

Three days after the Department of Labor ruled that PATCO was again eligible to seek recognition, the union filed a petition for exclusive national certification. PATCO competed with three other labor organizations for recognition. In March 1972, FAA Administrator Shaffer reported improved relations with PATCO since the election of Leyden. Said Shaffer, "I have seen P.A.T.C.O. strategy change from a hippodrome act to hard work, attention to the job and cooperation in responsible arms-length dealings with the Federal Aviation Administration rather than talking to management through outside media."54

In July 1972, Assistant Secretary of Labor Usery ruled that a national representative election would be held within sixty days. During the September balloting, PATCO collected 83% of the votes cast and became the exclusive national bargaining agent of the 15,000 air traffic control specialists then employed by the FAA.55 On March 20, 1973, FAA and PATCO signed a labor agreement which for the first time recognized PATCO as the controllers' sole bargaining agent.

Fourth Job Action of
July 28, 1976 through August 3, 1976

During 1975, FAA, PATCO, and the Civil Service Commission considered reclassification of air traffic controllers to provide greater pay for those in the busier facilities. By July 28, 1976, the project had not reached fruition. To protest an alleged lack of progress, some controllers staged isolated slowdowns which they described as strict compliance with regulations. An impact was felt at the busier air traffic hubs before the job action ended on August 3. No legal action was taken by FAA or ATA, probably because the slowdown was short-lived and relatively harmless. ATA threatened to return to the courts, however, and Vice President Clifton Von Kann said that FAA and PATCO must find a way to resolve labor-management relations disputes so as "to keep the public from be-

ing the loser in labor problems." On January 13, 1977, the Civil Service Commission ruled in favor of increased salaries for many air traffic controllers.

Fifth Job Action of May 25, 1978 through June 7, 1978

In May 1978, PATCO reported that "the mood of the force is not good." Pan American, Northwest, and Trans World Airlines were not granting free familiarization rides to air traffic controllers on their overseas flights.

The collective bargaining agreement between FAA and PATCO stated: "Both Parties recognize that familiarization flying is a training program and is intended solely to acquaint control personnel with the cockpit environment and to enable them to observe the operation of the air traffic system first hand." The agreement further provided: "The Parties recognize that any air carrier may suspend or abridge their participation in the SF-160 Program (familiarization flying) at any time and that the Employer has no authority to direct the conduct of the program by individual air carriers."

Despite this written understanding, controllers were annoyed that their requests for free familiarization travel were frequently denied. In Air Transport Association of America v. Professional Air Traffic Controllers Organization, the ATA alleged by affidavit that "Upon information and belief, [Mr. John F.] Leyden stated that the controllers are 'angry' and 'fed up' with these airlines, predicted a 'spontaneous' slowdown could hit 'today, tomorrow or anytime' and observed that the airlines 'can allow us a free seat or spend some money burning fuel.' "

Serious delays occurred during May 25-26, 1978, and June 6-7, 1978, at the Los Angeles, Philadelphia, Pittsburgh, New York City, St. Louis, and Washington, D.C. terminals. FAA estimated 7,970 air carrier flights were delayed at least fifteen minutes each during the four day period, resulting in the loss of 1.25 million gallons of aviation fuel.

On May 26, 1978, ATA sought an adjudication that PATCO be held in civil contempt for violating the court's permanent injunc-

58. 453 F. Supp. at 1291.
tion entered on September 9, 1970.\textsuperscript{59} ATA asked that PATCO be required to pay $25,000 for each of the four days of the slowdown. PATCO disputed ATA's claim that the 1970 permanent injunction pertained to the present case. The parties entered into a Stipulation Re Motion for Contempt on June 22, 1978. In essence, the Stipulation provided that 1) ATA's motion be limited to contempt adjudications only as to May 25 and 26, 1978, and June 6 and 7, 1978, and 2) that defendant PATCO concede that if the court decided that its permanent injunction of September 9, 1970, did apply, PATCO would be deemed to have disobeyed the injunction and be required to pay ATA $100,000 in accordance with the terms of that injunction.

Citing \textit{New York Telephone Company v. Communications Workers of America},\textsuperscript{60} PATCO argued that the case

stands for the proposition that an injunction issued in a particular controversy and designed to restrain conduct arising out of that controversy may not lawfully be used as a basis to hold persons in contempt as to a future matter of dispute substantially altered from the original matter which has since been resolved.\textsuperscript{61}

PATCO claimed that the 1970 dispute involved the understaffing of air traffic facilities and the resulting impact upon controllers, while the instant dispute involved controller familiarization flights. PATCO concluded that because the sources of the two slowdowns were unrelated, the permanent injunction of September 9, 1970, could not be invoked.

ATA argued, and the court agreed, that the \textit{Communications Workers} case is clearly distinguishable. First, in \textit{Communications Workers}, the complaint submitted on the original application for a temporary restraining order was clearly limited to the specific dispute involved therein. In the instant case, the complaint seeking the original restraining order was predicated on alleged violations of federal statutes which make illegal all strikes by government employees, regardless of their purpose. Second, in \textit{Communications Workers}, the Second Circuit Court of Appeals was troubled by an absence of consideration or a quid pro quo for the broad and indefinite injunction to which the union consented. Here, in exchange for the Stipulation of Settlement, ATA waived its right to

\textsuperscript{59} Id. at 1287.
\textsuperscript{60} 445 F.2d 39 (2nd Cir. 1971).
\textsuperscript{61} 453 F. Supp. at 1291.
claim substantial money damages. Also, by agreeing to the permanent injunction, PATCO influenced the Department of Labor to requalify it as a representative of federal employees. Finally, the Second Circuit was concerned that the injunction in *Communications Workers* may have directly contravened the underlying policy of Section 9 of the Norris-LaGuardia Act and the United States Supreme Court's decision in *Boys Markets, Inc. v. Retail Clerks Union, Local 770* regarding the use and limits of the federal courts' injunctive powers in the context of labor-management disputes. In the present controversy, the court's enforcement of the permanent injunction would merely reinforce a prohibition already clearly imposed by federal statutes.

The court concluded:

Accordingly, said injunction is still in full force and effect, and, in accordance with the stipulation between the parties, dated June 22, 1978, this court deems PATCO to have disobeyed this injunction on May 25 and 26, 1978, and June 6 and 7, 1978, and orders PATCO to pay the plaintiff Air Transport Association of America the sum of $100,000, i.e. $25,000 for each daily violation of the 1970 injunction, as provided for in that injunction.64

ATA thus exploited a potent legal weapon against PATCO, one which might again be used in future, should air traffic controllers intentionally cause substantial delays to air carriers. Referring to the $100,000 fine imposed upon PATCO, the ATA said, "We are hopeful that it will prevent a recurrence of the inconvenience and hardships experienced by airline passengers in the past as a result of slowdowns."65

Summary

Since the first air traffic controller slowdown during the summer of 1968, the legal responses by FAA and ATA to unlawful job actions have become increasingly effective. The first job action resulted in no legal reprisals against the union or its members. The second slowdown prompted FAA to suspend eighty strike participants and to unilaterally reduce PATCO's organizational security as a trade association. The third and most protracted labor dispute provoked the FAA and ATA to seek temporary and preliminary

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64. 453 F. Supp. at 1293.
65. 238 Aviation Daily 74 (July 18, 1978).
injunctive relief. ATA settled its civil claim against PATCO in the form of a permanent injunction. FAA took disciplinary measures against more than 2,000 employees. FAA and the Department of Labor jointly threatened PATCO's very existence by challenging its status as a legitimate labor organization. The fourth job action only resulted in a threat by the ATA to return to the courts. The fifth and most recent slowdown induced ATA to invoke the penalty clause of the permanent injunction of 1970. Because of the proven flexibility and continued efficacy of this injunction, PATCO must consider its sanctions should the union or its members contemplate an unlawful job action in the future.

Conclusion

This comment seeks to present an impartial analysis of the legal consequences of a deliberate air traffic controller slowdown. There is no intent to vindicate or vilify any of the parties to the disputes discussed herein. While unlawful methods are not justified by laudable motives, it should be noted that the Professional Air Traffic Controllers Organization has significantly contributed to an improved work environment for air traffic controllers. The Corson Report\(^66\) revealed that in 1969 basic aspects of the air traffic control system required upgrading. In *United States v. Professional Air Traffic Controllers Organization,*\(^67\) Judge Waterman, in a dissenting opinion, observed that controller complaints about working conditions in 1970 were not de minimis: "There has been a reduction of compulsory overtime since the work stoppage, which did not come until after the work stoppage, and which suggests that the F.A.A. may, as alleged, have been unduly slow in relieving the pressure on the Controllers."\(^68\) FAA Administrator John Shaffer referred to the 1970 slowdown in remarks to the press in March 1972. "I believe that the controller demonstration helped considerably in bringing certain problems to light. This is not to mean that I agree with their strategy, which I thought then and still think was too extreme."\(^69\)

Unlawful strike activity cannot be condoned. It is particularly egregious when used to extort frivolous concessions. FAA Administrator Langhorne Bond remarked to the press that PATCO and its
members lost a share of prestige and influence as a result of the 1978 protest over familiarization flights. "Congress was livid and outraged by the slowdown, and the controllers lost a lot of credibility built up through the years." Furthermore, "[i]n the early slowdowns the congressional attitude was lenient and the public was sympathetic, but now the conditions that caused those slowdowns no longer exist, and that is widely known."\footnote{240 Aviation Daily 94 (Nov. 17, 1978).}

Despite numerous references by FAA, ATA, and the courts to illegal strike activity, there have been no criminal prosecutions to date. As a result of the 1978 job action, the FAA furnished information to the Department of Justice. On September 22, 1978, the Assistant Attorney General, Criminal Division, responded by a letter to the Administrator, which was released to the press. The letter states: "While the information presented by the FAA indicates that sufficient evidence may exist to support criminal prosecution under the anti-strike statute, 18 U.S.C. § 1918, at this time, we have decided to decline criminal prosecution of the individuals involved as well as certain Professional Air Traffic Controllers Organization (PATCO) union officials."\footnote{Letter from Philip B. Heymann to Langhorne Bond (Sept. 22, 1978).} The Justice Department reasoned that because it had never prosecuted an offender of the anti-strike statute in the twenty-three year history of the law, it must give adequate notice to concerned parties before doing so in the future.

The letter to Administrator Bond concludes with an outline of the likely legal response should unlawful job actions recur:

Having reviewed our policy with respect to initiating criminal prosecution for violation of the anti-strike statute, it is the position of this Department that an air traffic slowdown as a part of concerted job action may provide sufficient basis to support initiation of criminal proceedings for a violation of the anti-strike statute, 18 U.S.C. 1918. However, prior to resorting to criminal proceedings certain possible alternative steps must be thoroughly considered and, where feasible, implemented. These steps are as follows:

(a) This Department will seek appropriate injunctive relief against the union and the individuals involved, provided that an air traffic slowdown as part of a concerted job action or other strike activity is in progress;

(b) in the event that the air traffic slowdown or the strike activity should continue, the necessary action will be taken to have any
union members and/or union officials held in civil contempt and we would seek fines against both the union and the individual members involved of amounts up to $25,000 a day; and
(c) the FAA will initiate administrative action against the union, its membership, and/or individual employees. If any or all of these are determined to be ineffective, criminal investigations with a view towards prosecution will be undertaken either independently of or in conjunction with such civil and administrative action.72

It is improbable that the law will soon be amended to allow federal employees the right to strike against the United States government. This is particularly unlikely when those employees perform services which are necessary to the public welfare and national defense. The legal response to an unlawful air traffic controller job action has evolved into a more coordinated, flexible, and effective remedy than the stop-gap measures taken to counter the early controller protests. PATCO and its members cannot conduct another strike or slowdown with impunity.

GREGORY L. KARAM

72. Id.
NOTES


FACTS

In October 1977, a Special Agent in the Intelligence Division\(^1\) of the Internal Revenue Service (hereinafter Service) began an investigation into the income tax liability of the Respondent, Harvey F. Euge. Mr. Euge had failed to file income tax returns for the years 1973-1976. In order to reconstruct the Respondent's income and compute his tax liability for these years, the Special Agent sought the use of the "bank deposits method."\(^2\) Twenty bank accounts were discovered by the Agent, who had reason to believe that they were being held by the Respondent under aliases to conceal taxable income. Subsequent investigation revealed delivery of bank statements to post office boxes held by Mr. Euge and frequent transfer of monies between the numerous accounts. An inspection of the signature cards for these accounts disclosed addresses of property owned by the Respondent.\(^3\)

A summons was issued October 7, 1977, pursuant to I.R.C. § 7602,\(^4\) directing the Respondent to appear and execute hand-

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1. The Intelligence Division has been redesignated as the Criminal Enforcement Division. IRS News Release (February 6, 1978).
2. Explained simply, this involves examining deposits made to a bank account to determine which monies represent taxable income. See Morrison v. United States, 270 F.2d 1, 2 (4th Cir. 1959).
4. All statutory references are to the Internal Revenue Code of 1954, as amended, Title 26, United States Code, unless otherwise indicated.

Section 7602. Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

1. To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
2. To summon the person liable for tax or required to perform the act, or any officer or employee of such person having possession, custody, or care of books of account containing entries relating to the business of the person liable for
writing exemplars of the signatures listed on the bank signature cards. The Respondent refused to comply and an action for enforcement of the summons was commenced under I.R.C. § 7604(a). The district court ordered the Respondent to provide the handwriting exemplars.

The Eighth Circuit, en banc, reversed the district court order, holding that the views expressed by the dissent in United States v. Campbell were controlling as to the enforceability of a section 7602 summons requesting handwriting exemplars. According to the dissent in Campbell, compelling a taxpayer to execute handwriting exemplars violated the Fourth Amendment. The Service argued that section 7602 should be interpreted to include the power to compel handwriting exemplars because grand juries have been granted such power. The dissent specifically rejected this argument, stating the functions of the service and grand jury are different.

The Supreme Court granted certiorari to resolve a conflict between circuits. The Court, per Justice Rehnquist, reversed the Eighth Circuit, holding that Congress had “empowered the Service to seek, and obliged the witness to provide handwriting exemplars” under I.R.C. § 7602. Specifically, the Court held that the power of the Service under section 7602 to compel a witness to “appear,” to produce “other data,” and to “give testimony” included the

6. 100 S. Ct. at 877.
7. 524 F.2d 604 (8th Cir. 1975).
9. 524 F.2d at 608 (Heaney, J., dissenting).
10. 441 U.S. 942 (1979). Compare United States v. Rosinsky, 547 F.2d 249 (4th Cir. 1977) (Power of the Service under I.R.C. § 7602 is essentially the same as a grand jury’s power. A taxpayer may be compelled to provide handwriting exemplars) with United States v. Brown, 536 F.2d 117 (6th Cir. 1976) (Congress has not authorized the Service to compel non-existing handwriting exemplars; and the phrase “other data” in section 7602 contemplates items already in existence).
11. 100 S. Ct. at 880.
power to compel the execution of handwriting exemplars. Recognizing that the language of section 7602(2) may not explicitly provide this authorization, the Court supported its holding by finding that the duty to appear and give testimony included a duty to provide some forms of non-testimonial, physical evidence. Continuing, the majority declared that the power claimed by the Service is (1) necessary for effective performance of the Service's duty to enforce the tax laws; (2) consistent with the statutory language; and (3) not in violation of congressional policies or constitutional rights.

Justices Brennan, Marshall, and Stevens dissented. They observed that the Service has only the authority conferred by Congress, and that neither statutory language nor legislative history supported the majority's construction that an obligation to "appear" and "give testimony" includes an obligation to create handwriting exemplars.

Consistent with his position in United States v. Mara, Justice Marshall, in a separate dissent, repeated his view that the Fifth Amendment's privilege against compulsory self-incrimination prohibits the government from compelling handwriting exemplars. However, to avoid this constitutional problem, he joined Justice Brennan's dissent.

BACKGROUND

I.R.C. §§ 7602-7610 govern the Service's summons power. A discussion of the legislative and case history of the Service's use of this power is necessary to analyze the Euge decision and explore its future uses.

In legislating section 7602, the eighty-third Congress borrowed from sections 3614, 3615(a), (b), (c), and 3632 of the I.R.C. of 1939. Section 7602(a) and (b) mention "books, papers, records, or other data." The I.R.C. of 1939 varied slightly, specifying "books,
papers, records, or memoranda”19 and “books.”20

The legislative history of section 7602 is concise, with both committee reports stating “[I.R.C. §7602] contains no material change from existing law.”21 In United States v. LaSalle National Bank,22 the Court recognized that “section 7602 derives, assertedly without change in meaning, from corresponding and similar provisions in §§ 3614, 3615, and 3654 of the 1939 Code.”23 The legislative history of section 7602 was heavily relied upon by the LaSalle Court in determining congressional intent.24 The United States, petitioners in LaSalle, had argued successfully that the Service’s summons power under section 7602 remained unchanged in meaning from “existing law.”25

While not conclusive, the legislative history of section 7602 does not appear to authorize the Service to compel handwriting exemplars. The applicable sections of the I.R.C. of 1939 clearly refer to existing tangible documents.26 The 1954 enactment of section 7602 did not change “existing law” under the 1939 Code. Even decisions upholding the authority of the Service to compel handwriting exemplars agree that the 1939 Code refers to existing tangible documents.27

The Secretary of the Treasury, and the Service as his delegate,28 have a powerful weapon in section 7602 for gathering evidence to enforce the tax laws. A section 7602 summons can require the production of books, papers, records, or other data and the giving of testimony, as long as the information requested is “relevant or material to such inquiry.”29 Information will be relevant and material if it “might . . . throw light upon” the correctness of the tax return.

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19. Int. Rev. Code of 1939, Ch. 34 § 3614(a), 53 Stat. 438 (new I.R.C. § 3416(a)).
20. Int. Rev. Code of 1939, Ch. 34, § 3615(a), 53 Stat. 438 (new I.R.C. § 3615(a)).
23. Id. at 310.
24. Id. at 310-11, nn. 13 & 14.
27. See United States v. Campbell, 524 F.2d 604, 606 (8th Cir. 1975).
28. I.R.C. § 7801(a) vests in the Secretary of the Treasury the responsibility for administration and enforcement of the revenue laws. The Service was organized to carry out these responsibilities for the Secretary. See Donaldson v. United States, 400 U.S. 517, 534 (1971).
29. I.R.C. § 7602(2).
or upon the person’s tax liability. By analogy to a grand jury’s power to subpoena, a summons may be issued by the Service if there is only a suspicion that tax laws have been violated, or to assure that they have not been violated.

Under section 7605(b), “[n]o taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer’s books of account shall be made for each taxable year . . . unless the [Service], after investigation, notifies the taxpayer in writing that an additional examination is necessary.” The leading case on what constitutes necessity is United States v. Powell.

The taxpayer in Powell refused to produce records summoned for tax years which had been previously examined by the Service. The Service could only bring an action for fraud for those years. The taxpayer argued that grounds for the belief that a fraud had been committed should be proven by the Service for the summons to be valid. The Court held that probable cause is not required to meet the section 7605(b) necessity requirement. In an enforcement proceeding to prove necessity, the Service must show *prima facie* that:

1. the investigation is conducted for a legitimate purpose;
2. the summoned information or testimony will be relevant to the purpose;
3. the Service does not already have possession of the requested information; and
4. the proper procedure has been followed.

The taxpayer may challenge the summons on any appropriate ground before enforcement.

A section 7602 summons may also seek information from any person in possession of the requested material, rather than the taxpayer whose liability is being questioned. These people include

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30. Foster v. United States, 265 F.2d 183, 187 (2d Cir.), cert. denied, 360 U.S. 972 (1959). Foster adopts the same test of materiality and relevance as the test of materiality with respect to grand jury investigations employed in United States v. Siegel, 263 F.2d 530, 533 (2d Cir. 1959).
33. I.R.C. § 7605(b).
35. Id. at 53.
36. Id. at 57-58.
37. Id.
38. I.R.C. § 7609 contains the special procedures required for the issuance of a summons to someone besides the taxpayer.
banks, brokers, attorneys, accountants, and other institutions that require the storage of records in the ordinary course of business. The taxpayer, who will ordinarily be more concerned than the party summoned, must have notice of the summons and a right to intervene in the enforcement proceeding to effectively challenge compliance with the summons. The Supreme Court in Reisman v. Caplin[^39] held that a taxpayer, even though not a party to a third-party summons, might intervene to protect his interest and restrain compliance with the summons until ordered in an enforcement proceeding by a district court. In interpreting the Reisman decision, the circuits split on the issue of whether a taxpayer had to prove the existence of a substantial protectable interest required by Fed. R. Civ. P. 24(a)[^40], or as a matter of right could intervene to protect his interest.[^41]

The confusion over Reisman was resolved by Donaldson v. United States.[^42] The Service in Donaldson had issued a summons to the taxpayer's former employer and its accountant for employment and compensation records. The taxpayer tried to intervene in the enforcement proceeding under Fed. R. Civ. P. 24(a). He claimed he was being criminally investigated, which was not a proper purpose under section 7602, and that the summons violated the Fourth Amendment's search and seizure protections.[^43] The Court concluded a taxpayer has no absolute right to intervene despite being the subject of the investigation.[^44] Finding the taxpayer's interest inadequate for intervention, the Court suggested a proprietary interest in the records or a claim of attorney-client privilege are examples of "significantly protectable interests" under Fed. R. Civ. P. 24(a).[^45] As evidenced by later decisions,[^46] a

[^40]: Id. at 449-50.
[^42]: Fed. R. Civ. P. 24(a) provides that a person shall be permitted to intervene "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair... his ability to protect that interest."
[^43]: See, e.g., United States v. Benford, 406 F.2d 1192 (7th Cir. 1969); Justice v. United States, 365 F.2d 312 (6th Cir. 1966).
[^44]: 400 U.S. 517 (1971).
[^45]: Id. at 518-21.
[^46]: Id. at 530.
[^47]: Id. at 531.
taxpayer was defenseless if his records were summoned from a third party. Not until Congress passed the Tax Reform Act of 1976, in order to curtail the Service's summons power of third parties, did a taxpayer have a right to notice of the summons and to intervene as a matter of right. The Service has not given up in its effort to obtain information by the use of third-party summons, as indicated by new litigation on the definition of a "third-party recordkeeper." 49

Also changed by Congress in the Tax Reform Act of 1976 was the effect of the Court's decision in United States v. Bisceglia. The Service, further trying to expand its summons power against third-party recordkeepers, issued a "John Doe" summons to a bank. The investigation was triggered by two $20,000 deposits in deteriorated $100 bills. The use of "John Doe" summonses was held to be permissible. Recognizing that the Service could abuse this power and essentially conduct "fishing expeditions," the district courts were charged with the duty of limiting these summons as necessary to achieve its purpose. Justices Stewart and Douglas strongly dissented. They accused the majority of disregarding section 7602 and case law, and of failing to provide a reasonable standard for enforcement, thus making any private economic transaction open to this new power.

Expressing concern that privacy be balanced against the Service's duty to investigate potential underreported tax liabilities, Congress narrowed the Service's power. The Service must now

50. Supra, note 48.
52. Id. at 142.
53. Id. at 150-51.
54. Id. at 152.
55. Id. at 156-59.
57. Supra, note 48.
obtain a court order before a “John Doe” summons may be issued. Before a district court will issue a “John Doe” summons, the Service must establish that:

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any Internal Revenue Law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

A summons issued under section 7602 contemplates obtaining information for purposes of enforcing civil tax statutes. A summons, therefore, cannot be used solely to obtain evidence for a criminal prosecution. The determination of whether a section 7602 summons is being used solely for criminal purposes is not absolute. Congress has given enforcement power to the Service over tax laws which contain both civil and criminal elements “inherently intertwined.” The initial examination into a person’s tax liability is done by a Revenue Agent in the Examination Division. If, during an examination, the Revenue Agent suspects criminal violations, he will refer the case to the Criminal Enforcement Division, which assumes control, usually working jointly with the Examination Division. The criminal and civil aspects of this type of tax investigation do not separate until a referral to the Department of Justice permits criminal litigation to proceed.

Supreme Court decisions creating confusion among the cir-

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58. I.R.C. § 7609(f).
59. Id.
61. Id. at 309.
62. The Examination Division was formerly known as the Audit Division. IRS News Release, February 6, 1978.
63. The Criminal Enforcement Division was formerly known as the Intelligence Division. IRS News Release (February 6, 1978).
64. 437 U.S. at 300 n. 1.
65. Authority is reserved to United States Attorneys to prosecute criminal tax violations by 28 U.S.C. § 547(1).
66. Reisman v. Caplin, 375 U.S. 440 (1964) (A summons can be challenged on “any appropriate ground” including the improper purpose of obtaining evidence for use in a criminal prosecution) (dictum); Donaldson v. United States, 400 U.S. 517 (1971) (A section 7602 summons may be issued in aid of an investigation if issued in good faith and prior to a
on the civil/criminal nature of tax investigations and the use of summons led to the decision in *United States v. LaSalle National Bank.* The Special Agent in *LaSalle* was found to have only a criminal purpose in examining the tax liability of a trust beneficiary. The Court held that to establish a summons has been issued in bad faith, the taxpayer must show that the Service, at the highest levels of review, has abandoned its investigation of civil tax violations. This created the concept of "institutional bad faith." Rarely is this type of "bad faith" found. The Court offers two examples of bad faith: a delay in referring a case to the Department of Justice after an institutional decision has been made in favor of prosecution, in order to gather additional evidence by summons; the use of a summons to gather information for other government agencies. The phrase in *Donaldson,* "prior to a recommendation for criminal prosecution," was interpreted as the recommendation of criminal prosecution to the Department of Justice.

*LaSalle* has not resolved lower court conflict. The issue of using a summons for improper purposes in criminal prosecutions is very much unsettled. Two circuits, in considering the use of a section recommendation for criminal prosecution. The presence of a special agent participating in the investigation does not mean the case has solely a criminal purpose.

67. Compare *United States v. Lafko,* 520 F.2d 622 (3d Cir. 1975) (Recommendation for criminal prosecution referred to in *Donaldson* is that of the local Special Agent in charge, even if not final or reduced to writing); *United States v. Wall Corp.,* 475 F.2d 893 (D.C. Cir. 1972) (Summons not issued in good faith if the investigating agent has formed a firm purpose to recommend criminal prosecution, even though formal recommendation is not made or if civil tax liabilities have been finalized) and *United States v. Weingarden,* 473 F.2d 454 (6th Cir. 1973) (Bad faith exists if a summons is issued pursuant to a request from the Justice Department if they controlled the investigation) with *United States v. Morgan Guaranty Trust Co.,* 572 F.2d 36 (2d Cir. 1978) (*Donaldson* set forth an objective test. A summons may be used any time prior to a recommendation for prosecution. Bad faith refers to harrassment or pressure to settle a collateral dispute by the use of a summons).


69. Id. at 304.

70. Id. at 316.

71. Id.

72. Id. at 317.

73. Id. at 311-12.

74. See, e.g., *United States v. Genser,* 595 F.2d 146 (3d Cir. 1979) (Summons should be examined individually to check issuance for solely a criminal purpose, even though the examination as a whole is civil in nature); *United States v. O'Henry's Film Works, Inc.,* 598 F.2d 313 (2d Cir. 1979) (Only if civil liability purpose is completely abandoned prior to a Department of Justice referral could bad faith be found); *United States v. Chase Manhattan Bank,* 598 F.2d 321 (2d Cir. 1979) (Connection between evidence sought by IRS summons and delay of "imminent" non-tax criminal indictment establishes "bad faith").
7602 summons to gather information as part of a joint strike force with the Department of Justice, have reached opposite results.75

Case history of a section 7602 summons reveals the Supreme Court broadly construes the statutory authority which Congress has given to the Service. This has continued although Congress, in 1976, felt the Court went too far in their interpretations of the Service's power. The decisions also have failed to achieve the clarity needed for lower courts. The common element of the decisions upholding the power claimed by the Service is "any other holding . . . would thwart and defeat" the Service in the enforcement and administration of Internal Revenue laws.76

REASONING OF THE SUPREME COURT

The Supreme Court in Euge was presented with the question of whether the power to compel production of handwriting exemplars was included in the power to compel a person to "appear," to produce "other data," and to "give testimony."77 Relying on the past analogy the Court fashioned between administrative summons and grand jury subpoenas,78 and by expansively construing congressional intent,79 it was determined section 7602 authorized compulsion of handwriting exemplars.

The Court began by stating that Congress had imposed an evidentiary duty under section 7602 on persons who possessed information relevant and material to a tax investigation.80 A person summoned under section 7602 is obligated "to produce documentary evidence and to 'appear' and 'give testimony.'"81 Common law was then examined to determine the scope of this evidentiary or testimonial duty.82 The Court previously had confirmed, in Schmerber v. California,83 this common law duty to include an ob-

75. United States v. Serubo, 604 F.2d 807 (3d Cir. 1979) (The grand jury's role in investigation is violated and the discovery right enlargement is improper by use of a strike force summons). Contra, United States v. Chemical Bank, 593 F.2d 451 (2d Cir. 1979) (Although a joint strike force issued the summons, the information remained exclusively within the Service).
77. 100 S. Ct. at 878.
80. Id. at 878.
81. Id.
82. Id.
ligation to provide certain types of nontestimonial, physical evidence. Subsequent to Schmerber, handwriting was held nontestimonial, physical evidence subject to a grand jury’s subpoena power. 84

The Court cited Blackmer v. United States85 for support that Congress may provide by statute the performance of this broad common law evidentiary duty.86 Since section 7602 contains an obligation to appear, which by necessity includes an obligation to display physical characteristics, the Court concluded Congress intended and thereby authorized the production of handwriting exemplars, a type of nontestimonial, physical evidence.87

Admitting that section 7602 did not specifically compel the production of handwriting exemplars, the Court supported its finding by relying on previous interpretations of this statute.88 The summons power claimed by the Service had always been upheld if necessary for the enforcement of tax laws and contrary legislative purposes were not undermined.89 In Euge the Service claimed handwriting exemplars were necessary to identify:

(1) holders of bank accounts,
(2) persons filing multiple tax returns under false names to claim unwarranted tax refunds,
(3) purchase of money orders under aliases, and
(4) forgery of joint tax returns to take advantage of lower tax rates.90

The Court agreed with the Service that handwriting exemplars were necessary for effective enforcement of tax laws.91

The Respondent argued section 7602 contemplated the production of items already in existence, therefore eliminating handwriting exemplars. This argument was rejected as the Court did not equate the demonstration of physical evidence with the creation of documentary evidence. The limitation on the Service’s authority to compel production of previously nonexistent documentation was not specifically removed as the Court declined to express an opin-
ion on this question. No constitutional problems faced the Court's interpretation of section 7602, as handwriting exemplars do not violate the Fourth Amendment's search and seizure nor the Fifth Amendment's self-incriminations prohibitions. The majority concluded by suggesting a taxpayer has more than sufficient protection against improperly issued summonses. Under United States v. Bisceglia, a taxpayer may challenge a summons prior to enforcement in federal court and assert any appropriate defense. The Service must comply with the good faith requirements of United States v. LaSalle National Bank and with section 7605(b) protections against unnecessary examinations or investigations.

The dissent by Justices Brennan, Marshall, and Stevens failed to interpret section 7602 or legislative history to include an obligation to display physical features. "Appear" plainly indicated to the dissent that the summoned party must produce the requested information at a time and place designated by the Service. Continuing, the dissent stated the majority opinion admitted a handwriting exemplar is nontestimonial (emphasis original) in nature, thereby precluding a determination that a handwriting exemplar can be compelled by the authority of the phrase "give testimony."

ANALYSIS

The Euge decision, which adds enormously to the Service's summons power, misinterprets section 7602 and its legislative history. To provide a foundation for their holding, the majority opinion placed importance on the evidentiary duty created by the phrase "appear" and "give testimony." The Court built upon this foundation by showing that under common law, evidentiary or testimonial duty contains an obligation to provide nontestimonial, physical evidence, which includes handwriting exemplars. According to the above rationale, a section 7602 summons can require

92. Id. at 881 n. 11.
93. Id. at 881 (Citing United States v. Mara, 410 U.S. 19 (1973) and Gilbert v. California, 388 U.S. 263 (1967)).
94. 420 U.S. 141, 151 (1975).
96. 100 S. Ct. at 882.
97. Id.
98. Id. at 882 n. 1.
99. Id.
100. Id. at 878.
101. Id. at 878-79.
a person to appear in order to compel nontestimonial acts without also compelling him to produce documentary evidence or to give testimony.\(^{102}\) A logical reading of the statute does not support this view and causes the foundation to crumble.

Section 7602 contains three subsections. Subsection (1) authorizes the Service to examine “books, papers, records, or other data.” Subsection (3) authorizes the Service to take the testimony of a person summoned. The above subsections do not authorize the Service to require nontestimonial acts such as the giving of a handwriting exemplar. Subsection (2) authorizes the Service to compel a person “to appear . . . at a time and place named in the summons to produce” the documentary evidence which can be examined under subsection (1) and to give testimony which can be taken under subsection (3). Since the giving of handwriting exemplars is not “testimony,”\(^{103}\) the production of documentary evidence is the only nontestimonial act which the summoned person must perform.\(^{104}\) The Service’s instructions to its employees coincide with this conclusion. They state an administrative summons “should not require the witness to do anything other than to appear on a given date to give testimony and to bring with him/her existing books, papers, and records.”\(^{105}\)

Additionally, section 7604(a) fails to support the Court’s interpretation of the phrase “to appear.” This section gives the district court jurisdiction to order a person “to appear” in compliance with a section 7602 summons. In Reisman v. Caplin,\(^{106}\) it was determined that a witness may not ignore a summons requesting his appearance. He must go forward and make some sort of response to the summoning officer. However, the witness may refuse to testify or produce documents by interposing good faith defenses. To enforce the summons upon noncompliance, the Service must proceed in district court.\(^{107}\)

A logical reading of section 7602, the Service’s own instructions on the statute, and decisions of the Supreme Court demonstrates that “appear” and “give testimony” do not create a duty to pro-

\(^{104}\) Cf., Fischer v. United States, 425 U.S. 391 (1976) (The production of accountant’s workpapers are compelled as this act is not testimonial self-incrimination).
\(^{105}\) INTERNAL REVENUE MANUAL § 4022.64(4)(1977).
\(^{107}\) Id. at 445-46.
vide nontestimonial, physical evidence, including handwriting exemplars.

Assuming the Court's interpretation of the phrase "appear" and "give testimony" was valid in creating an evidentiary duty to provide nontestimonial, physical evidence, the decision still lacks support. The analogy to grand jury subpoenas to determine the scope of the evidentiary duty imposed by section 7602 summons is defective. While some valid comparisions may be made between the two, they are by no means identical.

The authority of the grand jury is said to derive "from none of the three basic divisions of government, but rather directly from the people themselves." As pointed out by Mr. Justice Stewart in United States v. Bisceglia:

The IRS is not a grand jury. It is a creature not of the Constitution but of legislation and thus peculiarly subject to legislative constraints. [Citations omitted]. It is true that the Court drew an analogy between an IRS summons and a grand jury subpoena in United States v. Powell, 397 U.S. 48, 57, but this was merely to emphasize that an IRS summons does not require the support of "probable cause" to suspect tax fraud [before it may be issued].

Additionally, important historical safeguards afforded by a grand jury are not present in a section 7602 summons requesting nontestimonial physical evidence (except for the production of documentary evidence). The grand jury, unlike the Service, is a neutral body. As said by Mr. Justice Black in In re Groban:

The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officer's misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors for their normally unbiased testimony as to what occurred before them.

108. In re April 1956 Term Grand Jury, 239 F.2d 263, 269 (7th Cir. 1956).
While the grand jury and the Service both investigate suspected crimes, the grand jury, in addition, also serves to protect individuals against unfounded or malicious accusations. One court has stated that "[t]he grand jury earned its place in the Bill of Rights by its shield, not by its sword." To fulfill its purpose as a "shield," a grand jury is allowed to subpoena nontestimonial evidence. The Court in United States v. Dionisio stated:

The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigation unhindered by external influence or supervision so long as it does not touch on the legitimate rights of any witnesses called before it.

The role of the Service and a Special Agent are contrary to that of a grand jury. Their job is to investigate suspected criminal violations and prepare a case for prosecution. Although a case is reviewed at several levels before a recommendation for prosecution, this procedure serves to pinpoint the strongest cases for prosecution rather than serve as a shield for the target of the investigation. While the Department of Justice must conduct a trial for criminal tax violations, the Service has more than just a passing interest. As said in In re William H. Pflaumer & Sons, Inc.,"[t]he Department of Justice depends upon the IRS entirely for the investigation of tax crimes, and all tax prosecutions are undertaken only upon recommendation of the IRS." Frequently the principal prosecution witness is the Special Agent who originally investigated the case (and issued the summons, if any). Technical assistance is provided by the IRS to the prosecutors and the grand jury in complicated cases.

114. See INTERNAL REVENUE SERVICE MANUAL 9900, HANDBOOK FOR SPECIAL AGENTS 9900 § 210 (March 1, 1977).
118. E.g., Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955).
As shown above, the Service's summons power under section 7602 is decisively different from the power of a grand jury to subpoena. However, this did not stop the Court in *Euge* from determining the scope of an incorrectly interpreted evidentiary duty under section 7602, by analogy, to include nontestimonial, physical evidence. The Service has only the authority granted by Congress. Only Congress can increase or decrease the scope of the Service's summons power, subject to, of course, applicable constitutional guarantees.

Further support for the Court's decision in *Euge* was based on the precedent that congressional intent should be determined to provide the authority requested by the Service if necessary for the enforcement of tax laws. The Court notes that the Service suggests several areas where handwriting exemplars will be helpful. The opinion fails, however, to prove why handwriting exemplars are necessary to enforce the tax laws. No alternative means of enforcement were suggested and shown to be ineffective.

The Service argued in *Euge* to have section 7602 interpreted to authorize the summoning of "any constitutionally permissible information." The Service may well need this power to effectively enforce the tax laws. Economic hardships caused by periods of high inflation in recent years have probably caused less compliance with the tax laws. But it seems unusual that the first reported case found by the author where the Service sought to employ handwriting exemplars was decided in 1975.

Since section 7602 does not specifically authorize the summoning of handwriting exemplars, the Service should have addressed Congress rather than the courts to gain this power. What the Service sought and the Court in *Euge* allowed "is not a construction of the statute, but, in effect, an enlargement of it . . . , so that what was omitted, presumably by inadvertence, may be included within its scope." As Mr. Justice Douglas said in commenting on the complicated and intricate nature of tax laws: "Resort to litigation, rather than to Congress, for a change in the tax law is too often the

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121. 100 S. Ct. at 878 n. 5.
122. *Id.* at 880.
123. *Id.* at 881 n. 10.
temptation of government which has a longer purse and more endurance than any taxpayer.” 127 The protections which the Court believes to be quite sufficient 128 will be of little if any help for the average taxpayer. 129

EUGE: BOUNDARIES AND INTIMATION

Although the Service in Euge was successful in their effort to expand its power to gather evidence, it is the author’s opinion that viable defenses exist to challenge a section 7602 summons. Handwriting exemplars summoned under section 7602 will be entitled to the same Fifth Amendment protections found in Gilbert v. California 130 and United States v. Mara. 131 A section 7602 summons requesting more than a handwriting sample should be carefully checked to assure it does not seek compelled testimony in violation of the Fifth Amendment. An exemplar would be testimonial if it reveals the summoned person’s “consciousness of the facts and operations of his mind.” 132 Additionally, section 7605(b) 133 restrictions and the criminal limits on section 7602 summons announced in United States v. LaSalle National Bank, 134 while not providing much protection, should be tested against a summons seeking handwriting exemplars.

Since the Court has measured the summons power of the Service with that of a grand jury, the author believes future use of the Service’s summons power may approach uses attached to grand jury subpoenas. The only limitations on this power might be the use for improper purposes in criminal actions, 135 attorney-client and work product protections, and constitutional limitations. The Service may try to summon a taxpayer or third party to appear in a line-up, 136 compel appearance for photographs, fingerprinting, measurements, or blood samples. 137 However, a 7602 summons

128. 100 S. Ct. at 882.
129. See notes 28-76 supra; United States v. LaSalle National Bank, 437 U.S. 298, 316 (1978). (“Without a doubt, this burden is a heavy one”).
130. 388 U.S. 263 (1967).
132. 8 WIGMORE ON EVIDENCE § 2265 at 386 (McNaughten Rev. 1961).
133. See notes 33-37 supra.
134. 437 U.S. 298 (1978); See notes 60-75 supra.
cannot force submission to a lie detector test. Whether the judicial system will enforce a summons attempting any of the above methods to gather evidence remains to be seen.

Last term the Supreme Court granted certiorari in United States v. Upjohn Co. to decide if the work product doctrine is available as a defense to a section 7602 summons. The reliance by the Court in Euge on the grand jury analogy may be to the taxpayers advantage in Upjohn. In In re Grand Jury Investigation (Sun Oil Co.) the government conceded the availability of the work product doctrine in a grand jury proceeding. Using a grand jury analogy, the Third Circuit suggested it would be "quite anomalous" to find the work product doctrine available in a grand jury proceeding and unavailable in a summons enforcement action. The Supreme Court did leave room for exception to the grand jury analogy in Euge, stating it was "one interpretive guide." To continue the expansion of the Service's summons authority in Upjohn, the Court will have to depart from their long standing reliance on an analogy to a grand jury's power.

CONCLUSION

Despite the lack of express statutory language, the Supreme Court has upheld the use of a summons requesting handwriting exemplars. Although the Service does need certain powers to ensure compliance with the tax laws and deter tax evasion, if Congress failed to authorize the power sought by the Service, whether deliberately or otherwise, the lack of authorization cannot be judicially supplied "however much later wisdom may recommend the inclusion."

Congress in the Tax Reform Act of 1976 enacted section 7609 in direct response to Supreme Court decisions expanding the Service's summons power. Hopefully, Congress will see the need for new legislation clarifying the scope and use of summons issued

138. Id. at 764.
139. 600 F. 2d 1223 (6th Cir. 1979), cert. granted, 100 S. Ct. 1310 (1980).
140. 599 F.2d 1224 (3d Cir. 1979).
142. 100 S. Ct. at 879 n. 8.
144. See notes 48-59 supra.
under section 7602 before another abuse of the Service's power occurs.

CHARLES E. CHRISTIAN

I. INTRODUCTION

W. H. Haines, an Ohio resident fishing from the Ohio shore of the Ohio River, was arrested and fined $17 by a Kentucky conservation officer for fishing in Kentucky’s waters without a Kentucky fishing license. Mr. Haines complained to Ohio officials about the uncertainty of the state’s boundary location. Ohio officials tried to get Kentucky officials to agree to a boundary away from the Ohio shore. Since they could not resolve the matter, Ohio filed suit in the Supreme Court. The Court rejected Ohio’s alternative claim to the middle of the river and referred the remaining dispute to a Special Master. The Court, relying on historical factors and Indiana v. Kentucky, adopted the Special Master’s recommendation. The decision in Ohio v. Kentucky fixes the boundary between Kentucky and Ohio at the northerly low water line that existed when Kentucky was admitted as a state in 1792. This note argues that precedent and the federal common law call for a different result, but practical considerations prompted the Court to act on an ad hoc basis to arrive at the result.

II. HISTORY OF THE CASE

In 1783 Virginia ceded the land “being to the North-west of the river Ohio” to the United States. The Court first interpreted this phrase in Handly’s Lessee v. Anthony. That case declared that Virginia and its successor, Kentucky, kept the river, but jurisdiction stopped at the northerly low water line. Subsequent Court

1. “After he was arrested September 19, [1959,] Mr. Haines charged that he was told to leave his 12-year-old son, Robert, with the arresting officer while he went to obtain $27 bond. But Conservation Officer E.H. Collett said the son went boat riding with him voluntarily while his father was away.” Cincinnati Enquirer, October 5, 1959, at 15, col. 1.
2. Id.
6. 136 U.S. 479 (1890).
decisions have affirmed this 1820 opinion by Chief Justice Marshall. In the late 1950's all fishers in the Ohio River were subject to enforcement actions by Kentucky authorities. Interstate conferences to address the resulting consternation of Ohio citizens and the impending raising of the water line by the operation of new dams could not resolve the boundary issue. Kentucky insisted on keeping the river from shore to meandering shore, while Ohio wanted some of the river within its exclusive jurisdiction. So, in 1966 Ohio brought suit claiming that the 1792 northerly low water mark should be considered the boundary line between Kentucky and Ohio. Ohio invoked the Article III original jurisdiction of the Supreme Court. Later, Ohio sought to amend its complaint and argue that competing pre-Revolutionary claims should be interpreted to place the boundary at the middle of the river. The Court rejected this amendment and held that "the State's long acquiescence in the location of its southern border at the northern edge of the Ohio River and its persistent failure to assert a claim to the northern half of the river convince us that it may not raise the middle-of-the-river issue at this very late date." The case was remanded to the Special Master for a recommendation as to whether the prevailing low water line or the 1792 low water line is the boundary.

The Court generally resolves interstate boundary disputes, such as this one, by resorting to a body of federal common law. The federal common law of river boundaries includes several concepts relating to riparian rights: accretion or alluvion, erosion, reliction, overflow, avulsion, and acquiescence. These concepts may operate

10. See, e.g., Cincinnati Post and Times Star, Oct. 12, 1959, at 8, col. 2.
13. "The judicial Power of the United States shall be vested in one Supreme Court . . . The judicial Power shall extend . . . to Controversies between two or more states . . . ." U.S. CONST. art. III §§ 1, 2. "The Court has most frequently exercised its jurisdiction over suits between states in controversies concerning boundaries . . . ." R. STERN & E. GREBEN-MAH, SUPREME COURT PRACTICE 602 (5th ed. 1978).
15. Id. at 649.
17. See, e.g., Nebraska v. Iowa, 143 U.S. 389 (1892); Mississippi v. Arkansas, 415 U.S. 289 (1974); Annot. 31 L. Ed. 2d 1006, 1028 (1973).
to move water edge boundaries in order to maintain a landowner's access to the body of water and thus maintain the owner's expectation of use and transportation. Accretion or alluvion is the addition to land by deposition of soil carried by the body of water; the boundary of a state or parcel of land generally shifts to include accreted land.\textsuperscript{19} Erosion is the corresponding removal of soil by the natural action of the elements; the boundary likewise shifts to exclude the waterway occupying the eroded area.\textsuperscript{20} Reliction is the uncovering of land by the recession of water; similar to accretion, as reliction is often mistakenly called, the boundary of riparian land shifts to include the relicted land.\textsuperscript{21} Overflow is the covering of land by the raising of water; similar to erosion, the boundary of riparian land shifts to exclude the submerged land.\textsuperscript{22} Avulsion is the change of a river's bank, often suddenly and more particularly by a shift in channel, that causes land formerly in one jurisdiction to shift to another; when a channel shifts by avulsive action, boundaries remain the same.\textsuperscript{23} The rules of accretion, erosion, reliction, overflow, and avulsion apply without regard to the body of water or the cause of the change.\textsuperscript{24} Acquiescence can operate to support or modify the operation of the common law rules set out above. If parties have accepted or acquiesced to boundaries they will not be changed on the subsequent complaint of one party. The Ohio v. Kentucky Court relied on acquiescence to uphold Kentucky's boundary as the 1792 northerly low water line.

In Ohio v. Kentucky, the dissent called for the direct application of the common law rules. Justice Powell argued that the Court's result ignored Handly's Lessee, by contravening the common law and frustrated the Virginia Cession by creating an unidentifiable border.\textsuperscript{25} In Handly's Lessee Chief Justice Marshall endorsed the common law rules when he declared that "[a]ny gradual accretion of land, then, on the Indiana side of the Ohio would belong to Indi-
Powell claimed that the majority's reliance on Indiana v. Kentucky was misplaced. That case, in contrast, involved an abandoned channel or an avulsive change, a common law concept that does not change boundaries. Indiana v. Kentucky upheld Kentucky's claim to land that became attached to Indiana . . . Green River Island. Following these precedents, Powell would apply the common law and rule in Kentucky's favor. Unlike the majority, Justice Powell saw no reason why the common law rules should not apply to the edge of river boundary as well as to the center of river boundary. In addition, fixing a boundary line would not necessarily maintain the river as a boundary, the result intended by the Virginia Cession. The dissent concluded by noting that the common law acquiescence, alluded to by the Court, is not authoritative or uncontradicted and that a two hundred year old fixed boundary would be cumbersome.

The majority, relying on precedent, historical factors and acquiescence, distinguished the Ohio River boundary from the common law customary situation. It held that the 1792 northerly low water line fixes the boundary, notwithstanding surveying difficulty or possible anomalous land formations. Justice Blackmun's opinion recognized the application of the common law in the resolution of river boundary disputes by stating that "[i]n [the] customary situations the well-recognized and accepted rules of accretion and avulsion attendant upon a wandering river have full application." Justice Blackmun, however, would not apply the common law here. Historical factors distinguished the Ohio River boundary from the customary situation. He cited Texas v. Louisiana as another instance where historical factors dictated a result inconsistent with the common law. "Here the boundary is not the Ohio River just as a boundary river, but is the northerly edge, with originally Virginia and later Kentucky entitled to the river's expanses." He but-

26. 18 U.S. (5 Wheat.) 374, 381.
27. 444 U.S. 335 at 342 (Powell, J., dissenting).
28. "Such acquiescence [by Indiana] in the assertion of authority by the State of Kentucky . . . can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof." 136 U.S. 479, 510.
29. 444 U.S. 335 at 346 (Powell, J., dissenting).
30. Id.
31. Id. at 337.
32. Id.
34. 444 U.S. at 337-38 (citing the Virginia and U.S. legislation, supra note 8 and Handly's Lessee supra note 9).
tressed this conclusion by quoting from *Indiana v. Kentucky*: "Her dominion and jurisdiction continue as they existed at the time [Kentucky] was admitted into the union, unaffected by the action of the forces of nature upon the course of the river." The Court held that the *Indiana v. Kentucky* quotation controlled the determination of the Kentucky-Ohio boundary. Blackmun would not be dissuaded by either the difficulty of establishing an old line or the possibility that land of one State could come to be on the 'wrong' side of the boundary river. Justice Blackmun concluded the decision by noting what appears to be Kentucky's acquiescence to the 1792 low water line boundary.

### III. Analysis

The Supreme Court engaged in *ad hoc* decision making to arrive at a result that ignored precedent and the federal common law. This conclusion is inescapable because: (1) the historical factors cited by the Court either relied on or cannot be differentiated from boundary disputes where common law rules have been applied; (2) the common law rules could be and have been applied to the Ohio River boundary and other river edge boundaries; and (3) acquiescence by Kentucky and the corresponding prescription by Ohio cannot be found as a basis for fixing the 1792 boundary.

The heart of the Court's suspension of the common law rules is reliance on historical factors. Examination of the basis for the historical factors shows, however, that the only distinction is that the Ohio River boundary is at the low water line rather than the thalweg, the middle of the main channel. For example, the Court cites *Texas v. Louisiana* as an example of historical factors superseding the customary situation. In that case, Louisiana wanted the boundary placed at the west bank of the Sabine River, the old treaty limit, and Texas wanted the thalweg as the boundary. The Court rejected the common law boundary by saying that "[w]hen Congress sufficiently indicates that it intends a different boundary in a navigable river, the thalweg rule will not apply." The legislation concerning the territory that includes Ohio and

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36. Id. at 339-40.
39. Id. at 710.
Indiana leaves the river with Kentucky; it does not sufficiently indicate that the river's edge should be a fixed line. In *Ohio v. Kentucky* the fixed line, relied on by the Court, was judicial pronouncement, not legislative intent. Further, in *Texas v. Louisiana* the Court relied on deviation from *Washington v. Oregon* to support the thalweg rule. In the latter case, the Court held that the boundary was kept as the middle of the north channel of the Columbia River even though the south channel had become the main channel. The Court applied the avulsion rule. The boundary between the two states is "changeable only as it may be from time to time by the process of accretion."  

The Court also quotes from the seminal decision, *Handly's Lessee v. Anthony*, to support the historical factors that suspend the common law rules. *Handly's Lessee*, an ejectment action, involved conflicting claims to some land that was separated from Indiana only during high water. With this first pronouncement, the Court held that the northernly low water line should be the boundary. Thus, the land in question was declared to be part of Indiana. However, Chief Justice Marshall also stated that the common law rules would still apply. "Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana, and it is not very easy to distinguish between land thus formed and land formed by the [rising or] receding of the water."  

The Court attempted to secure its conclusion to suspend the common law rules by quoting *Indiana v. Kentucky* out of context. *Indiana v. Kentucky* involved a controversy over a tract of land five miles long and a half a mile wide, Green River Island. When Kentucky became a state, Green River Island was separated from the land north of the Ohio by a small channel; thus, it was part of Kentucky. Then the channel filled up, through natural and artificial means, and Indiana claimed it. The Court held that Green River Island was still part of Kentucky even though it was attached to Indiana. This holding is consistent with both the common law rule of avulsion, where channel shifts will not move

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40. The legislative intent can be inferred from another provision of the legislation. See text at note 51 infra.
41. 211 U.S. 127 (1908).
42. Id. at 136.
43. 18 U.S. (5 Wheat.) 374 (1820).
44. Id. at 380.
45. 136 U.S. 479 (1890).
boundaries, and *Missouri v. Kentucky*. The latter case involved Wolf Island in the Mississippi River between Missouri and Kentucky. When Kentucky was admitted as a state the main channel was between Wolf Island and Kentucky. "If the river has subsequently turned its course, and now runs east of the island, [between Wolf Island and Kentucky], the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the states, and the island does not, in consequence of this action of the water, change its owner." Nonetheless, the Court named the Mississippi River as one of the customary situations where common law rules apply. Since *Indiana v. Kentucky* relies on *Missouri v. Kentucky*, a customary situation, *Indiana v. Kentucky* was also an application of the common law rules.

In sum, the Court's four historical factors suspending the common law rules, *Texas v. Louisiana*, the original legislation, *Handly's Lessee* and *Indiana v. Kentucky*, all actually call for the application of the common law. If applied here, the common law rules would fulfill the legislative intent, follow precedent, and apply to river edge boundaries.

As shown in *Texas v. Louisiana*, the Court will look to the intent of Congress to determine whether the common law should apply. In 1791 Congress passed an act admitting Kentucky into the Union that incorporated by reference Virginia’s "Act [C]oncerning the [E]rection of the District of Kentucky into an Independent State." The seventh clause of the Virginia Act declares "that the use and navigation of river Ohio . . . shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth . . . shall be concurrent only with the States which may possess the opposite shores of the said river." A fixed line could not have been intended as the boundary. The common use and concurrent jurisdiction provisions of the Virginia Act would be frustrated if, for example, the water receded and left a sliver of Kentucky along the entire length of the boundary. Such a situation would isolate the states which possess

46. 78 U.S. (11 Wall.) 395 (1871).
47. Id. at 401.
51. Id. at xi.
the opposite shore and deprive them of the legislatively guaranteed free access to the Ohio River. The legislative intent must have been to maintain the operation of common law rules and allow for a fluid, recognizable boundary.

Applying the common law rules would have been consistent with precedent. The location of the Ohio River boundary has been litigated many times. As already discussed, the two major Supreme Court cases, Handly's Lessee and Indiana v. Kentucky, are consistent with the common law rules. Two other Supreme Court cases that addressed this issue placed the boundary at the northernly shore. In Henderson Bridge Co. v. Henderson City, the Court determined the extent to which a bridge over the Ohio River could be taxed. Justice Harlan, speaking for the unanimous Court, addressed the boundary location by saying that "it must be assumed as indisputable that the boundary of Kentucky extends to [the] low-water mark on the western and northwestern banks of the Ohio River." In Nicoulin v. O'Brien, Justice McReynolds, in a memorandum opinion affirming an illegal fishing conviction, upheld by the Kentucky Court of Appeals, stated that "[t]he territorial limits of Kentucky extend across the river to [the] low-water mark on the northernly shore."

The Court holds, without citation to authority, that because the boundary is the northernly edge of the river, rather than the thalweg, the common law rules do not apply. However, legislative intent, precedent, and other Supreme Court decisions all dictate that the common law rules must also apply to river edge boundaries. Further, three non-Ohio River Supreme Court cases have addressed the river edge boundary issue, either directly or by inference.

The first of these is Howard v. Ingersoll. In that case, the Court settled a boundary dispute involving the Georgia-Alabama border along the Chattahoochee River. After reviewing the history of the formation of the states and holding that the boundary is the west bank of the Chattahoochee, the Court discussed the boundary

52. 173 U.S. 592 (1899).
53. Id. at 613. Relying on Handly's Lessee and Indiana v. Kentucky and citing five Kentucky Court of Appeals decisions. See also Louisville and Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 at 393 (1903).
54. 248 U.S. 113 (1918).
56. 248 U.S. at 114, accord Indiana v. Kentucky, 136 U.S. 479, 519 (1890).
57. 54 U.S. (13 How.) 381 (1851).
and how to settle disputes regarding it.

When the commissioners used the words 'bank' and 'river' they did so in the popular sense of both . . . . It requires no scientific [investigation] to find or mark it out . . . . Wherever that line may be, is to be determined in each trial at law . . . , the jury being instructed by the court that the bed of the river, wherever that may be, belongs to Georgia . . . .

Thus, the Court intended that the boundary would be an observable, moving line, as opposed to a fixed line requiring the sophisticated surveying techniques which will be needed to establish the 1792 low water line.

The Court recognized the difference between a moving edge of river boundary and a fixed line boundary when it fashioned its decree in *Maryland v. West Virginia*. The Court's decree described the boundary as

"at or near the mouth of the Shenandoah River (near Harper's Ferry) and running thence with the southern bank of the North Branch of the Potomac River at low-water mark to the point where the north and south line from the Fairfax Stone crosses the said North Branch of the Potomac line and thence running northerly, as near as may be, with the Deakins or Old State line to the line of the State of Pennsylvania . . . . And they are hereby, appointed commissioners to run, locate and establish and permanently mark with suitable monuments the said Deakins or Old State line as the boundary between the States of Maryland and West Virginia . . . ."

Had the Court intended the low water line as a fixed boundary, the commissioners would have also been ordered to survey and monument the river line, not only the northerly running line.

The Court most recently addressed the edge of river problem in *Bonelli Cattle Co. v. Arizona*. Previously submerged river bottom, exposed due to the operation of Hoover Dam, was claimed by both Arizona and a private party. This private dispute bears on *Ohio v. Kentucky* because "[i]t is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors

58. Id. at 415-17 (emphasis added).
60. Id. at 582-83.
In Bonelli, Justice Marshall found that the federal common law governed the dispute, and he stated that "[s]ince a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control." The private owner's boundary moved notwithstanding Arizona's contention that the "engineering relocation of the waters of the river by artificial means" should suspend the operation of the federal common law rules. Thus, the federal common law rules operate to change the edge of river boundary even if the change is man-made. Bonelli was cited by the dissent because dams, constructed on the Ohio River to raise the water level for navigation, have moved the prevailing northerly low water line. The dissent's reasoning on this point was unanswered.

Acquiescence by Ohio was used as a basis for rejecting a claim to the middle of the river; the Court implied, with only superficial evidence and analysis, that Kentucky acquiesced to the 1792 line. "That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well." For example, the bulk of the decision in Indiana v. Kentucky analyzed substantial evidence to find that Indiana had acquiesced to Kentucky's jurisdiction over Green River Island. However, in Ohio v. Kentucky the Court mustered only three Kentucky references to show Kentucky's acquiescence to the 1792 line: a Kentucky Legislative Research Commission Bulletin, an Opinion of the Kentucky Attorney General, and a Kentucky Supreme Court case. The Legislative Research Commission's Bulletin was issued during the pendency of the middle-of-the-river claim. It addressed that issue, rather than which northerly low water line constituted the boundary. Further, the Bulletin and the Opinion of the Kentucky Attorney General

63. 414 U.S. at 326.
64. Id. at 328.
66. "[T]here are some uncontroverted facts . . . which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question." 136 U.S. at 509-10. The discussion of acquiescence runs to Id. at 518, ten pages of a fifteen page opinion. See also note 28 supra.
67. 444 U.S. at 340-41.
“are hardly authoritative pronouncements that should control [the Court’s] outcome.”68 The Court also cited the Kentucky Supreme Court decision in *Perks v. McCracken*69 to support the conclusion that Kentucky accepted the 1792 boundary.70 However, *Perks* involved the same sort of island/abandoned channel dispute that faced the Court in *Indiana v. Kentucky*.71 Therefore, *Perks* offers the Court the same support that *Indiana v. Kentucky* does, to wit—none. In contrast, Kentucky cited seventeen Kentucky cases, ten Ohio cases, five Indiana cases, an Illinois case and three lower federal court cases to support its assertion of domain to the northerly prevailing low water line.72

Unstated considerations are speculations at best; they range from the generous to the ominous. Yet, when the law clearly does not support the Court’s decision, one must look for unstated factors that could have affected the result. For example, the concern of Ohioans who were forced to obtain Kentucky licenses for river activities on or near the Ohio shore might have motivated the Court to put that part of the river, between the 1792 and prevailing low water lines, within Ohio’s jurisdiction. Or, perhaps interest in allowing Ohio to maintain sovereignty near its shores might have motivated the Court to move the boundary away from the shore. The likelihood of such magnanimous motives is remote.

On the other hand, consider the nuclear energy issue. Heated public debate, large demonstrations and substantial opposition have accompanied the construction of all nuclear power plants nowadays. Many groups will use any means available to impede their completion. Considerations regarding one such plant at Marble Hill, Indiana, could have influenced the Court’s decision. The situation at Marble Hill came to the Court’s attention shortly before it rendered the decision in *Ohio v. Kentucky*.73 A recent decision by the Atomic Safety and Licensing Appeal Board (ASLAB), involving Marble Hill’s Limited Work Authorization, hinged upon the location of the Kentucky-Indiana boundary.74 ASLAB decided

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68. 444 U.S. at 346 n.3 (Powell, J., dissenting).
69. 169 Ky. 590, 184 S.W. 891 (1916).
70. 444 U.S. at 340-41.
71. 169 Ky. at 591, 184 S.W. at 891.
that the 1792 line is the boundary.\textsuperscript{76} Section 401 of the Federal Water Pollution Control Act requires that Marble Hill's operators obtain a "certification from the State in which the discharge originates or will originate . . . ".\textsuperscript{77} ASLAB interpreted this phrase to mean that the section 401 certification must "come from the state into whose waters the effluent would be discharged."\textsuperscript{78} However, "[c]onstruction of Marble Hill is opposed by the Commonwealth of Kentucky, the City of Louisville and Jefferson County, Kentucky, and Save the Valley/Save Marble Hill, a private Indiana-based organization."\textsuperscript{79} The determination of the boundary involved many of the same considerations that were involved in \textit{Ohio v. Kentucky}; however, the compact between Indiana and Kentucky, that could not have entered the Court's consideration of \textit{Ohio v. Kentucky}, was crucial to ASLAB's decision.\textsuperscript{80} Kentucky and Indiana agreed, with the consent of Congress, to a legal description of Kentucky's land, Green River Island, which is attached to Indiana. The description went to the low water mark. ASLAB decided that the description fixed the entire Indiana-Kentucky boundary.\textsuperscript{81} However, since the difference between the Ohio-Kentucky boundary and the Indiana-Kentucky boundary "is of no possible legal consequence, the applicable principle's are the same . . . ."\textsuperscript{81} A decision in Kentucky's favor in \textit{Ohio v. Indiana} would, by implication, overrule the ASLAB decision. With ASLAB overruled, the issue of which state controlled the section 401 discharge license could be reopened. Due to Kentucky's ongoing opposition, such an action would delay the construction of Marble Hill Nuclear Generating Station.

IV. Conclusion

The Supreme Court, by exercising its original jurisdiction, has developed a body of federal common law to resolve state boundary disputes involving rivers. This body of law preserves expectations and legislative intent by relying on doctrines relating to riparian

\textsuperscript{75} Id.
\textsuperscript{77} Marble Hill Nuclear Generating Station, \textit{supra} note 74 at ¶ 30,323.02.
\textsuperscript{78} Marble Hill Nuclear Generating Station, Units 1 and 2, [1978] 1 Nuc. Reg. Rep. (CCH) ¶ 30,272 at .01.
\textsuperscript{79} Marble Hill Nuclear Generating Station, \textit{supra} note 74 at ¶ 30,323.02.
\textsuperscript{80} Id.
\textsuperscript{81} \textit{Ohio v. Kentucky}, 444 U.S. at 339.
rights. The Ohio River boundary has been the subject of much of the litigation in this body of law. The Court, in Ohio v. Kentucky, deviates from the common law by building on historical factors to fix the boundary at the 1792 northerly low water line. However, on analysis, these historical factors lack foundation. The Court ignores parts of Handly's Lessee and Indiana v. Kentucky, other river edge boundary litigation, and the legislation that established the Commonwealth of Kentucky. The supposed acquiescence of Kentucky similarly fades under scrutiny. Therefore, this ad hoc decision must have been based on some unstated practical considerations.

GEORGE A. VILA
BOOK REVIEW


Reviewed by Paul R. Joseph*

In an important new book, G. Edward White attempts, and to a large extent succeeds, to do the impossible: that is, to present a concise, readable, and yet scholarly description of the growth and shaping of tort law through the interaction of judicial decisions and the writings of academics. In seven short chapters, the author traces this growth chronologically while stopping to focus on three giants of torts, Justices Cardozo and Traynor and Professor Prosser.

The author begins by outlining the intellectual origins of modern tort doctrine. Arguing that torts, before the collapse of the writ system, had no unifying standard of liability or internal consis-

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3. Benjamin Nathan Cardozo was born in New York in 1870. A.B. 1889, A.M. 1890, Columbia University; Columbia University School of Law, 1890-92. After his admission to the New York Bar in 1891, he practiced law in New York until 1914. He served as a Justice of the Supreme Court of New York until his elevation to the New York Court of Appeals where he served as Associate Judge and later Chief Judge. Appointed Associate Justice of the United States Supreme Court in 1932, he served until 1938.

4. Roger Traynor was born in Park City, Utah, in 1900. A.B. 1923, Ph.D. 1926, J.D. 1927, University of California. Traynor served as an Instructor in Political Science and Professor of Law at the University of California, before his appointment as Associate Justice of the Supreme Court of California in 1940. He became Chief Justice in 1964, serving until 1970, when he returned to teaching law. His most recent publication is Transatlantic Reflections on Leeway and Limits of Appellate Courts, 1980 UTAH L. REV. 255.

5. William Lloyd Prosser was born in 1898. A.B. 1918, Harvard University; LL.B. 1928, University of Minnesota. After private practice in Minneapolis, Prosser served as lecturer, Assistant Professor, and Professor of Law at the University of Minnesota Law School. He also taught at the Harvard Law School, Hastings College of Law, and the University of California where he served as Dean.
tency, the author implies that perhaps none was necessary. If the panoply of independent writs, each with its own rules and exceptions did not work as badly as is popularly supposed, the author suggests another reason for the dramatic transformation of tort law in the mid-nineteenth century. Reacting to the decline of religion as a unifying force and the disintegrating quality of a rapidly expanding industrial world, academics in all fields sought more secular unifying principles to explain and define the world. In law, as in other disciplines, the answer was science and the scientific method. Led by law professors such as Langdell and others, the academics professionalized legal education while transforming torts into a unified field with negligence/fault as its central unifying principle.

In any scientific period a key goal is order, and the professor/scientists worked to create a system of principles which would explain the decided cases and shape future decisions as practitioners and judges came to rely more and more on the academics to synthesize and systematize their field. "In the age of legal science, recurrent results admitting of no doctrinal explanation were heretical. If courts could not provide an explanation, academics would invent one." To the scientists, consistency of doctrine was paramount. Principles predominated, and individual cases were seen as mere applications of more general propositions. Cases failing to apply these propositions were "wrong" according to Langdell, although later scientists were somewhat more willing to acknowledge and attempt to reconcile change in law with prior legal doctrine.

By the early twentieth century tort law had a "philosophical identity" largely suggested by academics through legal literature and through their control over the newly professionalized legal education. The academics had helped to transform the earlier writ

6. G. White, Tort Law in America (1980).
7. Id. at 8.
8. Id. at 9.
9. Id. at 5.
10. Id.
11. Id. at 21.
12. Nicholas St. John Green and Oliver Wendell Holmes, Jr., for example.
14. Id. at 40.
15. Id. at 39.
16. Id. at 50.
17. Id. at 26.
18. Id. at 28.
system, with its particularized duties of care based largely on status,\textsuperscript{19} into a unified field of law, with a fault base and a universal
duty of care,\textsuperscript{20} in answer to felt needs for a conceptual and all-
compassing theory of tort law. However, those same academics
severely limited the scope of liability under that duty through de-
vices such as assumption of risk and contributory negligence.
Based on underlying assumptions such as free will, the autonomy
of the individual, and the undesirability of government interfer-
ence in the marketplace,\textsuperscript{21} the legal scientists created a system of
tort law based on an attempt to punish blameworthy conduct
rather than to compensate individuals for injury.\textsuperscript{22} The system's
concern with creating an orderly and all-encompassing conceptual
vision through the use of scientific reasoning eventually led to its
own rigidity and dogmatism.\textsuperscript{23} “Ultimately, the values of legal sci-
ence came to be perceived as hopelessly in conflict, and the hegem-
one of the conception of law as a science crumbled.”\textsuperscript{24}

The inevitable attack against legal science proceeded from two
differing but analogous positions. Sociological jurisprudence argued
that the quality of American life was uniquely different than it had
ever been before,\textsuperscript{25} with qualities of interdependence requiring gov-
ernment intervention to cure social ills.\textsuperscript{26} The principles of the le-
gal scientists were outmoded\textsuperscript{27} because they did not take into ac-
count the work of social scientists in documenting social problems
which had to be solved.\textsuperscript{28} Objectivity in law was to be found not in
doctrinal principles, but in social realities as documented by the
empirical observations of the social scientists.\textsuperscript{29} In light of the
pressing problems and their unique character, abstract moral judg-
ments had no place.\textsuperscript{30} Legal solutions were to be judged by whether
they worked to solve the particular problems at hand,\textsuperscript{31} not by
whether they were in tune with some abstract legal principle.

\begin{itemize}
  \item 19. Id. at 41.
  \item 20. Id.
  \item 21. Id. at 60.
  \item 22. Id. at 62.
  \item 23. Id. at 37.
  \item 24. Id.
  \item 25. Id. at 66.
  \item 26. Id. at 68.
  \item 27. Id. at 67.
  \item 28. Id.
  \item 29. Id.
  \item 30. Id. at 68.
  \item 31. Id. at 66.
\end{itemize}
If the sociological school attacked legal principles because those principles upheld legal results with which they disagreed, the legal realists went further, arguing that to give importance to any legal rule was wrong per se, because legal rules did not accurately describe the legal process as it actually was. Real rules were found, not in cases, but in actual practice, including business procedures, legislative behavior, and the particular actions of judges. Realists argued that the focus of legal study should be the policy aspects of judicial decisions because these aspects influenced decisions much more than abstract principles of law. Cases were not mere embodiments of more general principles. Each case was unique in itself, testing old principles against new necessities and altering or abandoning them as required by social policy.

Tort law was, to the realist, an exercise in social engineering. Realists studied which interests were worthy of protection in relation to specific classes of litigants. This perspective led realists away from the negligence concept and towards experimentation with an expanded role for strict liability, since strict liability allowed an explicit process of balancing the interests of the litigants without resort to traditional fault principles.

Although realism was never successful in entirely blotting out earlier conceptualistic visions of tort law as propounded by the legal scientists, it managed to become by 1940 the dominant theory of legal scholars and teachers. Under relentless pressure from realists, casebooks expanded to include other types of material and the factual context in which cases were decided was stressed. A greater role for policy issues, the validation of social science material as a basis for decisions, and the increasingly diverse nature of the formerly unified torts field can all be traced to realists' critiques. A greater tendency toward concern with particular cases and

32. Id. at 71.
33. Id. at 72.
34. Id.
35. Id. at 73, 111.
36. Id. at 106.
37. Id. at 95.
38. Id. at 108-09.
39. Id. at 109.
40. Id. at 91.
41. Id. at 63.
42. Id. at 84-88.
43. Id. at 91.
an anti-universalist\textsuperscript{44} scepticism of abstract rules and principles were also products of realist jurisprudence as expounded by realist professors. As a result, the torts field became an “unwieldy, diverse, fluid subject.”\textsuperscript{45}

Realist theory was a powerful force in shaping tort law but it was never entirely dominant. If the strict, unchanging views of the legal scientists had been largely discredited,\textsuperscript{46} the impulse to conceptualize the field, to build a comprehensive system of controlling legal doctrines of general applicability, lived on among a significant sector of legal scholars, most particularly those at the Harvard Law School\textsuperscript{47} and those involved in the effort to create a restatement of the law of torts.

The scholarly battles between the two schools of legal thought were bloody. To its supporters, “prominent lawyers, judges, and law professors,”\textsuperscript{48} the restatement movement represented a return to order and clarity established through agreement of the best minds in the legal profession.\textsuperscript{49} To the realists the whole concept of a restatement of torts was reactionary,\textsuperscript{50} an effort having nothing to do with the real problems facing society.\textsuperscript{51}

Realism shattered the static and universal system of the legal scientists, but it was unable to offer its own analytical framework.\textsuperscript{52} The view that law was almost entirely shaped by economic and social conditions and that the focus of legal study should be the actions of judges rather than the theories under which they claimed to act, led to a call for detailed studies of the particular decisional patterns of individual judges. These studies were neither very influential,\textsuperscript{53} nor very helpful. If legal doctrine was meaningless, then there was no basis for using law as a guide for future action,\textsuperscript{54} and lawyers had little if anything with which to work.

Attacks on legal realism increased during the thirties and early forties. The empirical focus of realism was perceived as moral rela-
ativism which seemed more in tune with European totalitarianism than with American democracy. Critics charged that realists were "nihilists, atheists, and totalitarian sympathizers." The realists countered that legal doctrine was a mere "smoke screen," concealing the true nature of law as an "endlessly diverse, complex, and fluid" experience.

During and after the Second World War, legal scholars groped towards a new theory of tort law which would take into account the insights of the realists while retaining some doctrinal structure. Rejecting reliance on moral relativism, the new theory sought to integrate general principles with the actual results in particular cases, while grounding legal analysis on emerging philosophical premises.

While retaining a pluralistic, interdependent, humanitarian view of American society, and while postulating a need for government action to solve some social problems, the new consensus scholars saw rationality and objectivity as central values of American law. They also required decision makers, such as judges, to justify their actions by an appeal to neutral principles. If decisions should not be made on a purely "case by case" basis, it was also true that policy, equities and social concerns were factors encouraging the shaping of particular legal doctrines. Tort doctrines were constantly evolving and were not static as the legal scientists believed.

In William Prosser the consensus scholars found a voice that could fuse the realists' views with those of the doctrinal school. In Prosser's writings, torts was portrayed as a series of differing doctrines each having a general formula or principle. The principle was, however, acknowledged to be an oversimplified explanation. The actual doctrine, as expressed in the aggregate of the cases, was more diverse than the rule suggested. Rules were flexible enough to allow for unique situations; at the same time they were rigid

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55. Id. at 139.
56. Id.
57. Id.
58. Id. at 143.
59. Id. at 145.
60. Id. at 141.
61. Id. at 143.
62. Id. at 151.
63. Id. at 157.
enough to guide lawyers and make legal prediction possible.\textsuperscript{64} Prosser's approach was rather to create pseudo-rules, classifications that purported to summarize the "state of the law" in a given area of Torts, but in fact were simply devices that aided in summary and synthesis of a disparate mass of material. Unlike the classifications attempted by legal scientists, which were intended to function as working doctrinal principles, Prosser's classifications were only his efforts to wrest some surface intelligibility from the chaos of cases spread out before him.\textsuperscript{65}

If legal rules were illogical, Prosser said so.\textsuperscript{66} Not content to leave it at that, he used policy perspectives and interest-balancing to suggest better rules. If policy was essential to understanding tort law, legal doctrine was crucial too.\textsuperscript{67} Prosser worked to expand strict liability, and he argued for the recognition of privacy interests and the tort of intentional infliction of emotional distress.\textsuperscript{68} At the same time, he sought to control these expansions. The consensus view was that torts was capable of doctrinal analysis, that doctrines changed constantly but incrementally, and that radical modifications of tort doctrine should be shaped, controlled and contained by the analytical work of the law professors.\textsuperscript{69}

Prosser's gift as a synthesizer gave him the ability to create doctrine.\textsuperscript{70} As the author of the most widely used treatise and casebook on torts, as a constant scholar, and as reporter for Restatement of Torts Second, Prosser's views gained wide acceptance. By his death in 1972, he was the dominant force in American tort law.\textsuperscript{71} Even as consensus thought solidified its hold on American tort law, however, social and political forces combined to begin a process which might result in undermining its preeminent position.

The nineteen sixties and seventies were times of great discontinuity in the United States. Vietnam and Watergate, among other factors, helped to destroy previously held values and faith in the institutions of American life. Just as such pressures in the late nineteenth century led scholars to establish conceptualistic visions of law to provide a certainty and stability lacking in the psyche of

\textsuperscript{64} Id.
\textsuperscript{65} Id. at 161.
\textsuperscript{66} Id. at 162.
\textsuperscript{67} Id. at 163.
\textsuperscript{68} Id. at 169-76.
\textsuperscript{69} Id. at 178.
\textsuperscript{70} Id. at 176.
\textsuperscript{71} Id. at 156, 176.
the times, so similar factors led late twentieth century torts scholars to attempt to conceptualize torts around universal theoretical perspective. 72

The author notes that this "neo-conceptualism" has not yet adopted a particular theory of torts. Rather, the unifying features of neo-conceptualistic writing include a turning away from the narrowly focused, dispassionate, closely reasoned scholarship which typified the fifties. Instead these new scholars produce broader and more abstract articles, often based explicitly on personal theoretical perspectives of tort law and often embodying data from fields as diverse as economics and the behavioral sciences. 73 Recent casebooks in the field have shown some tendency to concern themselves with wide-ranging speculation on the purpose of tort law and to compare traditional tort remedies against alternatives such as no-fault insurance. 74

Two schools of debate are evident. 75 One sees torts essentially as a system for compensating injury and spreading the risks of injury throughout society. Professor Calabresi, arguing that the party who can avoid the injury most cheaply should bear the cost of injury, 76 belongs to this faction. The other school is more concerned with corrective justice and views tort law as primarily a private matter between the litigants, rather than a method of adjusting wide social imbalances. 77 Professor Fletcher argues that the party subjecting the other to the greatest risk of injury should pay. 78 Professor Epstein suggests that tort law should be used to protect individual liberty and private property. He attempts to reduce tort theory to a system of pleadings and presumptions. 79 Although differing with each other, the modern scholars share a desire to impose universal theories over the entire body of tort law.

Make no mistake about it, this is a book with a point of view. Although confined explicitly to the introduction and final chapter,

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72. The author does not explain the reasons for the growth of neo-conceptualism, but this reviewer assumes that parallel historical forces tended to produce a conceptualistic impulse in both the nineteenth and twentieth centuries.
73. G. WHITE, TORT LAW IN AMERICA 215-16 (1980).
74. Id. The author admits that the amount of space given over to such speculation is, at times, slight. Id. at 217.
75. Id. at 218.
76. Id. at 221.
77. Id. at 224.
78. Id.
79. Id. at 226.
the author's viewpoint is implicit throughout the book. White is essentially hostile to the involvement of academics in the development of law. While saying that "[t]here is nothing inherently invidious about academics acting as lawmakers," he argues that academics are "a small and self-reinforcing class of persons," who are evaluated only by their peers and who are not accountable for their actions to the wider world. "The expectations of the public about lawmaking can hardly be said to include the idea that their lives will be affected by some law professor's theory of tort liability."

What the author fails to acknowledge is that law professors do not make legal decisions. Instead, they propose solutions to legal problems and submit them to the marketplace of ideas to be adopted or disregarded by judges and legislators who are accountable to society generally. The system, in fact, may be one of the best balanced to have been devised. A group of skilled professionals are encouraged to speculate, investigate, theorize and propose solutions to problems, but are given no power to implement their own ideas. Experts in other fields, such as psychology and education, may have no such check on their experimentation.

The author would probably disagree. According to his view law professors at a few "elite" law schools, in a symbiotic relationship with a few judges on highly visible and influential courts, have had "an influence disproportionate" to their numbers. Further, the author believes that the influence of these elite groups is related to "the institutional context in which they have appeared," rather than "to the inherent soundness of the ideas."

If true, such views would be alarming and would explain the author's resistance to academic involvement in the formulation of legal doctrine. No ideas should be adopted from any source unless the ideas are judged to be worthy by those adopting them. The author's presentation on this point, however, is not fully convincing. While it is true that the ideas of scholars at the most prestigious law schools have carried great weight, that fact is susceptible

80. Id. at 241.
81. Id. at 242.
82. Id.
83. Id. at 243.
84. Id. at xii.
85. Id. at xiii.
86. Id.
to many explanations. One of the most obvious explanations is that such institutions have been able to attract many of the best minds in the academic world. Perhaps these scholars articulate views which are in tune with historical trends running through society at large and which are perceived to be valuable. It is unlikely that the entire lawmaking establishment is swept away by wild and idiosyncratic theories of law professors which would not be proposed by anyone else. This is an exaggeration of the power of law teachers and an undervaluation of the ability of lawmakers to independently evaluate legal ideas.

The author seems to overstate the degree to which law professors shape tort law in response to their own desire for uniformity and underestimates the extent to which the ideas of academics are responsive to the generally perceived needs of the time. The author seems to suggest, for example, that the academics played a large part in destroying the writ system and establishing the fault principle when such actions were unnecessary. To support this proposition the author rejects, without sufficient discussion, the view that the writ system was breaking down, causing widespread dissatisfaction and that economic explanations, such as the desire to protect infant industry from the sweeping liability which would have been imposed under the trespass writ, played a major role in the growth of modern negligence.

The author paints a picture of a healthy and diverse writ system which neither needed nor had any general standards of liability. By focusing heavily on Brown v. Kendall,\textsuperscript{87} the author seems to suggest that concern with the theoretical underpinnings of tort law grew full blown from the minds of academics in the mid-nineteenth century. Such discussion may actually have begun much earlier.

The Thorns Case\textsuperscript{88} is an early case in which a clash of philosophical theories is found. Defendant trimmed his hedge, causing some cut thorns to fall onto the property of his neighbor. Defendant retrieved the thorns and the plaintiff, a neighbor, sued in trespass.\textsuperscript{89}

Defendant, through his counsel, argued that an action in tres-

\textsuperscript{87} 60 Mass. (6 Cush.) 292 (1860).
\textsuperscript{88} Y. B. Mich. 6 Edw. 4, f. 7, pl. 18 (1466), reprinted in C. \textsc{Gregory}, H. \textsc{Kalven} Jr., and R. \textsc{Epstein}, \textsc{Cases and Materials on Torts} 48 (3d ed. 1977). Citations in this review are to the latter source [hereinafter cited as \textsc{Gregory, Kalven, and Epstein}].
\textsuperscript{89} \textsc{Gregory, Kalven, and Epstein} at 48.
pass would not lie since the damage was caused against his will.\textsuperscript{90} His position was that defendant behaved lawfully in cutting his own hedge and that gravity, rather than any fault on the part of the defendant, caused the thorns to fall. While admitting causation and damage to plaintiff, the defendant argued implicitly for a fault-based theory of liability.

Plaintiff's counsel argued the opposite position and the judges agreed. Judge Littleton suggested that liability for trespass was not premised on fault but on the desire to compensate the victim for the injury he had suffered. "If a man suffers damage, it is right that he be recompensed."\textsuperscript{91} Under Littleton's view, the essence of the case was proof that defendant caused the damage when he had no right to do so. It was not relevant that defendant did not want to cause the damage or, by implication, that he had taken reasonable measures to avoid causing it.

While agreeing with the result, Chief Judge Choke, in dicta, seemed to suggest a modification to Littleton's absolute liability position, by suggesting that if defendant had done "all that was in his power to keep them [the thorns] out,"\textsuperscript{92} then perhaps defendant would not be liable. Although Choke's standard would be much more stringent than modern negligence, the suggestion remains that the efforts of defendant to avoid the injury to plaintiff should not be entirely irrelevant. This standard seems to imply a very broad fault base to the action. The act of causing the injury was enough to indicate blameworthiness, but Chief Judge Choke's standard would make that a presumption which could be rebutted.

The philosophical dispute was muffled under arguments about the technicalities of pleadings, and so it was not fully illuminated. Yet, it is impossible to read the Thorns Case without hearing ancient echoes of modern philosophical debates. It seems that, even in 1466, judges and lawyers attempted to place particular cases within the context of general philosophical theories. Such practices are not as recent as a reader of this book might conclude.

The author's basic position is that "[t]orts is not a unified subject but a complex of diverse wrongs whose policy implications point in different directions."\textsuperscript{93} Academics are seen, by the author, as attempting to conceptualize and unify a field which cannot and

\begin{itemize}
  \item\textsuperscript{90} Id. at 49.
  \item\textsuperscript{91} Id. at 50.
  \item\textsuperscript{92} Id.
  \item\textsuperscript{93} G. WHITE, TORT LAW IN AMERICA 233 (1980).
\end{itemize}
should not be unified. The author says that torts continues to be disorderly despite the efforts of the professors to keep it orderly.94

This reviewer agrees with the author that torts can never be made finally and forever orderly. Torts is an area of law which lends itself to new ideas and to the battles of changing public policy. History, social conditions, individual equities and social policies, all play a part in tort decisions, and they should do so. On the other hand, order, stability and predictability are important goals in law. Decisions should attempt to be logical and rational and litigants should be treated evenhandedly. The predictive and planning functions of law require some generalized doctrinal propositions, even if they can never be all-inclusive.

This reviewer believes that law professors have been equally responsible for pointing out the unique forces at work in particular cases and for creating conceptual order and unity, and more importantly, both functions are necessary.

Defining tort doctrine is, to some extent, always a process of building in sand, and all too soon the structure will return to the earth. This does not mean, however, that the building process is wrong or even futile. Each of the schools of legal thought have contributed some of the insights needed to understand the tort process at work.

The excitement of torts is that it is never static, that no attempt to understand it is ever final. No theoretical understanding is ever complete. The efforts of torts scholars have, in this reviewer's opinion, shown a pattern of expansion and contraction, of building up and tearing down systems in response to changing needs. In this continuing process, academics have been of continual help.

While this reviewer is critical of some of the author's views, they are minor in the total scheme of the book. The discussions of judges, professors and evolving tort theories are fascinating and, with the cautions expressed in this review, the book is recommended to all those who are interested in the growth and change of that most interesting area of the law, torts.

94. Id. at 243.