Leader Groups in American Law

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If one surveys the major legal systems of the world, he finds that each has been molded by a particular group of leaders. Private gentlemen of leisure and, later on, high-ranking officers of the administration left their imprint on the law of ancient Rome. Theologians like Islamic mullahs, Jewish rabbis, and Hindu Brahmins shaped the sacred laws of their secular communities. The law of England was made by the judges of the royal courts. European continental laws received their characteristic features through the work of learned scholars, from the days of Irnerius down to the Pandectists of the nineteenth century. Max Weber, who traced these influences on a worldwide scale, called these shapers of the law the Rechtshonoratioren (honoratiore of the law). In his inquiry into the roles played by judges and scholars in structuring the legal systems of England, France, and Germany, John P. Dawson speaks of the Oracles of the Law. Such unfamiliar terms may be useful to describe so novel a concept. A common term like “leader groups” may easily evoke erroneous ideas. But I still prefer it, and the meaning with which it is used here will, I hope, emerge from the following discussion of familiar facts of American history.

Heinrich Triepel in Germany and Karl N. Llewellyn and Gerhard O. W. Mueller in this country have shown that characteristic styles exist in legal systems as well as in art and literature. One would expect such differing patterns since creation, application, and development of law partake of the character of art. The style by which the legal art is characterized depends, just as in painting or in poetry, on the identity

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4 Llewellyn, On the Good, the True, the Beautiful in Law, 9 U. Chi. L. Rev. 224 (1941).
of the artists. The words of Rudolph Wiethölter recently reminded me of the diversity of legal styles: "We do not have to harbor any fear that members of the legal system will bring about a change of the social order. Quite the contrary, society is being stabilized and the status quo is maintained primarily by means of the law and the lawyers."  

As to Germany, this proposition may contain a grain of truth. For a considerable period it also would have been applicable to England. But it certainly does not apply to the United States or, to speak more correctly, to the present third phase of the legal development of the United States. In that development each of three successive phases is characterized by the leadership of a particular branch of the legal profession. The impact of these groups is shown so clearly that it provides a striking illustration of the general role of legal leader groups.

I

The first phase of the legal development of the United States extends approximately to the Civil War. During this period the leading branch of the profession was the same as it had been in England, namely the judiciary. The law that was created by the lordly judges at Westminster was meant to serve the needs of the big landowners, of big business, and of the City of London. Until recently the common law of England had little interest in the needs of little people. Access to the administration of justice was impeded by the high cost. The spirit of the common law was conservative; the judges saw themselves as representatives of what has now come contemptuously to be called the Establishment.

Did any Establishment exist in the early period of the United States? It certainly did in the South where economic, political, and social power lay with the slave-owning planters of cotton and tobacco. Perhaps one could also find an Establishment in New York, Philadelphia, or Boston where a commercial community had begun to play an economically and politically significant role. However, the North and even more the Western frontier, as they continuously increased in population density and prosperity, were wide open geographically and socially. The society in these regions fluctuated and vacillated between the anarchic inclinations of the adventurers and the desire for a fixed order of those settlers of the cities and farms who had attained prosperity.

Generally, American society was colorful, tumultuous, anti-authoritarian, and passionately adverse to privileges of birth or status. This social climate was reflected in the spirit of the legal profession and consequently in that of the bench, the major part of which emerged

through popular election. Only reluctantly can one apply the term "jurist" or even "lawyer" to the large and heterogenous fold of the bench and bar in the period around 1840. The major part of its members were craftsmen of legal practice, and their training was that of craftsmen. The typical lawyer began his career as an apprentice in the office of an attorney, was used as a messenger boy, clerk, or office helper, watched the "master" in court, and copied more or less established forms of contracts, conveyances, and wills. In addition, he perhaps read the four volumes of the American edition of Blackstone's Commentaries. When he felt ready for the bar examination, which was not overly difficult, he made a first try and as many repeated efforts as necessary. After admission to the bar he practiced more or less ably, engaged in politics, and, once the necessary contacts with influential persons had been established, he ran for political or judicial office.

The law and its administration underwent a transformation from an esoteric art into a popular craft. But the astonishing fact is that the law did not become chaotic. Continuity with the common law of England was preserved even though the law had to be adapted to the needs of a rapidly developing country of different geographic, political, and social conditions. A great majority of the judges combined the technique of the common law, which they had acquired through practical observation and training, with the fine finger-tip sense for the needs of a given situation which they had developed through experience in political life. In addition, the members of the bar and the bench also comprised quite a few men who had received solid legal training in England and who, in one of the growing number of American colleges, had acquired the humanistic education that was required of the upper classes. John Marshall, Joseph Story, Lemuel Shaw, Roger Taney, Daniel Webster, and Rufus Choate are just a few outstanding examples. Such persons attained leadership through their intellectual superiority, through their ability clearly to express their thoughts in cultured English, and through their knowledge of the world, including the legal culture of the European continent.

The confluence of these various elements produced a judge-made law that often widely differed from the English model. The command of the binding effect of precedent was taken less seriously than in England, and legal thinking did not move exclusively along the channels of strict case analogy. Philosophical and technical concepts, at times of broad generality, came to be used. Decisions, especially innovative ones, tended to be justified by reference to principles of natural law or political theory. Both branches of the common law, the English and the American, were made essentially by judges. However, Amer-
ican judges were different from their English counterparts, and consequently the law that they created assumed a style which diverged from that of the law of England.

II

With the victory of the increasingly industrialized North over the capitalist-agrarian South, American legal life entered the second phase, in which leadership shifted to a new group. As the land was opened and the growth of industry accelerated, the high financiers and industrialists became progressively more powerful. Positions on the bench became less attractive. Men of vitality and creative energy, attracted by the economy, devoted themselves to developing the resources of the country. For the legal mind of outstanding ability it became more attractive and rewarding to place himself at the service of business, and thus to occupy a leading position in the economy. Candidacy for judicial office was left to mediocre lawyers who were dependent on political bosses.

This change in the type of leaders influenced the character and operation of the legal system in two ways. Legal thinking, which until this time had been highly dynamic and creative, became more rigid. The law became conservative. Its style as well as its content was altered in the process. In a pattern similar to that which simultaneously evolved in England, precedents came no longer to be treated as evaluations of concrete sets of facts. Weight was given to those conceptual formulations that found expression in judicial opinions. The conceptualistic style of thinking of the German Pandectists had found its way into England through the Hanoverian university of Göttingen. American legal thought presented that very same trend toward conceptualism or, to use Weber’s terminology, toward formal-rational thinking. The penetration of this method into American law at the turn of the century confirms Weber’s thesis that formal-rational thinking is especially compatible with the economic system of capitalism. It results in a high degree of stability of judicial practice, in predictability of judicial decisions, and consequently in the possibility of long-range private economic planning of credit and investment.

The judges were helpful to capitalist employers not only in the style of their thinking but also in the contents with which they filled the legal system. Such active support was consistent with the temper prevailing among the American people. To them the country presented unlimited possibilities of space, of natural resources, and of chances, through personal and entrepreneurial initiative, rapidly to obtain unlimited wealth, or equally rapidly to lose it. Open the door
to the able, and woe to the unfortunate. He who was rolled over by
the wave was lost. There was no room for a policy of social security or
of help for the weak. The demand was for freedom to build up the
country through courageous enterprise, and the judges answered that
demand. John Roche has shown how well the content of the legal sys-
tem corresponded to this trend of the times. The leading position in
the legal profession was occupied not by the judges but by the legal
advisors of industry and finance who molded the law, both in content
and form. Although from his vantage point as a French comparatist,
Edouard Lambert believed that the period was characterized by the
government of judges, in fact it was characterized by the government
of general counsel.

But the transformation of the method, the change from material-
rational to formal-rational thinking, was also connected with the rise
of a new group of co-leaders of the law, the academic teachers and
scholars—the professors. Through them American law has been im-
pregnated with traits which are well known in the classical professorial
law of the European continent, especially Germany. They developed
a trend toward clear concepts, consistent definitions, and systematic ar-
rangement. The growth of the professorial influence in the United
States is partly explained by the same factor that gave the continental
European law its character of a book law, a professorial law. In the
United States, as in eighteenth and nineteenth century Europe, an
area of uniform culture has been split into a multitude of territories,
each with its own law. And as in Europe, there has existed no superior
court with the power to bring these separate legal systems into uni-
formity.

The task of preserving the basic unity of American law is served by
such organizations as the National Conference of Commissioners on
Uniform State Laws and the American Law Institute, and it is assisted
by the personal contacts arising from the multitude of meetings of the
American Bar Association. But the danger of American law being split
up into fifty or more different compartments is being overcome more
effectively by the university law schools and their professors. Until far
into the nineteenth century the English system of apprenticeship
training was the normal system of American legal education. But, build-
ing upon foundations laid in the eighteenth century, universities be-
gan the task of systematic legal education in the nineteenth century.
Today, although some remnants of the apprentice system persist, and

7 Roche, Civil Liberty in the Age of Enterprise, 31 U. Chi. L. Rev. 103 (1963); Roche,
8 E. Lambert, Le Gouvernement Des Juges (1921).
part-time study at night school is not uncommon, the normal course of legal studies is attendance at a university law school. In many university law schools the students are drawn from the school's own geographic area, and the local law plays a major role in the curriculum. But nowhere is it taught exclusively. And what is taught in those great national law schools, the students of which are drawn from all parts of the nation? An attempt to teach the law of every jurisdiction not only would be impossible, it would be sheer nonsense. What must be cultivated is American law, which is a law that, as such, is in effect everywhere and nowhere. The curriculum necessarily must concentrate on those elements which are common to the laws of all the states. That means concentration on the common law tradition—on the principles and, above all, the method of common law thinking. In stressing these factors, present-day American legal education resembles European legal education of the eighteenth century and German legal education of the nineteenth.

For counsel and guidance the practitioners of the local courts look to the legal scholars. These scholars are united in a nationwide organization; many of them move from state to state. For all of them American law constitutes the subject matter of their scholarly and teaching activities. Because the professors are not only the teachers of the practicing branch of the legal profession but also the guides and advisors, American law, as actually practiced, has begun to assume some of the traits of a professorial law. It has tended toward systematization and occasionally toward creation of concepts of high abstraction. In these respects American law has acquired a certain resemblance to continental European legal systems.

The new professorial features have found significant expression in those comprehensive treatises, such as Williston on Contracts, Wigmore on Evidence, the works of Scott and Bogert on Trusts, and Davis on Administrative Law, in which American scholars, much in the manner of their continental European brethren, have presented major branches of the law. The new trend culminated in the American Law Institute's Restatement of the Law which attempted to distill the "true" common law out of the enormous mass of precedents and to present it in the manner of a systematically arranged code. In this gigantic enterprise it was natural that professors played the leading role. If the Restatement had achieved the effect it was hoped it would achieve, American law would have approached professorial law of European style. But the success has been limited. The practitioners, accustomed to the traditions of case law, were unwilling fully to submit to the new style. But the Restatement exists, and it has made an impact on the courts.
over, the large number of participating scholars and practitioners were strongly stimulated and influenced through the very process of its creation.

American law professors thus have become influential leaders of the law. In certain respects this influence has had consequences similar to those which professorial influence has had in Europe. However, in the United States the professorial influence has made itself felt in another direction, and this circumstance is due to the transformation undergone by the American legal scholars.

III

The transformation of the attitudes of the legal scholars coincides with the transformation of the intellectual and political climate of the country. Conservative laissez faire is being replaced by a "liberal" social policy of active governmental interference in favor of groups which, under the system of laissez faire, had obtained but an unsatisfactory share of the affluence of the nation. The workers were the first group to obtain such attention, then the ethnic minorities, especially the Negroes, finally the "poor," whoever they may be.

The country was shaken profoundly by the Great Depression of 1929, which shattered the faith in the irresistible force of automatic progress. In Franklin D. Roosevelt's New Deal, the government intervened in the economic life of the nation in order to reestablish the shaken economy. Prior to this time, social scientists had propounded the idea that social reforms were necessary and that they had to be carried out through active governmental intervention. With the advent of the New Deal the implementation of this idea became politically feasible.

The legislative bodies appeared, at first, to be the natural carriers of the new policy. But two kinds of obstacles stood in the way. First, legislators inclined to proceed with social reforms met with the resistance of conservative judges who frustrated essential parts of social reform by declaring the pertinent laws unconstitutional. This judicial resistance was eventually overcome. But the second obstacle remained; in many cases legislatures were disinclined to initiate social reforms, even when such reforms were politically inevitable. For example, although the legislatures in general were willing to assist labor, Southern legislatures were unwilling to repeal racially discriminatory laws, even if such repeal was made necessary by the impact upon the United States of postwar world opinion.

Something had to be done and, since no one else was willing or able to do what had become inevitable, the courts had to step in to fill the
gap. The Supreme Court of the United States made the first strides, which were followed by the lower federal courts and ultimately by the state courts. The judicial tendency to give serious consideration to political values reemerged, and its reemergence was facilitated by the case law tradition. Judges working within the framework of case law must constantly search for analogies between the case at bar and the existing precedents. During the earlier part of the twentieth century the analogies were widely found in similarities of an abstract and conceptual character. But quite easily, or one might even say naturally, analogies may be discovered in the similarity of ideological value judgments. This method of legal reasoning had never been lost in American case law, even though it was temporarily pushed into the background. It became dominant again when it began to correspond to the ideas of the new legal leaders, the professors.

The last forty years have seen a dramatic rise of the professorial influence in the United States. It was strengthened when law teachers like Rutledge, Douglas, Frankfurter, Schaefer, O'Connell, and Traynor were called or elected to high judicial positions. At the same time the new leader group also became potent in legislation and administration. Professors began sitting on the committees charged with the preparation or reform of legislation, and when a professor sits on a committee he is likely to exercise a leading influence. In the administration as well as in government agencies, professors were called to policy-making positions which they would occupy for a number of years until they returned to their universities or became business lawyers.

The new professorial influence took a direction different from that which professors had exercised in the preceding phases of American law. This change was caused by the transformation that occurred in the ideology and the methods of legal learning, and that transformation was, in turn, caused by the general change in the ideologies dominant in the nation. In addition, two special factors of American legal education explain the emergence of professors as protagonists of reform rather than defenders of the status quo. The first is the invention of a new method of instruction. Under the case method, the law is not presented through academic lectures which would require systematic organization and conceptual fixation. Instead, the opinions of appellate courts are discussed and subjected to trenchant critique. In this process one is not satisfied with conceptual analysis. Inevitably, one begins to search for the policy reasons by which the judges were moved, and one seeks to discover the ways in which life is actually being affected by the work of the courts. One learns to read between the lines, to look at the case as an attempt to resolve a conflict between divergent interests of
different groups. One tries to discover the reason why a judge has favored one group over another, or the manner in which he has sought to work out a compromise between them. One tries to predict what influence the decision is likely to have on economic or social reality. One learns that voluntaristic elements stand behind the alleged compulsion of the conceptualistic formulae—in other words, that judges have power. Thus comes the realization that judges, through their decisions, can influence the course of social life, can restructure society, can be social engineers.

The second factor of American legal education which explains the active role of professors in social reform is the interaction between American legal learning and the social sciences, which had been growing vigorously in the United States. This development first found expression in the sociological jurisprudence advocated by Roscoe Pound, and then, in a more radical way, in the realist movement of the 1930’s. The interaction resulted from the admission practices of the leading law schools, which all began to require attendance at a college as a necessary preliminary to admission. In all colleges social studies became a necessary part of the curriculum. The familiarity with social science consequently acquired was carried over in law school into the critical discussion of cases. It was exercised in the classroom as well as in the study of the scholar. Integration of the social sciences with legal learning was vociferously demanded. Social scientists joined law school faculties. Teamwork by representatives of the two branches of learning was at times vigorously pursued. As social scientists worked toward objective insight into social reality, they discovered that the American Dream had not been as fully achieved as the public was inclined to believe. Sizable groups of the population had not reached full participation in the achievements of the Century of Progress. This realization caused many social scientists to become political “liberals”—advocates of social reform through government action. And for the representatives of the social science of law, the courtroom became the vortex of policy formulation.

As a result of the case method of legal education and the integration of law and social science, in the present third phase of American legal development the judges are more in need of professorial guidance than ever before. The case method bestows a peculiar character upon the work of the American legal scholar, namely an awareness that judging, especially appellate judging, involves creation of law. This awareness accounts for his primary interest in the possibilities of settling social conflicts and in thus establishing the good society upon the democratic pattern. Accordingly, the legal scholar devotes himself to the
monographic investigation of relationships between law and life. His research is legal fact research in which social science methods are used extensively. This kind of research cannot be performed by busy judges, who in their daily work have to deal with a great variety of problems. It requires the attention of specialists who have the time to become experts—in other words, the professors. American law consequently tends to become a professorial law, but a professorial law that differs widely from the European law that existed in the heyday of European professorial influence.

**Conclusion**

One who tries to understand the American law of today must know who its leaders are, by what ideas and ideals they are inspired, and in what ways they exercise their influence. What applies to the American law of the present also applies to the past phases of its development. Each of these periods had its own kind of leaders and consequently its own peculiar character. Understanding these facts and relationships opens up awareness of essential features of legal history. It also opens up awareness of essential characteristics of legal orders of different countries.

Comparative law can no longer be carried on in the method of comparing conceptual elements. Its method can only be functional. The comparatist must become familiar with the problems of social life and then must investigate the tools by which the world's different legal orders seek to solve these problems. He will also be interested in the results achieved with the various tools. He has come to recognize that law is not an autonomous phenomenon capable of being investigated in isolation from other social phenomena. He knows that law, with all its rules and institutions, is an aspect of social life, that it must be studied in its relationship to all the other aspects of a society's cultural climate. Particularly important is an understanding of the ideologies with which it is imbued. The task of the comparatist is to develop his feel for these relationships, to discover and to describe them, to disentangle the strands of the seamless web of social relationships. This arduous task is facilitated if, in the study of a particular culture, one interposes between the law and society the human beings who are the mediators between them. Of course, the leaders of the law are themselves determined by the structure of the society in question. Systematic observation of leader groups can thus be the bridge from which one can discover the relationship between a society's cultural climate and its legal order.
Brown v. Board of Education\(^1\) stands for the proposition that the equal protection clause prohibits the operation of a "dual school system" and requires the conversion of that system into a "unitary nonracial school system." Under a dual system, students are assigned to schools on the basis of their race in order to segregate them. That is clearly impermissible. But what is a permissible basis for assigning students to schools under a "unitary nonracial school system'? This seems to be the central riddle of the law of school desegregation.

There is one easy answer to this question: Under a "unitary nonracial school system" students may be assigned to schools on the basis of any criterion other than race. But there is an understandable reluctance to accept this answer. This stems from the fact that even if some seemingly innocent criterion is substituted for race as the basis for assignment, virtually the same segregated patterns of student attendance that existed under the dual system might result—whites in one set of schools and blacks in another. Moreover, there are reasons to be concerned with this result, even assuming race is not the basis for assignment. The concern might be predicated on a fear of "evasion"—if the school board is allowed to use any criterion other than race, it might be able to accomplish the same thing as it did under the dual school system. The concern with the result might also be based on the view that a segregated student attendance pattern alone—without regard to the basis for assignment—gives rise to an inequality. The segregation might stigmatize the blacks, deprive them of educationally significant contacts with the socially and economically dominant group, and reduce the share of resources allocated to black schools simply because they are attended only by members of the minority group.

But, of course, the picture is not all one-sided. There are several countervailing factors that have the effect of diluting this concern

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\(^{1}\) 347 U.S. 483 (1954); 349 U.S. 294 (1955).
with the mere result—the segregated pattern of student attendance. One is the uncertainty surrounding the central empirical proposition that a segregated pattern of student attendance itself leads to inferior education for blacks. Another is the price of a remedial order eliminating the segregated school pattern. Such an order would probably divert financial resources because of the expense of transportation and frustrate the intense associational desires of large parts of the community. A court aware of these costs is likely to feel a need to justify its action in terms that have the quality of a moral imperative. A justification couched in terms of the wrongness of excluding individuals from a school because of their race—the classic concept of racial discrimination—certainly has that flavor. But one cast primarily in terms of the alleged inferiority of racially homogeneous schools does not.

These conflicting considerations account for the uncertain nature of the law of school desegregation. The controversy has in large part been over two approaches—one that forbids only the use of the racial criterion as the basis of assignment (sometimes referred to as a de jure approach), and the other that focuses on the result, the segregated patterns themselves (sometimes referred to as a de facto approach). It is the latter approach which presents the greatest challenge to the school segregation of the North, for the assumption is that students in the North are assigned to schools, not on the basis of race, but instead on the basis of a seemingly innocent criterion—geographic proximity. The controversy between these two approaches is far from resolved, but there has been a historical trend. I would like to suggest that the trend of school desegregation doctrine has been one in which the courts have rejected an approach that forbids only the use of race and have moved in the direction of the result-oriented approach.

I

The first significant development in Supreme Court doctrine occurred in 1968 in *Green v. New Kent County School Board.* There the criterion for student assignment was individual choice. Under the Board's plan, no student was assigned to a school on the basis of his race. Instead, all students, black and white, were assigned on the basis of their own choice. The result was that some blacks attended the formerly all-white school, most blacks remained in the black school, and no whites attended the black school. The Court declared that in the school system before it, freedom-of-choice was an impermissible

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2 These issues are surveyed in more detail in an earlier article of mine, *Racial Imbalance in the Public Schools: the Constitutional Concepts,* 78 Harv. L. Rev. 564 (1965).

basis for assigning students to schools. The freedom-of-choice plan, the Court concluded, had failed to "work." It had failed to produce a "unitary nonracial school system"—a system, so the Court said, in which there are not black schools and white schools, but just schools.

Despite the captivating quality of these phrases, they do not indicate the basis for invalidating the choice plan. The Court said that it was not ruling freedom-of-choice plans unacceptable in all circumstances, but it failed to identify the particular circumstances that rendered the New Kent County plan unacceptable. The Court carefully avoided resting its decision on the view that the result was the product of threats or that procedural irregularities of the plan interfered with the exercise of choice. However, the Court did not say that a student assignment plan would be deemed to "work" only when it produces an integrated pattern of student attendance—when it eliminates, to the extent possible, the all-black school. The message that emerges from Green is a negative one—that a school board does not fulfill its duty to convert to a unitary system by substituting for a racial criterion one that is innocent on its face. In effect, the Court rejected the simple formula that reduced the equal protection clause to a prohibition against the use of race as a basis of assignment and thereby permitted the use of any other criterion. In 1968 this was a considerable achievement.

Further movement in this direction occurred this past term when in Swann v. Charlotte-Mecklenburg Board of Education the Supreme Court once again considered the adequacy of student assignment plans. The Court reaffirmed Green's rejection of the view that only the use of race is forbidden but took four additional steps. First, the seemingly innocent criterion held inadequate in Charlotte-Mecklenburg was not the freedom-of-choice criterion of Green but one more common in the North—assigning students to the schools nearest their homes. This holding was not premised on a finding that the proposed geographic zones were "gerrymandered" in the Gomillion v. Lightfoot sense. Instead, Charlotte-Mecklenburg holds that even if geographic proximity, not race, were the basis for the zones and thus for assignments, the Board's duty to convert to a "unitary nonracial school system" would not be satisfied.

Why is the use of this seemingly innocent criterion—geographic proximity—impermissible? The Court did not answer this question merely by pointing to the resulting segregated pattern of student atten-

dance. The existence of this segregation was an important factor in its analysis, but the Court added another ingredient. It sought to show that the Board of Education was to some degree responsible for the segregation, thereby making it "state-imposed segregation." For this purpose, it focused attention on the Board's past wrongdoing. The Court saw a causal connection between the Board's past discrimination and present segregation, and on the basis of this connection attributed responsibility to the Board for the segregation.

Two types of connections are suggested in the opinion: (1) The past discriminatory conduct of a school board might have contributed to the creation and maintenance of segregated residential patterns which, when coupled with the present use of geographic proximity as the basis for assignment, produce segregated schools. The assumption is that, under the dual system, schools are racially designated as "white" or "black" and are located in different geographic areas, and that in the past racial groups chose to live near "their" particular schools. That choice might have been motivated by the desire of families to live close to the schools which their children attended, or it might have reflected the belief that the racial designation of a school also racially designated the residential area. (2) Prior decisions by a school board regarding the location and size of schools might in part explain why assigning students to the schools nearest their homes will result in racially homogeneous schools. Under the dual school system, school sites were selected and the student capacity of schools determined with a view toward serving students of only one race. These past policies are important because assignment on the basis of geographic proximity will not result in a racially homogeneous school unless, in addition to the existence of residential segregation, the school is so small that it serves only a racially homogeneous area or so situated that it is the closest school to students of only one race.

The second advance of Charlotte-Mecklenburg relates to the fact that these causal connections between past discrimination and present segregation are no more than theoretical possibilities and obviously involve significant elements of conjecture. The Court's response was to announce an evidentiary presumption that in effect resolves all the uncertainties against the school board. The Court quite consciously avoided holding that segregated student attendance patterns are, in themselves, a denial of equal protection, and instead emphasized the role that past discriminatory conduct might have played in causing those patterns. But the Court also said that it was prepared to presume an impermissible cause from the mere existence of segregation:

Where the school authority's proposed plan for conversion
from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.\(^6\)

Concededly, the school board has the opportunity to show that the consequence—segregated schools—is not caused by its discriminatory action and that it is therefore not responsible for the segregation. In that sense the distinction between cause and consequence is preserved. But the distinction is likely to become blurred because the burden cast on the board is a heavy one. The burden cannot be discharged simply by showing that the school segregation is produced, given the segregated residential patterns, by assigning students on the basis of a criterion other than race, such as geographic proximity. The school board will also have to show that its past discriminatory conduct—invoking racial designation of schools, site selection, and determination of school size—is not a link in the causal chain producing the segregation. This will be very difficult to do, and the difficulty of overcoming a presumption will tend to accentuate the fact that gives rise to it, namely, the segregated patterns, and this will be reflected in the board's assignment policies. Greater attention will be paid to the segregated patterns.

The third development relates to what the Court said must be done to eliminate these patterns—everything possible. Prior to *Charlotte-Mecklenburg* it was generally assumed that even if attention were focused on the result and a school board were obliged to eliminate the segregated pattern, the extent of the obligation would be simply "to take integration into consideration." Under this formulation of the remedial obligation, integration would be one value, along with others (such as minimizing the time and expense of transportation and avoiding safety hazards), that must be considered in designing attendance plans. There would be a rough parity among these values. In *Charlotte-Mecklenburg* the Court constructed a hierarchy among these values in which integration assumes a role of paramount importance. The Court declared that "the greatest possible degree of actual desegregation" must be achieved. The practicalities of the situation must, of course, also be taken into account, but the Court made clear that

\(^6\) 402 U.S. at 26.
if there is a conflict between integration and other values, integration will generally prevail.

Thus, the remedial plan in Charlotte-Mecklenburg requires a massive, long-distance transportation program: Students living closest to inner-city schools are to be assigned to suburban ones and students living closest to suburban schools are to be assigned to inner-city ones. True, this is the plan that had been formulated by the district court, and there is considerable language in the Supreme Court's opinion about the broad discretion that the district court has in fashioning a remedy. But the discretion the Court vests in the district court goes only to the question of how integration shall be achieved—the details of the remedial plan (such as which particular schools shall be paired for the transportation program). The lower court has no discretion to alter or disregard the central remedial obligation—achieving the greatest possible degree of actual desegregation—and the plan it approves will be measured by that stringent standard. That is why in a companion case involving Mobile, Alabama, the Supreme Court rejected a desegregation plan that allowed some all-black schools to remain in operation.\(^7\) The elimination of that residue of segregation required assigning students across a major highway that divided the metropolitan area. For the Fifth Circuit, this factor constituted a sufficient practical barrier to relieve the school board of its obligation to remove all remnants of segregation from the system.\(^8\) Nevertheless, the Supreme Court remanded because “inadequate consideration was given to the possible use of bus transportation and split zoning.”\(^9\)

Fourth, Charlotte-Mecklenburg is significant because it validates the use of race in student assignments when the goal is integration rather than segregation. In this context there is little room for the pretense of color blindness. In part this was anticipated in 1969 in *United States v. Montgomery County Board of Education*,\(^10\) a case involving faculty assignments. There the Court affirmed a desegregation order requiring that teachers be assigned so that the proportion of white and black teachers in the system as a whole would be mirrored in each school. The achievement of that goal, in the face of preexisting segregated patterns, required that in the process of deciding where to assign teachers some weight be given to each faculty member's race. Similarly, in Charlotte-Mecklenburg the Court recognized that the achievement of student integration requires that race play some role in the process of deciding

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7 Davis v. Board of School Comm'rs, 402 U.S. 33 (1971).
8 Id. at 36.
9 Id. at 38.
to which school a student will be assigned, and for that reason the Court permitted the use of this criterion.

This aspect of Charlotte-Mecklenburg undermines the constitutional basis for one objection that had frequently been voiced against remedial programs—whether court-ordered or voluntarily adopted—that were designed to eliminate segregation. More broadly, it indicates a conceptual departure from the approach to school desegregation that focuses exclusively on the racial criterion. In effect, it says that the prohibition of the equal protection clause against the use of race as a basis of assignment cannot be understood independently of the result. The prohibition against the use of race is linked to the result. Race is a forbidden criterion for assignment when it is used to produce segregation, but not when it is used to produce integration.

II

These four doctrinal advances of Charlotte-Mecklenburg occurred in response to a situation, not readily found in the North, in which a school board had maintained a "dual school system" in the recent past. The opinion appears to be further limited in its application by its emphasis on recent, as opposed to ancient, history. It suggests that the rules announced may be only transitional requirements. Moreover, this concern with history has an analytical basis. It is used to attribute responsibility. The Court's insistence that the school board be responsible for the segregation is satisfied in Charlotte-Mecklenburg by finding a pattern of past discriminatory conduct. In time, however, the legacy of past discrimination may become so attenuated that it will be unrealistic to presume the existence of any causal connection between it and the present school segregation.

Nevertheless, it should be emphasized that this concern with recent past discrimination does not confine Charlotte-Mecklenburg to the

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11 The passage, which was obviously tacked onto the end of the opinion, indicating that it may have been exacted at the last moment in exchange for someone's vote, reads:

At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be "unitary" in the sense required by our decisions in *Green* and *Alexander*. It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

402 U.S. at 32.
South. Until a few years ago, Southern school districts openly maintained dual school systems, and therefore the existence of past discriminatory practices can be established by admission. In Northern systems, there is no such admission. But that, of course, does not mean that the past discriminatory practices of the Charlotte-Mecklenburg type did not occur. It only means that they are more difficult, though not impossible, to prove. In my judgment, a very close, hard look at the construction policies of Northern school systems would reveal numerous instances in which school boards in the recent past have chosen sites and determined capacity with an eye toward serving racially homogeneous areas—often called "neighborhoods." Instead of formally and openly designating a newly constructed school as the Negro school, a school board may have called it the Lincoln School or the Booker T. Washington School and staffed it only with black teachers. The same message is conveyed.

Thus, there are some situations where, because of their recent past discrimination, Northern school systems can be assimilated to the Southern systems, and where the rules of Charlotte-Mecklenburg are therefore clearly applicable. But beyond that, one cannot simply say that Charlotte-Mecklenburg "outlaws" the school segregation of the North. Because of its focus on past discrimination, the case does not lend itself to a blanket judgment about the North, as it does with respect to the South. The net effect of Charlotte-Mecklenburg is to move school desegregation doctrine further along the continuum toward a result-oriented approach, but the progression is not complete. Additional steps are required. It seems to me, however, that over time this move will probably be made and that, in retrospect, Charlotte-Mecklenburg will then be viewed, like Green, as a way-station to the adoption of a general approach to school segregation which, by focusing

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13 While Charlotte-Mecklenburg dealt primarily with student assignment, in my judgment the most difficult aspect of school desegregation, it also reaffirmed previous doctrine requiring the desegregation plan to liquidate all aspects of the dual system, including faculty segregation. This has considerable significance for the North. The Court wrote:

In Green, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system. 391 U.S., at 435. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

402 U.S. at 18.
on the segregated patterns themselves, is more responsive to the school segregation of the North.

This forecast is based in part on my view that the Court will want to avoid the appearance of picking on the South. This appearance is derived from the fact that segregated patterns of student attendance are no less severe in Northern cities than in Southern ones. Under Charlotte-Mecklenburg, Southern school systems are obliged to eliminate those patterns and to achieve the greatest possible degree of integration. But there is no similar blanket judgment about those patterns in the North. A complicated analysis of causation might, under the Charlotte-Mecklenburg theory, serve to justify the differential treatment afforded these otherwise identical patterns. But such an analysis is not likely to be understood or even believed by most people. And no national institution can afford to be unresponsive to the popular pressures likely to be engendered by an appearance of differential treatment of certain regions of the country. Even the Supreme Court is not immune from such pressures, particularly when they become identified with the ideal of equal treatment.

The forecast is based also on my view that the predominant concern of the Court in Charlotte-Mecklenburg is in fact the segregated pattern of student attendance, rather than the causal role played by past discriminatory practices. I realize that in Charlotte-Mecklenburg the Court used past discrimination to attribute responsibility to the Board for the school segregation, but this theory for attributing responsibility seems contrived. Although the existence of past discrimination cannot be denied, the Court made no serious attempt either to determine or even to speculate on the degree to which it contributes to present segregation. Nor did the Court attempt to tailor the remedial order to the correction of that portion of the segregation that might reasonably be attributable to past discrimination. The Court moved from (a) the undisputed existence of past discrimination to (b) the possibility or likelihood that the past discrimination played some causal role in producing segregated patterns to (c) an order requiring the complete elimination of those patterns. The existence of past discrimination was thus used as a “trigger”—and not for a pistol, but for a cannon. Such a role cannot be defended unless the primary concern of the Court is the segregated patterns themselves, rather than the causal relation of past discrimination to them. The attention paid to past discrimination can be viewed as an attempt by the Court to preserve the continuity with Brown and to add a moral quality to its decision.

The Court is not likely to abandon its requirement that a school board be responsible for the segregated patterns before it is ordered
to eliminate them. This requirement, however, need not foreclose any doctrinal advance. An alternative theory for attributing responsibility exists—one that is equally applicable to North and South and well rooted in other areas of the law, such as torts. This theory would hold the school board responsible for the foreseeable and avoidable consequences of its own action. In this context, the pertinent action of the school board is its choice of a criterion for student assignments. The board decides how students are to be assigned. The result of using a criterion such as geographic proximity in a system with residential segregation is foreseeable; and in most instances there are reasonable measures that the board could adopt, if not to eliminate, then at least to mitigate the result that flows from the use of that criterion.

This theory for attributing responsibility is not without limitations. For example, the causal chain linking the school board's decision to assign on the basis of geographic proximity and the school segregation might be broken if it could be presumed that present residential segregation is truly voluntary. Moreover, the board might be relieved of responsibility if there were no "reasonable" steps it could take to avoid school segregation. For this reason, this theory might be viewed as holding the school board to a lesser standard than that of Charlotte-Mecklenburg, which, through the triggering action of past discrimination, requires the board to take every possible step to eliminate segregation. However, this difference in standards roughly parallels tort rules which hold a person responsible for all the consequences of an intentional wrongdoing but which limit liability to the proximate consequences when the wrongdoing is not intentional. In this area a rule that requires the school board to take reasonable steps—as opposed to all possible steps—to eliminate segregation seems to be the more sensible one and therefore the one that will predominate. It does not rest on the unrealistic assumption that all present segregation is a consequence of past wrongdoing, and it gives a more balanced appraisal to competing values that should be taken into consideration in assigning students to schools. In any event, the general effect of the theory would be to focus attention on the segregated patterns themselves and to bridge the doctrinal gap between Charlotte-Mecklenburg and an approach to school desegregation that emphasizes primarily the result.

Admittedly, this theory for attributing responsibility does not require the construction of a causal chain that includes a racially discriminatory act in the past. But, analytically, that should be unnecessary. The equal protection clause requires that some government
agency be responsible for the unequal treatment, but it does not require that the responsibility be predicated on a causal chain involving an earlier discrimination. It does not require double discrimination. There is no need to search for a second discrimination if it is determined that the segregated patterns themselves render the education afforded blacks inferior and thus are a form of unequal treatment. Under this approach the central dispute would be over the factual assertion that segregated education is inferior. Indeed, this is what the dispute should be about.

The Court in *Charlotte-Mecklenburg* appears to have avoided this dispute by relying on past discrimination. Arguably, the denial of equal protection in *Charlotte-Mecklenburg* originated in past discriminatory school construction practices and, although the Court was no longer able to stop those practices, the injunction it issued could be viewed as an attempt to undo the effects of the past wrong. Under this interpretation, the school segregation was a present effect of the past denial of equal protection, and not itself a denial of equal protection. But this interpretation of *Charlotte-Mecklenburg* does not seem persuasive. It seems much more plausible that the segregated patterns themselves, and not the past construction practices, are viewed as the denial of equal protection. To regard all school segregation as simply an "effect" of the past denial of equal protection requires the positing of an unproved and unlikely causal connection between the two. Furthermore, there is no reason why the courts should use their remedial powers to correct the effect of a past wrong unless that effect is itself harmful or disadvantageous. Thus, at the very least, there is an implicit judgment in *Charlotte-Mecklenburg* that segregation itself is harmful or disadvantageous. And if the segregation is viewed as particularly harmful or disadvantageous to blacks, then it can be construed as a form of unequal treatment. Under this interpretation, the only question remaining is whether the school board is responsible for it. In *Charlotte-Mecklenburg* the Court attributed responsibility for segregation on the basis of past discrimination. My point is that there is an alternative theory for attributing responsibility for the segregation that is as intellectually satisfying as the *Charlotte-Mecklenburg* theory requiring a search for past discrimination.\(^\text{14}\)

\(^{14}\) It should also be pointed out that the very use of geographic criteria may be as responsible for residential segregation as past discriminatory construction policies. By rigidly adhering to geographic criteria over a long period of time, a school board assures the white parent who does not want his children to go to school with blacks that this desire can be fulfilled by moving into a white neighborhood. The use of geographic criteria also assures the white parent that if he moves out of the neighborhood into which blacks are moving, he will be leaving the blacks behind. They will not follow him to the new school—unless they also change residence.
Thus far the development in school desegregation doctrine has been largely the work of the courts, and my forecast about future direction is based on the view that the courts will—in the face of popular pressure and logic—evolve an approach to school desegregation that is increasingly result-oriented. Within the weeks immediately following Charlotte-Mecklenburg that seems to be precisely what has been happening in a few lower courts. It is important to emphasize, however, that other branches of government need not wait for these projected doctrinal advances.

Local agencies are today free to institute the appropriate measures to correct segregated patterns of student attendance. There is no suggestion in Charlotte-Mecklenburg that such voluntary remedial measures need be predicated on the discovery of past discrimination. Indeed, this term the Supreme Court invalidated two statewide "anti-busing" laws, one in New York and the other in North Carolina, that would have impeded the efforts of local school boards to correct racial imbalance. Moreover, Congress need not wait until the Supreme Court declares a practice a violation of the equal protection clause before requiring (or inducing) local authorities to correct it. Cases such as Katzenbach v. Morgan and Jones v. Alfred H. Mayer Co. indicate the lengths to which the Court will go to indulge and even to encourage congressional activity on behalf of the cause of racial equality. Under the Civil War amendments, Congress is free to enact a rule of law that would require (or induce) school boards throughout the country to take reasonable steps to eliminate segregated patterns of student attendance—without regard to proof in each instance of past discriminatory practices and their contemporary vestiges. Such legislation can be predicated on a judgment about the inequality that arises from a segregated pattern of student attendance itself. And if the legislature insists, as does the Court in Charlotte-Mecklenburg, that the segregation be "state-imposed," then such legislation can be predicated on a conclusion that the South has no monopoly on past

discrimination, or that school boards are responsible for the foreseeable and avoidable consequences of their own actions. In any event, there is no question about the authority to enact nationwide school desegregation laws. For the last several years that has been clear. The only question is about the will. Conceivably, Charlotte-Mecklenburg, by imposing such a heavy burden on the South and by requiring the greatest possible degree of actual desegregation, might be sufficient inducement for such legislation. That might be the most significant aspect of Charlotte-Mecklenburg for the North and for the law of school desegregation.
...And Then There Were None: The Diminution of the Federal Jury

Hans Zeisel†

Goneril: Hear me, my lord. What need you five-and-twenty? ten? or five?
Regan: What need one?

King Lear, Act II, Scene IV

In a dramatic move sponsored by the Chief Justice of the United States Supreme Court, seventeen of the federal district courts will reduce the size of their civil juries from twelve members to six.† Immediately following the Chief Justice's announcement, Representative William Lloyd Scott of Virginia introduced a bill in Congress to provide for six-member juries in all federal trials, both civil and criminal, except in cases involving capital offenses.‡ On the state level, the New Jersey Supreme Court called for an amendment to the state constitution that would allow the legislature to reduce the size of all juries and to end jury trials in civil cases.§ Moreover, at least one of the federal district courts has already been experimenting with six-member juries in criminal trials, albeit by encouraged agreement between prosecution and defense.¶

Juries with less than twelve members, of course, are not foreign to our experience. Some state courts try small civil claims and minor criminal cases before six-member juries;¶ four states even try non-

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¶ Information available from the Administrative Office of the United States Courts.
‖ E.g., the District Court for the Southern District of Illinois. Id.
¶ Minor cases include those civil and criminal cases before inferior courts, KY. CONST. art. 248; MONT. CONST. art. III, § 23; OKLA. CONST. art. II, § 19; W. VA. CONST. art. III, § 13, and those civil actions involving small claims, IDA. CONST. art. I, § 7; N.J. CONST. art. I, § 9; see UTAH CONST. art. I, § 10, which specifies eight jurors in all noncapital cases before courts of general jurisdiction. See also constitutional provisions authorizing state legislatures to pass laws limiting jury size to less than twelve persons (I) in all civil cases before inferior courts, ALASKA CONST. art. I, § 16; ILL. CONST. art. II, § 5; N.D. CONST. art
capital felony cases before juries that have fewer than twelve members.\textsuperscript{5} Despite this background, experiment with the jury was previously confined to the states. Until the present time, the federal jury appeared to be immutable.

The reasons presently given for reduction of the size of federal civil juries are to expedite jury trials and to lessen their cost. With respect to the latter, the Chief Justice has estimated that contracting the size of federal civil juries to six would result in an annual savings of four million dollars.\textsuperscript{7} While this may seem to be a substantial sum, it is only 2.4 per cent of the total federal judicial budget, and little more than a thousandth part of one per cent of the total federal budget.\textsuperscript{8}

With respect to minimizing delay, the smaller jury would merely decrease the time required for impaneling. Although there are no data available on the time consumed in impaneling juries, we do have accurate data indicating that federal district court judges spend eight per cent of their total working time in trying civil jury cases.\textsuperscript{9} Estimating that impaneling the jurors takes, on the average, about ten per cent of the trial time,\textsuperscript{10} one discovers that only eight-tenths of one per cent of the federal district judges' total working time is presently consumed by impaneling civil juries. On first impression, it might seem that reducing the twelve jurors to six would save half of that impaneling time. But in many federal courts the jurors are examined primarily by the judge, who directs most of his questions to all jurors at the same time. In this situation the savings would be minimal, since it takes no more time to ask a question of twelve jurors than to ask it of six. In any event, we are discussing an amount which is less than half of the impaneling time—at best four-tenths, more likely three-tenths, of one per cent of the judge's working time.

\textsuperscript{6} See FLA. CONST. art. V, § 22; LA. CONST. art VII, § 41; TEX. CONST. art. V, § 13 (where juror dies or is incapacitated); UTAH CONST. art. I, § 10.

\textsuperscript{7} N.Y. Times, May 17, 1971, at 1, col. 1.


\textsuperscript{9} FEDERAL JUDICIAL CENTER, DISTRICT JUDGES' TIME STUDY, Mar., 1971 (mimeographed study). Table A-5 indicates that 16% of district court judges' time is consumed by jury trials; a communication from the Center's research director relates that approximately half of that time was consumed by civil jury trials.

\textsuperscript{10} This estimate is based on informal consultation with federal district judges and trial lawyers. It would be misleading to infer higher figures for impaneling from the recent widely publicized and extremely atypical voir dire proceedings in the Manson trial in California or the Black Panther trial in New Haven. Both, in addition, were criminal trials and neither was in the federal courts.
Thus, neither the amount of money nor the amount of time that would be saved can adequately explain and justify the reform recommended by the Chief Justice. However, when viewed in the broader context of the other proposals to limit the functioning of the jury, the decision of the federal district courts to adopt the six-member jury appears as a significant step toward a drastic reduction of the American jury system in general. Under these circumstances, this initial reform deserves careful scrutiny on its own merits.

I. Williams v. Florida

The last pieces of the legal foundation for the six-member jury were laid in the Supreme Court's decision in Williams v. Florida. Williams, accused and subsequently convicted of robbery, had made a pre-trial motion to impanel a twelve-member jury instead of the six-member jury prescribed by Florida law for non-capital cases. The motion had been denied. In affirming the conviction, the Supreme Court ruled that the sixth amendment's guarantee of trial by jury does not require that jury membership be fixed at twelve. In sweeping language, the Court removed the constitutional obstacles to decreasing the size of federal or state juries in both civil and criminal cases. First, the Court summarized its historical discussion by stating that the twelve-member jury appears to have been a "historical accident, unrelated to the great purposes which gave rise to the jury in the first place."12

History, however, might have embodied more wisdom than the Court would allow. It might be more than an accident that after centuries of trial and error the size of the jury at common law came to be fixed at twelve. A primary function of the jury was to represent the community as broadly as possible; yet at the same time, it had to remain a group of manageable size. Twelve might have been, and might still be, the upper limit beyond which the difficulty of self-management becomes insuperable under the burdensome condition of a trial. On this view, twelve would be the number that optimizes the jury's two conflicting goals—to represent the community and to remain manageable.

Having disposed of the rationality of the number twelve, the Court proceeded:

Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other than purely

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11 399 U.S. 78 (1970). In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court had held that the fourteenth amendment incorporated the sixth amendment.
12 Id. at 89-90.
historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial.\(^{13}\)

After a casual reference to empirical data, to which we will devote our attention presently, the Court concluded that while the jury should comprise a cross-section of the community, a six-member jury does not perceptibly differ in this respect from a twelve-member jury:

> [W]hile in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible. Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden . . . the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.\(^{14}\)

Here, then, is the Court’s reference to empirical data:

What few experiments have occurred—usually in the civil area—indicate that there is no discernable difference between the results reached by the two different-sized juries.\(^{15}\)

The Court cites, impressively enough, six items:\(^{16}\) (1) Judge Wiehl’s article on “The Six Man Jury” in the *Gonzaga Law Review*;\(^{17}\) (2) Judge Tamm’s “The Five-Man Civil Jury: A Proposed Constitutional Amendment” in the *Georgetown Law Journal*;\(^{18}\) (3) Cronin’s piece on “Six-Member Juries in District Courts” in the *Boston Bar Journal*;\(^{19}\)

\(^{13}\) *Id.* at 99-100 (emphasis added).

\(^{14}\) *Id.* at 102. Only at one point does the Court admit the possibility of a difference between twelve-member and other juries. It notes that “[i]n capital cases . . . it appears that no State provides for less than 12 jurors.” *Id.* at 103. But instead of appreciating that the twelve-member jury provides better community representation, the Court merely approves size *qua* size, the number twelve being a “recognition of the value of the larger body as a means of legitimating society’s decision to impose the death penalty,” *id.*, just as a firing squad is superior to one executioner.

\(^{15}\) *Id.* at 101.

\(^{16}\) *Id.* at 101 n.48.


\(^{19}\) Cronin, *Six-Member Juries in District Courts*, 2 *BOSTON B.J.* No. 4, at 27 (1958).

It is worthwhile to disinter the substance buried in these citations:

(1) Judge Wiehl approvingly cites Charles Joiner's Civil Justice and the Jury, in which Joiner somewhat disingenuously states that "it could easily be argued that a six-man jury would deliberate equally as well as one of twelve."\(^2\) Since Joiner had no evidence for his conclusion, Judge Wiehl also does not have any.

(2) Judge Tamm had presided over condemnation trials in the District of Columbia in which five-man juries are used and found them satisfactory.\(^2\)

(3) Cronin relates that the Massachusetts legislature had authorized, on an experimental basis, the use of six-member juries for civil cases in the District Court of Worcester, a civil court of limited jurisdiction. Forty-three such trials were conducted, and the highest verdict was for a sum of $2,500. The clerk of the court is said to have reported that "the six-member jury verdicts are about the same as those returned by regular twelve-member juries."\(^2\) Three lawyers also testified that they could not detect any differences in verdicts, one because "the panel is drawn from the regular Superior Court panel of jurors,"\(^2\) another because "[t]here seems to be no particular reason why the size of a finding would be affected by a six-man jury."\(^2\) All those trials, it seems, were given preferential scheduling to endear them to counsel.

(4) The Court's fourth cited authority consists of an abbreviated summary of the Massachusetts experiment and concludes that "the lawyers who use the District Court, as well as the clerk, report that the verdicts are no different than those returned by twelve-member juries."\(^2\)

\(^2\) C. Joiner, Civil Justice and the Jury 83 (1962), cited in Wiehl, supra note 17, at 39 n.16.
\(^2\) Tamm, supra note 18, at 137.
\(^2\) Cronin, supra note 19, at 27.
\(^2\) Id. at 28.
\(^2\) Id. at 28-29.
\(^2\) Six-Member Juries Tried in Massachusetts District Court, supra note 20, at 136.
(5) The *ABA Bulletin* contains the statement that "the Monmouth [New Jersey] County Court has experimented with the use of a six-man jury in a [sic] civil negligence case."

(6) Judge Phillips summarizes the economic advantages derived from the Connecticut law that permits litigants to opt for a six-member jury in civil cases. He advocates a mandatory reduction in jury size, but never even mentions the problem of possible differences in verdicts in comparison to the twelve-member jury.

This is scant evidence by any standards. The several thousand verdicts by criminal juries each year in Florida, Louisiana, and Utah would have provided better evidence. Of course, no such evidence was produced at the trial court, but the Court could conceivably have asked sua sponte for such a study. Even without specific data, however, it is possible to demonstrate that the six-member jury must be expected to perform quite differently than the twelve-member jury in several important respects.

II. SIX-MEMBER CIVIL JURIES IN A STRATIFIED COMMUNITY

The jury system is predicated on the insight that people see and evaluate things differently. It is one function of the jury to bring these divergent perceptions and evaluations to the trial process. If all people weighed trial evidence in the same manner, a jury of one would be as good as a jury of twelve because there would never be any disagreement among them. In fact, we know the opposite to be true, if not from observation of our community then from the performance of our juries. Two-thirds of all juries find their vote split in the first ballot in a criminal case. We have no comparable data on the li-

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29 *New Jersey Experiments with Six-Man Jury*, supra note 21.
31 When the Supreme Court granted certiorari in the World War II treason case of *Cramer v. United States*, it "invited reargument addressed to specific questions," *Cramer v. United States*, 325 U.S. 1, 7, 8 (1945), whereupon "[t]he Solicitor General engaged scholars not otherwise involved in conduct of the case to collect and impartially to summarize" the historical background of the issue in the major legal systems, *id.* at 8 n.9. For the compilation of American law, see Hurst, *Treason in the United States*, 58 Harv. L. Rev. 226 (1944).
32 These proofs are derived from well established elementary statistical theory, from simple models, and from some empirical data; it is the best evidence presently available. To acquire more complete evidence would require additional research along two lines: (1) controlled simulated experiments that would allow six- and twelve-member juries to view and judge the same case and, more accessible if more tenuous, (2) retrospective performance analysis of actual six-member juries in the states that employ them.
33 This is perhaps more true today than it was at the time the jury grew into a legal institution. Originally, the emphasis was directed more toward the difference between the jury and the judges as the representative of the King, and less toward the differences among jurors.
ability vote of the civil jury, but we do know that the evaluation of damages usually covers a broad range.

There is, therefore, good reason to believe that the jury, to some extent, brings into the courtroom the differences in perception which exist in the community. To see how the six-member jury performs this function in comparison with a twelve-member jury, it will be useful to begin with a simple model of a stratified society. We shall assume that 90% of the community share identical viewpoints and that the remaining 10% have a different viewpoint.\textsuperscript{35} Even a jury of twelve, of course, is too small to represent all community views, but it can be shown that the smaller the size of the jury, the less frequently it even approaches community representation.

Juries, especially federal juries,\textsuperscript{36} are chosen by lottery from the pool of available jurors. Suppose, now, we were to draw 100 twelve-member juries and 100 six-member juries from a population that had a 10% minority. Of the 100 twelve-member juries, approximately 72 would have at least one representative of that minority; while of the 100 six-member juries, only 47 would have one. It is clear, then, that however limited a twelve-member jury is in representing the full spectrum of the community, the six-member jury is even more limited, and not by a “negligible” margin.

Whether this difference in degree of community representation results in a difference in civil verdicts is, of course, even more important. To explore this question we will slightly complicate our stratification model of the community. We know from experience and from many careful studies that the values different people place on the harm done in a personal injury case are likely to diverge considerably. Table 1 assumes that with respect to the evaluation of a particular claim the community is divided into six groups of equal size. We shall make a further assumption, very close to reality, that whatever the composition of the jury, the damages it awards will lie around the average of the evaluations of all individual jurors. Again, we shall simulate 100 random selections of the two types of juries—the twelve-member and the six-member jury. This time, however, we shall be

\textsuperscript{35} The “minority” need not be a demographic one; it may represent any minority viewpoint, although the obvious concern is for representation of demographically defined minorities. One may argue, and I would, that we should not confront each other as majority and minority. But at this juncture of history, it is apparently not the accepted view to disregard such differences. And to force on the jury a view that is not accepted by the population in other spheres would seem to be a rash move.

TABLE 1  
COMMUNITY EVALUATION OF PERSONAL INJURY CLAIM  

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<thead>
<tr>
<th>Fraction of Community</th>
<th>Dollar Evaluation</th>
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<tbody>
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<td>1,000</td>
</tr>
<tr>
<td>1/6</td>
<td>2,000</td>
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<td>1/6</td>
<td>3,000</td>
</tr>
<tr>
<td>1/6</td>
<td>4,000</td>
</tr>
<tr>
<td>1/6</td>
<td>5,000</td>
</tr>
<tr>
<td>1/6</td>
<td>6,000</td>
</tr>
</tbody>
</table>

Average 1/1 3,500

interested in the average of the individual evaluations of any given jury. Thus, we shall record a twelve-member jury consisting of 6 persons who would evaluate an injury at $1,000, and 6 who would evaluate the same injury at $2,000, as $1,500—the average of $6 \times $1,000 + $6 \times $2,000. Table 2 indicates the relative spread of these averages around the middle value for all juries of $3,500.

TABLE 2  
PER CENT DISTRIBUTION OF THE AVERAGE EVALUATION  
BY 100 RANDOMLY SELECTED JURIES

<table>
<thead>
<tr>
<th>Interval</th>
<th>Twelve-member</th>
<th>Six-member</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1,000-1,499</td>
<td>—</td>
<td>0.1</td>
</tr>
<tr>
<td>$1,500-1,999</td>
<td>0.1</td>
<td>1.4</td>
</tr>
<tr>
<td>$2,000-2,499</td>
<td>2.0</td>
<td>6.4</td>
</tr>
<tr>
<td>$2,500-2,999</td>
<td>13.7</td>
<td>16.4</td>
</tr>
<tr>
<td>$3,000-3,499</td>
<td>34.2</td>
<td>25.7</td>
</tr>
<tr>
<td>$3,500-3,999</td>
<td>34.2</td>
<td>25.7</td>
</tr>
<tr>
<td>$4,000-4,499</td>
<td>13.7</td>
<td>16.4</td>
</tr>
<tr>
<td>$4,500-4,999</td>
<td>2.0</td>
<td>6.4</td>
</tr>
<tr>
<td>$5,000-5,499</td>
<td>0.1</td>
<td>1.4</td>
</tr>
<tr>
<td>$5,500-6,000</td>
<td>—</td>
<td>0.1</td>
</tr>
<tr>
<td>Totals</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

It is easy to see that the six-member juries show a considerably wider variation of "verdicts" than the twelve-member juries. For instance, 68.4% of the twelve-member jury evaluations fall between $3,000 and $4,000, while only 51.4% of the six-member jury evaluations fall in this range. Almost 16% of the six-member juries will reach verdicts that will fall into the extreme levels of more than $4,500 or less than $2,500, as against only a little over 4% of the twelve-member juries. The appropriate statistical measure of this variation
is the so-called standard deviation.\textsuperscript{37} The actual distribution pattern will always depend on the kind of stratification that is relevant in a particular case, but whatever the circumstances, the six-member jury will always have a standard deviation that is greater by about 42%. This is the result of a more general principle that is by now well known to readers of such statistics as public opinion polls—namely, that the size of any sample is inversely related to its margin of error.\textsuperscript{38}

Lest it be thought that standard deviation is merely part of a statistician's game that has no counterpart in reality, it will be useful to provide the appropriate translation of the term into lawyer's language. It is the measure of the gamble the lawyer takes when he goes to trial. The "gambling" notion is seldom made explicit because normally each case is tried only once, but lawyers are quite conscious of the degree to which jury verdicts may vary. To obtain a measure of this variability, trial lawyers were asked to think about their next civil case and to estimate how they would expect ten different juries to decide.\textsuperscript{39} These estimates show, as a rule, a considerable amount of variation, which should not come as a surprise since a case goes to the jury on the very ground that reasonable men may differ in its resolution. Whatever the extent of the "gamble" incurred through the twelve-member jury, we must expect that it will be significantly greater with a six-member jury.\textsuperscript{40}

This increase in the "gamble" might well have an interesting side effect; it could increase the incidence of jury waiver and thereby

\textsuperscript{37} The standard deviation is the square root of all squared deviations from the group average.

\textsuperscript{38} A reduction of the size of a sample by $\frac{1}{4}$ increases the margin of error by the square root of $2/1$, or simply of 2—that is, by a factor of 1.42, or by 42%.

\textsuperscript{39} Data collected by the University of Chicago Jury Project, on file at the University of Chicago Law School. The following is an excerpt from the questionnaire and a sample answer:

Which, in your estimate, will be the most likely award in this case after trial?

\textdollar 25,000

Of course, you cannot be certain that this will be the verdict. If you had to try this case ten different times before ten different juries, you would expect some variation in the verdicts. What do you think these verdicts would look like?

\begin{tabular}{lcccc}
$0$ & $20,000$ & $25,000$ & $25,000$ \\
$35,000$ & $35,000$ & $50,000$ & $100,000$ \\
$100,000$ & $100,000$ & \\
\end{tabular}

Another way of providing an estimate of the variability of jury verdicts would be to allow properly selected extra-juries—for instance by observation of closed-circuit television screens—to try the same case after simulated deliberations.

\textsuperscript{40} The juries in our model have not undergone voir dire challenges which, when conducted by competent counsel, would tend to eliminate the extreme value positions. Nevertheless, it is fair to assume that such challenges would affect both types of juries equally and consequently would not eliminate the differences between them.
reduce the frequency of jury trials. The trial lawyer survey also suggests that lawyers expect the variation of verdicts returned by twelve-member juries to be of about the same magnitude as the variation expected if the same case were tried in bench trials before different judges. If the jury size is reduced from twelve to six, this perception of the approximate balance between jury and bench trial will be disturbed. Henceforth, the "gamble" with a jury will be significantly greater than the "gamble" with a judge and, as a result, more lawyers might waive their right to a jury, perhaps a consequence not unexpected by those who initiated the reform.

In addition to the tendency to be less representative and to produce more varied damage verdicts, the six-member jury is likely to yield fewer examples of that treasured, paradoxical phenomenon—the hung jury. Hung juries almost always arise from situations in which there were originally several dissenters. Even if only one holds out, his having once been the member of a group is essential in sustaining him against the majority's efforts to make the verdict unanimous. Fewer hung juries can be expected in six-member juries for two reasons: first, as discussed earlier, there will be fewer holders of minority positions on the jury; second, if a dissenter appears, he is more likely to be the only one on the jury. Lacking any associate to support his position, he is more likely to abandon it.

In Williams the Court cites the studies conducted in connection with The American Jury to support its proposition that "jurors in the minority on the first ballot are likely to be influenced by the proportional size of the majority aligned against them." It is only fair to point out that the findings were quite different:

Nevertheless, for one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations. The juror psychology recalls a famous series of experiments by the psychologist Asch and others which showed that in an ambiguous situation a member of a group will doubt and finally disbelieve his own correct observation if all other members of the group claim that he must have been mistaken. To maintain his original posi-

41 Data collected by the University of Chicago Jury Project, on file at the University of Chicago Law School.

42 The hung jury is treasured because it represents the legal system's respect for the minority viewpoint that is held strongly enough to thwart the will of the majority. The paradox lies in the fact that the hung jury is only tolerable in moderation; too many hung juries would impede the effective functioning of the courts.

tion, not only before others but even before himself, it is necessary for him to have at least one ally.\textsuperscript{44}

The distinction is crucial in this respect: If it is only the proportion that matters, then one versus five is the equivalent of two versus ten; but if the original companionship of an ally is essential, then one versus five is far less likely to produce a hung jury than two versus ten. As stated previously, the probability of having at least one member of a minority (which comprises 10\% of the population) on the twelve-member jury is 72 out of every 100, as against 47 on six-member juries. The discrepancy is aggravated by the fact that the expectation of having more than one minority member on the twelve-member jury is 34 out of every 100, as against only 11 on six-member juries.

This was one hypothesis, among those developed in this article, that could be put to an immediate test. A survey was initiated to establish the frequency of hung juries in criminal jury trials that had gone to verdict since January 1, 1969 in the Miami Circuit Court, the largest Florida court. The results were 7 hung juries in 290 trials before six-member juries. The comparison with the national average provides startling and gratifying confirmations of this prediction:

\begin{table}
\caption{Hung Juries in Criminal Jury Trials}
\label{table:hung_juries}
\begin{tabular}{lcc}
\hline
           & \textbf{Twelve-member} & \textbf{Six-member} \\
\hline
Twelve-member & ................................. & 5.0\%\textsuperscript{a} \\
Six-member    & ................................. & 2.4\%\textsuperscript{b} \\
\hline
\end{tabular}
\end{table}

\textit{Sources:}
\begin{itemize}
\item[a] H. Kalven, Jr. & H. Zeisel, \textit{supra} note 34, at 56.
\item[b] Data collected by the University of Chicago Jury Project, on file at the University of Chicago Law School.
\end{itemize}

On grounds of economy, one might welcome any reduction in the number of hung juries. One should understand, however, that such reduction is but the combined result of less representative, more homogeneous juries and of a reduced ability to resist the pressure for unanimity.

From the foregoing discussion, it would appear that the Court's holding in \textit{Williams} rests on a poor foundation. In several important respects, the six-member jury performs differently than the twelve-member jury. The Court probably suspected that some differences in composition and performance would exist between the types of juries but thought them negligibly small. It would seem that the Court has underestimated their magnitude.

\textsuperscript{44} H. Kalven, Jr. & H. Zeisel, \textit{supra} note 34, at 463.
III. CRIMINAL SIX-MEMBER JURIES AND MAJORITY VERDICTS

Neither the reduction of the size of the criminal jury nor the adoption of majority verdicts are presently being considered by the federal courts. Yet it is not premature to explore the consequences that would accompany these two changes. Despite the Court’s emphasis of the importance of the unanimity requirement in *Williams*, there are indications, as Justice Harlan has recognized, that this requirement could fall, and the reduction of the criminal jury may similarly be within purview.

The above analysis of the six-member civil jury applies with minor variations to the criminal jury, where the stratification does not pertain to the dollar-evaluation of a claim, but to the perception of the gravity of the charged crime and, more importantly, to the differing standards of “reasonable doubt.” To obtain a conviction under the unanimity rule, the prosecutor must persuade the juror with the highest standard. Considering the class of jurors who are most difficult to convince as a “minority” in terms of our model, it is evident that fewer six-member juries will contain representatives of that minority. Consequently, a six-member jury provides a lesser safeguard for the defendant than a twelve-member jury. Careful study of the operation of juries with less than twelve members in such states as Florida, Louisiana, and Utah should confirm this hypothesis by revealing that these juries yield fewer hung juries, more findings of guilt, and among them relatively fewer convictions for the lesser included offense than are rendered in comparable cases by twelve-member juries.

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45 Williams v. Florida, 399 U.S. 78, 122 (Harlan, J., concurring in result).

Rumblings on this theme came from the recent London meeting of the American Bar Association:

From the remarks that have been made in speeches so far, it appears that five features of the British system are prime candidates for tryouts in the United States:

One is nonunanimous verdicts in jury trials. For several years British courts have been permitting jury actions on votes of 10 to 2, and statistics show that there have been more convictions, more acquittals and fewer hung juries than before. The United States Supreme Court is expected to decide during its next term if it would be constitutional for United States juries to rule by less-than-unanimous votes.

N.Y. Times, July 19, 1971, at 14, col. 3.

47 See H. Kalven, Jr. & H. Zeisel, supra note 34, at 182-90.
48 See text at note 42 supra.
49 See note 46 supra.
With respect to the abandonment of the unanimity rule, there is again considerable experience in the state courts. Many states allow majority verdicts in civil trials before both twelve- and six-member juries; some states permit such verdicts in minor criminal trials, and two states allow majority verdicts even in felony trials for non-capital offenses. The important element to observe is that the abandonment of the unanimity rule is but another way of reducing the size of the jury. But it is reduction with a vengeance, for a majority verdict requirement is far more effective in nullifying the potency of minority viewpoints than is the outright reduction of a jury to a size equivalent to the majority that is allowed to agree on a verdict. Minority viewpoints fare better on a jury of ten that must be unanimous than on a jury of twelve where ten members must agree on a verdict.

An example will elucidate this proposition. Suppose we again assume a minority position held by 10% of the population, and that two sets of juries are drawn: 100 twelve-member juries and 100 ten-member juries. In Table 4 are the frequencies with which the minority view can be expected to be represented.

<table>
<thead>
<tr>
<th>Number</th>
<th>Twelve-member</th>
<th>Ten-member</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>28</td>
<td>35</td>
</tr>
<tr>
<td>One</td>
<td>38</td>
<td>39</td>
</tr>
<tr>
<td>Two</td>
<td>23</td>
<td>19</td>
</tr>
<tr>
<td>Three or more</td>
<td>11</td>
<td>7</td>
</tr>
<tr>
<td>Totals</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

* Representing 10% of the population.


52 La. Const. art. VII, § 41; Ore. Const. art I, § 11. In 1967, the British House of Commons enacted a statute that allowed majority verdicts of ten in all criminal juries. The Home Secretary had requested the change to prevent a potentially bribed juror from thwarting an otherwise certain conviction. See H. Kalven, Jr. & H. Zeisel, The American Jury: Notes for an English Controversy, (University of Chicago Round Table No. 228, April, 1967); The Times (London), Apr. 4, 1967, at 71. See also 745 House of Commons Official Reports (Hansard), No. 188 (April 27, 1967).
Looking first at the 100 twelve-member juries, we expect to find 38 juries with one minority representative, 23 with two, and 11 with three or more. If these twelve-member juries must be unanimous to reach a verdict, the majority will have to reckon with at least one minority member in $38 + 23 + 11 = 72$ out of the 100 cases. If these juries are permitted to reach a verdict by agreement of ten jurors, then the majority will be able simply to disregard the minority position in $38 + 23 = 61$ of the 72 cases. Only in the 11 cases in which we must expect three or more minority jurors will they be able to influence the verdict.

Let us now turn to the ten-member juries. Here only $39 + 19 + 7 = 65$ of the 100 juries are expected to have at least one minority member. But if we assume that the ten-member jury must be unanimous, then the ten-member jury will give the 10% minority a chance to influence the verdict almost six times as frequently (65:11) as in the case of the twelve-member jury with majority rule.

No present proposals envisage combining size reduction and majority rule for federal juries. Yet the two jury-enfeebling measures do exist jointly in some of our state civil courts of limited jurisdiction, and there no longer appears to be any constitutional guarantee against such an extension even to federal criminal juries. This powerful combination has been brought to dramatic public attention by the special military court martial jury which tried Lieutenant Calley after the My Lai affair in Vietnam. Calley was tried on a criminal charge—a capital one at that—before a six-member jury authorized to reach a verdict by the agreement of only four jurors, a form which allows the majority to disregard a minority position as long as it does not have at least three representatives on the jury. In our hypothetical community with a 10% minority, fewer than 2 out of every 100 Calley-type juries will have more than two minority representatives if the juries are randomly selected from the population. Even if we assume a minority position that is held by 30% of the eligible jurors, only about every fourth Calley-type jury will effectively represent that minority. One might wonder why the men who drafted the rules for this type of court martial jury went to the extreme. Might one of their motives have been that such a jury, more than any other, could be expected to circumvent or conceal a disturbing minority position?

A significant characteristic of the Calley-type jury is its ability to hide the fact that the jury's findings may not have been unanimous; whether the verdict of the Calley jury was unanimous is still unknown.

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The formula for announcing the verdict reads merely: "Upon secret written ballot, two-thirds of the members present at the time the vote was taken . . . ." Only one voting constellation out of seven possible ones (from 6:0 to 0:6) results in a hung jury—the 3:3 constellation. All the others result in a verdict. The reason for the extraordinary length of the Calley jury's deliberation may have been its desire to achieve unanimity in a trial for a capital offense, even if that aspect of the verdict remained unpublished.

IV. Conclusion

We have shown that the change in verdicts that might be expected from the reduction of the twelve-member jury to six members is by no means negligible. We have also considered another potential modification of the federal jury, the majority verdict, and the possible combined application of both. However, the thrust of this article must not be misread. Its purpose is not to advocate any of the possible forms of federal juries. It pleads neither for the twelve-member jury nor for the smaller one, neither for the unanimity requirement nor for the majority verdict. All these solutions are possible, as is shown by the variety of rules adopted by our states. The legal systems of most countries do not have any jury trials; to be sure, their mode of selecting judges differs radically from ours.

The purpose of this article, rather, is simply to make clear that all these modifications make for differences in adjudication that appear to be negligible only to superficial scrutiny. Both in the short and in the long run our judicial system has many options, but every solution has its own balance sheet of advantages and costs. What is necessary is that we, and with us the United States Supreme Court, see both with equal clarity.

Voting Rights: A Case Study of Madison Parish, Louisiana†

During the past decade Congress recognized that the fifteenth amendment had not succeeded in securing the franchise for all citizens. In the South, particularly, state-enforced registration laws prevented the majority of blacks from participating in the electoral process. To remedy this situation, national legislation reaffirmed the right to vote and forged methods of federal enforcement of that right. Although the initial Civil Rights Acts of 1957 and 1960 provided necessary predicates for relief from discrimination, they did not terminate the need for county-by-county litigation. Accordingly, Congress designed the Voting Rights Act of 1965 to transfer enforcement from the courthouse to the registrar’s office through utilization of administrative remedies. This shift from a litigative to an administrative approach soon achieved impressive levels of black registration. However, the recalcitrance of registrars and local officials persisted. Discriminatory practices reemerged in attempts to prevent free exercise of the franchise through manipulation of electoral procedures. Consequently, the tedious litigation which preceded the Act did not abate; judicial intervention was still required to force compliance with fifteenth amendment guarantees.

This comment will attempt to trace the development and effects of voting rights litigation in Madison Parish, Louisiana, a black belt community which has experienced four major voting rights suits in the past ten years. Following a brief description of the parish, the discussion will focus on the emergence of private party and government suits, the implementation of the Voting Rights Act of 1965, the new discriminatory practices in the exercise of the franchise, and the concomitant effects on Madison Parish politics. It is hoped that this case study will, therefore, not only capture the flavor of voting rights litigation but also

† This study was performed under a research grant from the American Bar Foundation. The analyses, conclusions, and opinions expressed are those of the authors, however, and not those of the Foundation, its officers and directors, or others associated with its work.

During the course of research, extensive interviews were conducted with residents and local officials in Madison Parish and with attorneys and other participants in voting rights litigation. When requested, the identity of the person interviewed has been withheld to preserve anonymity.
suggest the policy considerations which should underly future efforts to secure the right to cast an effective ballot.

I. THE SETTING

Madison Parish, whose eastern border meets the Mississippi River, is situated in the Delta country of northeast Louisiana. The tracks of the Illinois Central and the Missouri Railroads divide the parish seat, Tallulah, both physically and racially—to the west the residences and business are black-owned and -occupied, to the east they are white. There is no municipal park, no municipal swimming pool, no indoor movie theater, no bowling alley, no municipal transportation system, no functioning hospital. An outdoor movie theater, the only public recreational facility in Tallulah, is located in the white section of town; the private Tallulah Country Club provides members with a nine-hole golf course.

Traditionally, the parish has been a plantation society with a black majority population. Farming still provides the area's economic base,
primarily through extensive government subsidies. Mechanization of agriculture has resulted in consolidation, however, and the majority of residents now live in Tallulah.

A changing racial profile has accompanied this demographic shift. Since 1940, white population has risen in city and parish alike, while nonwhite population has increased in Tallulah but decreased in the parish as a whole. In other words, a few rural blacks have migrated to the city while a greater proportion have left the parish altogether.

Lack of industrial development helps explain this exodus. The only source of large-scale employment in Tallulah itself is a lumber mill.

<table>
<thead>
<tr>
<th>1940</th>
<th>1950</th>
<th>1960</th>
<th>1970</th>
</tr>
</thead>
<tbody>
<tr>
<td>Madison</td>
<td>Population</td>
<td>Per Cent</td>
<td>Population</td>
</tr>
<tr>
<td>Total</td>
<td>18,443</td>
<td>17,451</td>
<td>16,444</td>
</tr>
<tr>
<td>White</td>
<td>5,655</td>
<td>30.7</td>
<td>5,891</td>
</tr>
<tr>
<td>Nonwhite</td>
<td>12,788</td>
<td>69.3</td>
<td>11,560</td>
</tr>
<tr>
<td>Tallulah</td>
<td>Total</td>
<td>5,712</td>
<td>7,758</td>
</tr>
<tr>
<td>White</td>
<td>1,955</td>
<td>34.2</td>
<td>2,145</td>
</tr>
<tr>
<td>Nonwhite</td>
<td>3,757</td>
<td>65.8</td>
<td>5,613</td>
</tr>
</tbody>
</table>

* 1970 figures not yet available.


Between 1950 and 1964, the number of farms operated by blacks decreased from 1,058 to 152 while the number of white-owned farms increased from 611 to 368. Statistical Profile, supra note 7, at 13 (1950 figures); Bureau of the Census, U.S. Dept. of Commerce, Census of Agriculture: 1964, Louisiana 326-27 (1965) (1964 figures).

Although Madison Parish does not meet the 6% unemployed criterion for classifica-
Welfare payments, therefore, support a substantial segment of the population, both black and white.\(^\text{12}\)

Madison Parish has always been a black majority community under white control.\(^\text{13}\) In 1884 the ratio of black to white voters was ten to one, the highest of any parish in Louisiana.\(^\text{14}\) Blacks did not, however, govern themselves, and following the post-Reconstruction era they were disenfranchised.\(^\text{15}\) For the next half century, the apparatus of state-sup-

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\(^\text{12}\) In 1959, of 3,619 families, 63.2% earned under $3,000 and 4.6% earned over $10,000. The median annual income was $2,190. \(\text{Bureau of the Census, U.S. Dep't of Commerce, County and City Data Book 1967, at 153 (1967)}\) [hereinafter cited as 1967 Data Book]. Comparative Louisiana state figures: 35.6% of the population earn less than $3,000 per year, 9.9% earn more than $10,000; the median income for Louisiana is $4,272. \(\text{Id.}\) In December, 1970, 1,092 families received food stamps for 5,271 individuals, amounting to $120,885 in coupons. Madison Journal (La.), Jan. 28, 1971, at 3A. Aid to Dependent Children funds reached 427 families, representing 1,695 children and amounting to payments of $38,829. \(\text{La. Public Welfare Statistics, Report on April, May and June 1970, at 10 (figures as of June 1970). Contributing to the dominance of welfare in the Madison Parish economy are the age level and educational background of residents. The percentage of citizens over 65 rose from 4.8% in 1940 to 7.7% in 1950 to 10.2% in 1960, while the percentage of those 21 and over decreased from 59.5% in 1940 to 55.5% in 1950 to 51.7% in 1960. 2 Bureau of the Census, U.S. Dep't of Commerce, Sixteenth Census of the United States: 1940, Population pt. 3, at 372 (1943); 2 Bureau of the Census, U.S. Dep't of Commerce, Report of the Seventeenth Decennial Census of the United States, Census of Population: 1950 pt. 18, at 72 (1952); 1 Bureau of the Census, U.S. Dep't of Commerce, Eighteenth Decennial Census of the United States, Census of Population: 1960 pt. 20, at 82 (1963). Only 19.6% of the residents have completed high school, and 36.8% have finished less than five years of school; 10.9% of the adults have no schooling. 1967 Data Book, supra, at 153. With a median school year completion level of 6.7 grades for those 25 and over, id., Madison Parish ranks 54th of the 64 parishes. Statistical Profile, supra note 7, at 5.\)


\(^\text{15}\) See Walker, supra note 3. Carpetbag government existed in Louisiana until April, 1877. During the following twenty years, the Democratic Party secured its position by buying black votes while running on a white supremacy ticket. The 1898 state constitution established three alternative qualifications for electors: an educational requirement which included demonstrating ability to read and write by filling out an application form containing "traps for the unwary," a property requirement of $300 assessed value and paid-up taxes, and a grandfather clause. La. Const. art. 197, §§ 3-5 (1898). The grandfather clause was a substitute for the understanding clause, which had been condemned as a fraud. United States v. Louisiana, 225 F. Supp. 353, 372 n.46 (E.D. La. 1963), aff'd, 380 U.S. 145 (1965). Judge Wisdom's scholarly opinion provides a concise historical overview...
ported segregation insured that black citizens would be denied the right to vote. The white primary served to prevent blacks from influencing the nominating process and, following its invalidation, the Louisiana Constitution itself provided the means by which local officials deprived all blacks of the franchise—under the "voucher requirement," all prospective registrants were required to establish their identity to the registrar's satisfaction. In Madison Parish, the registrar invariably demanded that black applicants obtain personal verification from two registered voters. Since all registered voters were white and no white would "vouch" for a black, total disfranchisement on racial grounds resulted.

World War II appears to have been an important catalyst in changing this system. Although segregation existed in the army, black men trained with whites and were expected to perform similar jobs. Readjustment to Southern expectations of servility and self-deprecation was difficult. Moreover, an election for President had been held in 1944. White soldiers could cast absentee ballots, but many black men could not.

It was a time when President Franklin D. Roosevelt was run-
Voting Rights

ning for reelection. All of us black soldiers stood there and felt like fools as we watched white soldiers going to cast their absentee ballots for Roosevelt. You know all of us liked Roosevelt and, man, I wanted to vote so bad that it just hurt. But they told me I couldn’t vote because I wasn’t a registered voter in my hometown. Now here I was an American soldier way over in Europe fighting for some white people’s freedom and I couldn’t even vote for the president of my own country. That hurt me bad. I said to myself right then that when I get back to Tallulah [and Madison Parish] I was gonna start laying the groundwork for black people to get the right to vote.22

This resolution gained strength from evidence that blacks throughout the South were resisting discriminatory social patterns23 and from the increased black registration in some areas following invalidation of the white primary24

In Madison Parish, returning veterans began their first attempts to register during 1947. These individuals still reside in the parish and provide the continuity of leadership which has been a major factor in securing the black community’s strong political position.26 Zelma C. Wyche, the acknowledged leader of the parish’s blacks, described the nature of prelitigation history:

[In 1947] we drew up a petition with the names of the taxpayers in the town and presented it to the Mayor and the Sheriff after an appointment had been made with them.

[T]hey said they would take it under consideration and notify us at a later date and this date was never given. We were

22 The statement is that of Village Marshal Zelma C. Wyche, quoted in Sanders, Black Lawman in KKK Territory, Ebony, Jan., 1970, at 57, 60.
24 It is estimated that in 1940 only 5% of voting-age blacks were registered to vote in eleven Southern states. By 1947 the number increased to 12% and by 1952 to 20%. M. Price, The Negro Voter in the South 1 (1957). In Louisiana, black registration in 1948 was only 3% but by 1952 it had reached 10.2% of the eligible adult blacks. Hearings Before the U.S. Comm’n on Civil Rights 424 (1961) [hereinafter cited as 1961 Civil Rights Hearings].
26 My primary reason for coming back to Madison Parish after World War II was to do something about the situation that we were in in Madison Parish as black people . . . . We were really under a bondage . . . . [B]lack people were primarily slaves, I might say, because there was nothing constructive that black people could do in Madison Parish that would help them. The only thing that the white man wanted out of us was work for nothing or a little pay. After that they were through with you. I knew I was going to stay in Madison Parish the rest of my days and that was why I thought it was necessary to band ourselves together to do something to help eradicate these conditions that we were in.

Interview with Zelma C. Wyche, in Tallulah, La., Oct. 29, 1970 [hereinafter cited as Wyche Interview].
asking for the privilege of registering and voting in Madison Parish.

[After the meeting with the Mayor and the Sheriff] we went to the Register office on the first occasion, we asked the Registrar if we could be registered at that time and she said, "Yes, but you will have to have two electors who are on my books to identify you."

And we asked if any Negroes were on the books and we were told no. We said, are there any whites registered? And she said, "Yes." We said, "who are some of them?" And she said, "practically all the white people in Madison Parish are registered."

"Would you give us some of the names?" We asked,—this is on the first occasion—and she said, "quite a few are registered." Or, "All are registered." And we asked if we could get some of the names and she said: "You might bump into some of them on the streets any place." And we left the office.

.......

[In 1951] we had a committee to go and try to register[26]

.......

[The Registrar] said, "You will have to have certain identification." And I told her I had my driver's license and also I had my tax receipts in my pocket, which I thought were identification enough, and at that time I had my honorable discharge from the Army in a small pocketbook size and I offered to show these but she said, "you still will have to have someone who is on our books to identify you." She told us we should see the Sheriff about registering, and we left the office and went across the hall to the Sheriff's office. He wasn't in on that particular date and we didn't see him.[27]

Repeated frustration led black residents to retain the only black attorney in that part of the state, James Sharp, Jr.,[28] as counsel. Con-

[26] The committee was composed of barbers Wyche, Harrison Brown, and Ike Oliver, and dry cleaning store owner Martin Williams.

[27] Record at 5-11, United States v. Ward, 222 F. Supp. 617 (W.D. La. 1963), rev'd, 349 F.2d 795, modified, 352 F.2d 329 (5th Cir. 1965) (testimony of Zelma C. Wyche) [this portion of the Record hereinafter cited as Wyche Testimony]. (The questions put to the witness are omitted from this quoted portion to permit a continuous narrative statement. The testimony has been edited to avoid repetitions, and bracketed words and phrases have been inserted for clarification.)

[28] Sharp was at that time the only black attorney in northeast Louisiana. For a documentation of the difficulties he encountered before Southern judges, see Sharp v. Lucky, 148 F. Supp. 8 (W.D. La. 1957), rev'd, 252 F.2d 910 (5th Cir. 1958), on remand, 165 F. Supp. 405 (W.D. La. 1958), aff'd, 266 F.2d 342 (1959), in which Sharp sued for money damages alleging injury to him as a black attorney. For a discussion of Sharp's difficulties as counsel for black plaintiffs, see M. Price, supra note 17, at 43. Sharp's client, Dr. Reddix, technically won his suit, Reddix v. Lucky, 252 F.2d 930 (5th Cir. 1958), but class relief was denied and Reddix dismissed Sharp.
continuing the negotiation approach preferred by parish representatives,\textsuperscript{29} Sharp contacted the Registrar of Voters, the town’s Mayor, and the Judge of Louisiana’s Sixth Judicial Court to seek their cooperation in correcting the registration procedures. Having received no response to his inquiry,\textsuperscript{30} Sharp visited the Registrar’s office. Registrar Mary K. Ward\textsuperscript{31} informed him that there was an agreement between the parishes of East Carrol, Madison, and Tensas to the effect that Negroes would not be permitted to register.\textsuperscript{32} She stated that she was operating under instructions from several public officials, including Sheriff C. E. Hester, and that Sharp should discuss the matter with them.\textsuperscript{33}

At Sheriff Hester’s office two armed officers were present during the interview.

I was somewhat surprised at the intimidating fashion in which he went about it . . . . Sheriff Hester began at that moment to denounce the administration of Mr. Truman, and he did seem to express just a little more regard for the administration of Mr. Eisenhower, and he told me that I was sitting on a powder keg; that in effect he said that if I pursued what appeared to be my purpose any further, that he would take me for a ride. He further stated that any efforts that I would make in that direction I could assure myself that I would not have any protection whatsoever from his office.\textsuperscript{34}

In a letter to Wyche recounting this experience, Sharp concluded that “legal proceedings are indicated and in my opinion . . . in order.”\textsuperscript{35} An additional unsuccessful attempt to register confirmed the necessity for litigation and provided the incident on which to base a complaint.\textsuperscript{36}

\textsuperscript{29} “I wish to confirm our decision at a recent conference to use all peaceful means to solve this problem before legal action is taken; to withhold legal proceedings in any event until the books are closed for registration in the coming election.” Letter from James Sharp, Jr. to Zelma C. Wyche, Mar. 1, 1954.

\textsuperscript{30} Letter from James Sharp, Jr. to Judge Frank Voelker, Sr., of the Sixth Judicial District Court of Louisiana, Mar. 1, 1954 (copies were sent to Mayor Sevier and Registrar Ward) (copy on file at \textit{The University of Chicago Law Review}).

\textsuperscript{31} Mrs. Ward had held the appointive position of Registrar of Voters since 1931; she retired in 1955.

\textsuperscript{32} Letter from James Sharp, Jr. to Zelma C. Wyche, Mar. 26, 1954 (copy on file at \textit{The University of Chicago Law Review}) (hereinafter cited as Sharp Letter).

\textsuperscript{33} \textit{1961 Civil Rights Hearings}, supra note 24, at 35 (testimony of James Sharp, Jr.).

\textsuperscript{34} Id. at 36. Compare the sworn statement submitted by Sheriff Hester to the Commission on April 26, 1961. \textit{Id.} at 755.

\textsuperscript{35} Sharp Letter, supra note 32.

\textsuperscript{36} This experience was a duplicate of previous attempts to register. However, Sheriff Hester erased any doubts concerning the feasibility of future applications by stating that there “wasn’t any niggers registered on the books, and . . . ‘as long as I am Sheriff there won’t be any registered on the books, and I am tired of you coming up here.’” Wyche Testimony, supra note 27.
II. PRE-VOTING RIGHTS ACT LITIGATION

A. The Private Suit: A Lesson in Futility

In 1954, blacks faced substantial barriers when instituting litigation.\(^{37}\) While the Department of Justice could file criminal charges,\(^{38}\) it was assumed that only the aggrieved private parties, and not the federal government, had standing to bring civil actions for damages or equitable relief.\(^{39}\) Moreover, fear of intimidation, lack of finances, difficulty in adducing evidence, and expectations of unfavorable verdicts from Southern jurors deterred individuals from initiating proceedings.\(^{40}\)

In weighing these factors, Madison Parish blacks deemphasized possible intimidation. Although harassment could be anticipated, black leaders believed that citizens in northeast Louisiana rarely resorted to violence when dealing with civil rights problems.\(^{41}\) Additionally, individuals who attempted to register were self-employed and served the black community; the impact of unofficial economic sanctions by local


\(^{38}\) For general criticism of government initiative in the field of criminal civil rights litigation, see Comment, Discretion to Prosecute Federal Civil Rights Crimes, 74 YALE L.J. 1297 (1965); cf. 1961 CIVIL RIGHTS REPORT, supra note 21, at 75 n.18 ("the criminal statutes were unwieldy and difficult to apply"). See also 1957 LA. ATT’Y GEN. ANN. REP. 109 (1957) (Louisiana federal grand jury refused to issue indictments in connection with voter registration discrimination). But see R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 198 (1947) (arguing that criminal sanctions here operate to order society without resort to punitive actions).


\(^{41}\) Interview with Zelma C. Wyche, in Tallulah, La., Oct. 28, 1970 [hereinafter cited as Wyche Interview].
whites would, therefore, be minor. Since the complainants were willing to testify about discussions held with Mrs. Ward and Sheriff C. E. Hester during recent unsuccessful attempts to register, the only anticipated difficulty was proving that the Registrar did not require "unknown" white applicants to meet the standards imposed on black citizens. In this regard, the plaintiffs hoped that a 1952 injunctive order against discriminatory use of the voucher in Bossier Parish would provide the basis for asking the district judge to find discrimination through statistical evidence. Noting that more than nine thousand whites and no blacks were registered to vote, Judge Porterie of the Western District of Louisiana had concluded in the Bossier Parish case: "This is enough taken arithmetically to give plaintiffs the injunction they seek."  

Since "the time to act had arrived," Sharp filed a class action suit in the United States District Court for the Western District of Louisiana on June 16, 1954. The complaint alleged, first, that the identification requirement of the Louisiana registration laws was unconstitutional on its face and, second, that even if constitutional the regulation was being discriminatorily applied by Mrs. Ward. The plaintiffs sought damages of $5,000 apiece. Judge Benjamin C. Dawkins, Jr. set the hearing for November 23, 1954.

Because of a flat tire, the complainants arrived late at the courthouse, which is located in Monroe, 75 miles from Tallulah. Judge Dawkins called their case first and, the plaintiffs not being present, dismissed the complaint with prejudice. Participants contend that Sharp did not file another suit for financial reasons. However, a sec-

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42 Byrd v. Brice, 104 F. Supp. 442, 443 (W.D. La 1952), aff'd, 201 F.2d 664 (5th Cir. 1953). The population of Bossier Parish was composed of 22,227 whites and 13,912 blacks.


It would be impossible for a white person to understand what happened within black breasts on that Monday. An ardent segregationist has called it "Black Monday." He was right, but for reasons other than the ones he advances; that was the day we won; the day we took the white man's laws and won our case before an all white Supreme Court with a Negro lawyer, Thurgood Marshall, as our chief counsel. And we were proud.


46 Judge Dawkins, a Democrat, was appointed by President Eisenhower in 1953 to succeed his father, Benjamin C. Dawkins, Sr., who had sat on the bench since 1924. Judge Dawkins has sat as trial judge in every voting case concerning Madison Parish.

47 The litigants contend that they were only five minutes late. "The Judge, knowing that this was an opportune moment to get rid of us once and for all, called us up first. We were not there and he threw the case out. We lost that round." Wyche Interview, supra note 41. On September 14, 1959, a formal order of dismissal was made by the court in the absence of counsel's submission of a formal decree.
ond filing fee of $25 would not have drained the plaintiffs' financial resources. Rather, it appears that counsel saw no hope of receiving favorable rulings from Judge Dawkins, and the plaintiffs became discouraged as they envisioned a succession of futile suits.\footnote{48}

\textit{Wyche v. Ward} represents only one of the cumulatively expensive\footnote{49} and unsuccessful\footnote{50} private attempts undertaken at this time to secure the franchise. Locally, these suits forced community leaders to create strong grass-roots organizations which could function as pressure groups in the face of insufficient legal remedies and the exercise of unbridled discretion by local officials and the federal judiciary. Nationally, these cases\footnote{51} provided the evidence for early arguments that the inequities in the dual school system described in \textit{Brown v. Board of Education}\footnote{52} represented only one discrediting aspect of race relations in the South. This contention gained support as state legislatures acted to insure

\footnote{48} Even if Judge Dawkins had found for the plaintiffs, he might not have withdrawn the Registrar's discretion. In \textit{Byrd}, Judge Porterie did not order registration of the complainants, stating that (1) they had not been tested as required by state law, and (2) even if they had been, "a direct mandate from us would be usurpation by us of the discretionary function of the registrar." Instead, the judge instructed that "the registrar must become convinced that the Negroes are entitled to the benefit of the same time and trouble she gives to the white applicants in her seeking to identify them. This, we think, will be an immediate solution of the situation." 104 F. Supp. at 443-44.

\footnote{49} Plaintiffs challenging disfranchisement in the courts are estimated to have spent over $500,000. W. \textsc{White}, \textit{How Far the Promised Land} 65-66 (1955). Additionally, only a handful of blacks have been registered after years of delay, appeals, and remands. A representative case is \textit{Mitchell v. Wright}, 62 F. Supp. 580 (N.D. Ala. 1945), a class action voter registration suit for injunctive relief and damages in which the complaint was dismissed for failure to exhaust administrative remedies and because the black plaintiff could not maintain a class action. The Fifth Circuit reversed and remanded on the ground that exhaustion was not required. 154 F.2d 924 (5th Cir. 1946). The hearing on the merits resulted in a decision for the defendants. 69 F. Supp. 698 (N.D. Ala. 1947). While the case was again being appealed to the Fifth Circuit, the defendant registrar produced a photocopy of Mitchell's registration certificate, dated January 20, 1945—two years prior to filing of the suit—showing Mitchell to be a certified voter. Mitchell had never been notified that his application had been "accepted," nor had the defendant registrar produced the certificate during the two and one-half years of litigation. \textit{ Accord}, \textsc{Davis v. Schell}, 81 F. Supp. 872 (S.D. Ala.), aff'd \textit{per curiam}, 336 U.S. 933 (1949) (condemning discriminatory application of registration tests and resulting in the registration of ten blacks).

\footnote{50} In East Carrol Parish, a suit was filed against the registrar of voters in 1951. It dragged on "from 1951 until 1957 [when] Jurist Ben Dawkins put us out of his court, said he had no jurisdiction, it belonged to the three-judge court, and after that our attorney went off to California." 1961 \textit{Civil Rights Hearings}, supra note 24, at 22 (testimony of Rev. John H. Scott); \textit{cf. Sellers v. Wilson}, 123 F. Supp. 917 (M.D. Ala. 1954) (allegations of discriminatory treatment upheld but injunctive relief denied on the ground that the defendant members of the board had resigned).

\footnote{51} For descriptions of the accumulated instances of refusal to grant injunctive relief and their effect, see 1959 \textit{Civil Rights Report}, supra note 18; 1961 \textit{Civil Rights Hearings}, supra note 24.

\footnote{52} 347 U.S. 483 (1954).
adherence to the philosophy of white supremacy. Moreover, state agencies and local organizations cooperated in a program of retrenchment designed to maintain white control of state and local politics.

B. The Government Suit: A Lesson in Frustration

Congress eventually gave formal recognition to the inadequacy of private party litigation by passing the Civil Rights Acts of 1957 and 1960. The 1957 Act authorized preventive relief to be sought by the Attorney General on behalf of one or more individuals threatened with deprivation of the right to vote, prohibited any person from purpose-


54 To insure administrative compliance, the Louisiana Legislature enacted a series of laws regulating the activity of registrars, see Kommers, supra note 37, at 397-98, and amended the Louisiana Constitution to provide for registrant disqualification on grounds of “bad character,” which included conviction of a misdemeanor carrying a six-month prison sentence, participation in a common law marriage, and parentage of illegitimate children. These designations were not exclusive and other evidence of bad character could be used by the registrar to disqualify. La. Const. art. VIII, § 1(c); see 1961 Civil Rights Report, supra note 21, at 68-70; Kommers, supra note 37, at 397-98.

55 The Association of Citizens Councils of Louisiana arranged to purge black registrants, suggested means to discipline or remove uncooperative registrars, and published an inflammatory “manual of procedure for registrars of voters”; the pamphlet, entitled “Voter Qualification Laws in Louisiana: The Key to Victory in the Segregation Struggle,” provided the basis for discussion at conferences sponsored by the Joint Legislative Committee and the State Board of Registrars. See 1961 Civil Rights Hearings, supra note 24, at 526-29, 532-46. See also United States v. Association of Citizens Councils, 187 F. Supp. 846 (W.D. La. 1960).


57 While black participation in elections may have rankled less than the anticipated desegregation of schools, see the “rank order of discrimination” analysis in G. MYRDAL, AN AMERICAN DILEMMA 60-61 (1944), fear of the effect of black voting is reflected in the sudden reversal of the trend in Louisiana of increased black registration. The percentage of blacks registered in Louisiana, having jumped from 3.0% in 1948 to 10.2% in 1952, reflected steady growth until July, 1954, when 13.3% of eligible blacks were on the rolls. The figure stabilized near the 13.7% level (except for a sporadic jump to 15.3% in May, 1956) until July, 1960. 1961 Civil Rights Hearings, supra note 24, at 424.


fully interfering with that right,\textsuperscript{61} and established the United States Commission on Civil Rights.\textsuperscript{62} While ambitious, the 1957 Act did not materially aid disfranchised blacks. Between 1957 and 1960 the Department of Justice initiated only four actions,\textsuperscript{63} not one of which resulted in placing blacks on the voting rolls for the first time.\textsuperscript{64} The Commission, which had been authorized to investigate complaints of voting rights deprivation, met with a series of legal challenges which delayed its effective functioning.\textsuperscript{65} In 1959 the Commission finally concluded: "Against the prejudice of registrars and jurors, the U.S. Government appears under present laws to be helpless to make good the guarantees of the U.S. Constitution."\textsuperscript{66}

Congress, therefore, strengthened the means for securing registration of qualified applicants in the 1960 Civil Rights Act.\textsuperscript{67} Whenever a government-initiated suit established denial of the franchise because of race, color, or creed, the Attorney General could request that a federal district court enter a finding of deprivation of rights pursuant to a pattern or practice of discrimination. Such determination would permit any resident within the defendant's jurisdiction to apply to the court for an order declaring him qualified to vote in any election, providing the applicant was qualified to vote under state law and had, subsequent to the court's "pattern or practice" finding, been denied

\begin{footnotesize}
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\item \textsuperscript{61} Id. at § 1971(b).
\item \textsuperscript{62} Id. at § 1975. The Act also restated the Enforcement Acts' right-to-vote policy, id. at § 1971(a)(1); eliminated the exhaustion of remedies requirement for federal jurisdiction, id. at § 1971(d); empowered district court judges to hear criminal contempt cases without a jury if the sentence did not exceed a $300 fine and 45 days' imprisonment, id. at § 1995; provided for an additional assistant attorney general, 5 U.S.C. § 295-1 (1964); and eliminated the requirement that federal jurors must qualify under state law, 28 U.S.C. § 1861 (1958).
\item \textsuperscript{63} Christopher, supra note 40, at 4.
\item \textsuperscript{64} For an explanation of the year's delay in filing this small number of suits on grounds that the first cases had to be "factually strong" to provide support against assertions of the Act's unconstitutionality, see Hearings on S. 2684, S. 2719, S. 2763, S. 2814, S. 2722, S. 2785 and S. 2535 Before the Senate Comm. on Rules and Administration, 86th Cong., 2d Sess. 360 (1960) (testimony of Attorney General William P. Rogers), criticized and evaluated in 1959 CIVIL RIGHTS REPORT, supra note 18, at 128-33; Note, The Civil Rights Act of 1960, supra note 37 at 957-61.
\item \textsuperscript{66} Id. at 33.
\item \textsuperscript{67} The Act, 74 Stat. 86 (1960), was signed on May 6, 1960, by President Eisenhower. For a general history and preliminary analysis, see Note, The Civil Rights Act of 1960, supra note 37. For a detailed account of the legislative history, see D. Berman, A BILL BECOMES A LAW: THE CIVIL RIGHTS OF 1960 (1962).
\end{itemize}
\end{footnotesize}
the opportunity to register or to vote by persons acting under color of state law. Additionally, the legislation permitted discretionary court appointment of federal referees to receive applications, hear evidence \textit{ex parte}, and present findings to the court on the applicant's eligibility for relief.\textsuperscript{68}

However, even after passage of the 1960 Act, severe hurdles to government action remained. These deficiencies are highlighted in \textit{United States v. Ward},\textsuperscript{69} a 1961 suit in which the Government sought to force abandonment of the voucher requirement as applied in Madison Parish, and to enjoin local officials from subjecting black applicants for registration to different and more stringent standards than were applied to white persons.

The first problem the Government encountered was convincing black residents to make the necessary attempt to register which would enable the Department of Justice to bring suit. While preparing a voting discrimination case in neighboring East Carroll Parish,\textsuperscript{70} government attorneys periodically visited Tallulah and discussed the Madison Parish situation, giving informal assurances that failure of a new attempt to register would initiate an investigation likely to result in the filing of a federal suit.\textsuperscript{71} However, black residents took no action until August 28, 1961; once again failure to fulfill the voucher requirement defeated the registration attempt.\textsuperscript{72} The Government filed suit on October 21, 1961.

While black residents do not remember why they hesitated to act despite the obvious desire of government attorneys to begin proceed-


\textsuperscript{71} \textit{Interviews with attorneys in the Civil Rights Division, United States Department of Justice, in Washington, D.C., Nov. 23-24, 1970} [hereinafter cited as \textit{Department of Justice Interviews}].

\textsuperscript{72} The registration attempt produced a unique dialogue indicating the tragicomic absurdity of Miss Ward's application of the voucher requirement. Wyche testified at the \textit{Ward} trial:

[The Registrar told us] "you will have to have two electors, as I have previously said, because I don't know any of you."
And I said, "I am Zelma C. Wyche."
And the Registrar said, "You are the one who filed the lawsuit against my mother [the former Registrar]."
I said, "I am."
She said, "I still don't know you. You will have to get someone to identify you."
Wyche Testimony, \textit{supra} note 27.
it appears that increasing harassment influenced their decisions. A black minister was arrested twice and beaten after testifying before the Civil Rights Commission in September, 1960. Wyche was subjected to unusual harassment in his Army Reserve unit, which eventually forced his resignation after sixteen years’ service. Harrison Brown, another leader of the black community, declined to testify before the Commission because he feared subsequent financial retaliation by whites and the possible loss of his wife’s teaching position.

The second problem attached to government suits filed under authority of section 1971(a) was the necessity for county-by-county litigation. Although an action attacking the voucher requirement had been brought in neighboring East Carroll Parish, a favorable decision from Judge Dawkins in that case could not aid Madison Parish blacks. No assumption was permitted that lopsided registration figures and a “pattern or practice” finding against one registrar were conclusive of discriminatory activities in another parish, despite identity of legal theory and striking similarity of evidence. Nor could the Government rely solely on statistical evidence of voting patterns within Madison Parish itself to prove its case. Although the Fifth Circuit had suggested, and Judge Dawkins eventually held, that disparate registration and popul-

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73 Elliot C. Nolley, a store owner registered in Ouachita Parish until he was purged in 1956, had written to the Department of Justice and had been visited by Federal Bureau of Investigation agents requesting him to register; he declined. Fieldworker’s Report, Aug. 8, 1960, on file at the United States Commission on Civil Rights.
74 Madison Parish blacks continually denied, however, that harassment or intimidation affected their activities. Interviews with local residents, in Tallulah, La., Oct. 26, 1970.
75 Fieldworker’s Report, Nov. 15, 1960, on file at the United States Commission on Civil Rights. Compare United States v. Deal, 6 RACE REL. L. REP. 474 (1961), in which East Carroll residents retaliated against farmer Joe Atlas, who had testified before the Commission, by refusing to gin his cotton and conduct ordinary business with him. Following intervention by the Department of Justice, the court issued a consent decree by which boycotting merchants agreed to desist.
76 1961 Civil Rights Hearings, supra note 24, at 29 (describing in detail another attempt to register). Compare the account given by Sheriff Hester in a sworn statement submitted to the Commission on April 26, 1961, following the Commission’s invitation to respond to Rev. Neal’s testimony. Id. at 754.
77 Fieldworker’s Report, Apr. 4, 1960, on file at the United States Commission on Civil Rights (report of interview with Wyche). Wyche specifically stated that his Army trouble stemmed from the fact that white citizens had learned he was to appear at a Commission hearing in Shreveport, Louisiana. Id.
78 Fieldworker’s Report, Aug. 8, 1960, on file at the United States Commission on Civil Rights.
80 No blacks had been registered in Madison Parish during this century, United States v. Ward, 222 F. Supp. 617, 618 (W.D. La. 1963), rev’d, 349 F.2d 795, modified, 352 F.2d 329 (5th Cir. 1965), nor in East Carroll since 1922, United States v. Manning, 205 F. Supp. 172 (W.D. La. 1962).
82 Where it is shown, as in this case, that, prior to the trial, none of the more than
lation figures could constitute prima facie evidence of discrimination, establishing the fact of segregated patterns was not enough. To obtain effective relief the Government needed to identify specific acts of discrimination. In Ward, 21 blacks testified that they had been denied applications for failure to meet the personal identification requirement. Additionally, the Government called Katherine Ward, the new Registrar, to describe the registration system she used; presented testimony that a general understanding existed among white people that they would not identify blacks; and demonstrated that Miss Ward knowingly utilized the voucher requirement to prevent registration of blacks.

Amassing the evidence necessary to supplement registration statistics.

5,000 Negroes of voting age in the Parish had been registered since 1900, and a majority of the white persons of voting age were allowed to register to vote, and a number of Negroes attempted to register to vote, this evidence alone establishes a claim for relief under the Fourteenth and Fifteenth Amendments, and under the Civil Rights Act of 1957, as amended. It must be concluded that Negroes were systematically excluded from registration for voting.

United States v. Ward, 222 F. Supp. 617, 620 (W.D. La. 1963), rev’d, 349 F.2d 795, modified, 352 F.2d 329 (5th Cir. 1965); accord, United States v. Wilder, 222 F. Supp. 749 (W.D. La. 1963); United States v. Manning, 205 F. Supp. 172, 174 (W.D. La. 1962). Since the Government did not rest upon presenting the statistical evidence in these cases, it is impossible to know whether Judge Dawkins would have made his conclusion of law absent the additional evidence of attempts by blacks to register. But see the refusals of other district courts to grant statistics even probative value. United States v. Logue, 9 RACE REL. L. REP. 770 (S.D. Ala. 1964), rev’d, 344 F.2d 290 (5th Cir. 1965) (Thomas, J.); United States v. Ramsey, 8 RACE REL. L. REP. 156 (S.D. Miss. 1963), rev’d, 331 F.2d 824 (5th Cir. 1964), modified, 353 F.2d 650 (5th Cir. 1965) (Cox, J.); United States v. Duke, 9 RACE REL. L. REP. 788 (M.D. Ala. 1963), rev’d, 332 F.2d 759 (5th Cir. 1964) (Clayton, J.). Compare the Fifth Circuit’s refusal to find discrimination based on voting statistics showing that 92% of white applicants were accepted while 62% of Negroes were not. United States v. Atkins, 323 F.2d 733 (5th Cir. 1963), aff’g 210 F. Supp. 441 (S.D. Ala. 1962).

88 Brief for Plaintiff at 17.

84 Miss Ward did not use the literacy test, which was optional, 47 LA. REV. STAT. §§ 18:35-36 (1969), but “qualified her voters” by determining age, residency, citizenship, and absence of conviction of a crime, id. at § 18:31, before permitting an applicant to fill out a form. If she knew an applicant or if the applicant had previously registered, no additional identification was required for issuance of a new certificate. Miss Ward stated that she knew many white people in the parish because she had been born and raised there but that she knew very few Negroes, “only those who work for me or help me.” Record at 122, 104-105, 107-108.

85 Tax Assessor Speigner, who had vouched for two white persons, stated that he did not want to identify blacks because “he didn’t care to have anything to do with it.” Record at 26. The Government demonstrated that 37 whites had been identified by public officials (including two by Sheriff Hester, four by Clerk of Court Post, and 23 by six of the sheriff’s deputies), and four blacks testified that white men they approached refused to identify them. Brief for Plaintiff, App. B, Table 2.

86 Miss Ward testified she knew that no blacks had been registered in the past while most whites had, and that no black had ever been identified by a white person. Moreover, when Wyche’s group appeared at her office on August 28, Miss Ward testified, “[T]t was the first time any colored persons had been in my office and it struck me as being a little peculiar or strange.” Record at 103.
required exhaustive preparation. Each government case demanded the presence of five lawyers for a minimum of one month to analyze all registration forms. Thus, for each county in which it brought suit, the Government spent at least 1,200 attorney-hours just to acquire complete command of registration material;\(^8\) it is impossible to estimate the time spent interviewing residents, preparing for trial, litigating the case, filing memorandums, and, inevitably, briefing and arguing appeals.\(^8\)

While the inherent delays in county-by-county litigation compounded the Government's difficulties, the discretionary nature of relief under the 1957 and 1960 Civil Rights Acts eventually proved to be the major obstacle. Despite a finding that the voucher requirement unconstitutionally deprived Madison Parish blacks of the right to vote,\(^8\) Judge Dawkins did not grant adequate relief. His final decree merely (1) enjoined use of the voucher to establish identity, (2) provided that the Registrar's records be available to government agents, and (3) required submission of periodic reports to the court detailing progress in processing registration applications.\(^9\)

These orders did not seriously affect the defendants' activities. Registrar Ward had already abandoned the voucher requirement in September, 1962, substituting more stringent registration procedures.\(^9\) Therefore, the injunction merely proscribed the application of a standard no longer in use, and Judge Dawkins' condemnation of the strict identification practice amounted to no more than judicial affirmation that the "voluntary abandonment" must continue. Similarly, since the Civil Rights Act of 1960 required registrars to make records available to government agents, the order's provision for inspection and photographing at all reasonable times merely insured future access without resort to court order. Moreover, the Government itself had indicated a willingness to accept less coercive sanctions by suggesting that Judge Dawkins adopt the monthly reports requirement as an alternative to appointing a voter referee.\(^9\) Thus, the plaintiff's victory

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\(^8\) Compare this Department of Justice estimate with Attorney General Katzenbach's statement that it has become routine to spend as many as six thousand man-hours only in analyzing the voting records of a single county. H.R. REP. No. 439, 89th Cong., 1st Sess. 10 (1965).

\(^8\) Department of Justice Interviews, supra note 71.

\(^8\) 222 F. Supp. at 620.

\(^9\) Id. at 620-21.

\(^9\) See text at notes 94-96 infra.

\(^9\) Judge Dawkins had previously assumed this overseer role at the Government's suggestion. United States v. Manning, 205 F. Supp. 172, 175 (W.D. La. 1961). The Manning decision included a finding of discrimination pursuant to a "pattern or practice." It has been conjectured that Dawkins did not realize the implications of using the statutory
amounted to a decree ordering the defendants to do that which they were already doing or could be required to do through pro forma application for a court order. The real significance of this decision lies, therefore, in Judge Dawkins' power to deny, subject to appeal, certain relief requested by the Government: (1) a finding of discrimination pursuant to a "pattern or practice;" (2) an order that standards applied to future applicants for registration be those which had been used between January 1, 1961 and August 31, 1962 (freezing relief); and (3) an assessment of costs against the State of Louisiana as well as Registrar Ward.

The failure to make a "pattern or practice" finding precluded either judicial registration of voters or the appointment of referees pursuant to section 1971(e) of the 1960 Civil Rights Act. The defendants, therefore, remained in control of the Madison Parish voter registration machinery. Moreover, the defendants had freedom to operate that machinery in a discriminatory manner as a result of Judge Dawkins' failure to order use of the former registration requirements in judging future voter applicants. Even at the time of trial it had been quite clear that the defendants were shifting to other discriminatory tactics in lieu of the voucher requirement.

First, in September, 1962, Registrar Ward had put into practice the "citizenship test" approved by the Louisiana legislature the previous month. Using this standard, an applicant could not qualify for registration unless he answered correctly four out of six multiple choice questions on citizenship, government, and history. Additionally, applicants were required to read and write from dictation a portion of the preamble to the United States Constitution. Since a system of permanent registration had been instituted in February, 1963, the stricter requirements were inapplicable to those persons who had registered prior to September, 1962 on the basis of age, residence, and no criminal conviction, all of whom were white.

A second pre-trial innovation concerned the application form which language and that he never intended to provide the means for triggering the 1971(e) machinery. C. Hamilton, Southern Federal Courts and the Negro Vote 207, 1957 (unpublished dissertation in Regenstein Library, The University of Chicago). Prior to trial no blacks had been registered and registration was periodic; a complete registration was held every four years. See La. Rev. Stat. §§ 18:231, 18:249 (Supp. 1969). On February 14, 1963, the police jury changed to a system of permanent registration. Therefore, the Government argued, past inequities would be perpetuated for many years if the lenient pre-September, 1962 requirements were not applied—at least until the effects of discrimination were eradicated. For extensive discussions of freezing relief, see Fiss, Gaston County v. United States: Fruition of the Freezing Principle, 1969 Sup. Ct. Rev. 379; Note, supra note 55, at 1137-52.

95 Record at 131-32.
had been used formerly as a means to obtain and record essential information about substantive qualifications of applicants; with abandonment of the voucher it had been transformed into a device to test literacy. The applicant was required to fill in the card himself without any assistance or supervision. To avoid "passing" through memorization, five different forms were used to elicit the same information.96

Having anticipated that the Registrar might attempt to use literacy as a means of disqualifying blacks should the voucher procedure be prohibited, the Government had sought to establish at trial the standard of acceptability for application forms previously set by Miss Ward. Each card was examined for mistakes; in court the Government presented successive cards with identical but unique mistakes, raising the inference that many applicants copied one form.97 Searches were made for the "lowest standard" registered voter who had filled out his own card. Arguably, his form would become the basis of comparison for all future applications98 since the Louisiana Constitution had been amended in 1960 to refuse illiterates the right to vote.99 Moreover, a handwriting expert attested to the Registrar's practice of completing cards for applicants. Through testimony the Government established that 1760 out of 1762 applicants or 99.9 per cent were registered, that Miss Ward accepted all applications unless they looked "ridiculous," and that she pointed out errors to applicants and permitted them to fill out new cards.100

Abrogation of these lenient standards would inevitably place a heavy burden on all future registrants, but, more importantly, the results of past, flagrant discrimination would be frozen in and perpetuated.101 However, the attempt to set a literacy standard which

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96 Id.
97 This thorough preparation revealed facts unknown to the defense. Counsel, caught unawares, merely continued to argue Miss Ward's adherence to the law. Moreover, counsel for Miss Ward never submitted a post-trial brief.
98 This technique was first adopted in Mississippi. Investigators would tour the community looking for the most deplorable living accommodations and then would determine whether the occupants were registered. Madison Parish's most "illiterate literate white voter" was found living under a railroad bridge siding. He was so far removed from the white power structure and so poorly informed about the parish's struggle to prevent black voting that on being subpoenaed to appear at trial, rather than ask a white citizen for a lift, he requested Wyche to help him get to the federal courthouse in Monroe. Since it was a civil rights matter, he assumed that Wyche was behind it and that no white citizens would be involved. Department of Justice Interviews, supra note 71.
99 LA. CONST. art. 8, § 1(d), as amended on November 8, 1960. However, it should be noted that illiterates already on the rolls would remain registered.
100 Record at 98, 122.
101 In presenting this evidence, the Government raised the possibility of future discrimination through registrar discretion by questioning the timing behind altered registration procedures. If prior to September, 1962, whites registered at will without
would, in effect, reflect past standards failed. Despite a century of segregation and evidence of current discrimination, Judge Dawkins refused either to take the voter registration machinery out of the defendants’ hands or to control significantly the way in which the defendants operated that machinery.

The Government did not challenge Judge Dawkins’ omission of the “pattern or practice” finding, which would trigger the assignment of voter referees, or the judicial registration of voters under section 1971(e). Department of Justice analysts felt that the court’s decision included statements sufficient to set the 1971(e) machinery in force “even though the judge clearly does not intend for it to.”

Referees were never requested, however; until proven insufficient the Government was willing to accept Judge Dawkins’ adoption of the limited overseer role.

The Department of Justice, did, however, appeal Judge Dawkins’ refusal to grant freezing relief. In August, 1965, the Fifth Circuit reversed the Ward decision and ordered suspension of nondiscriminatory voting qualifications not previously applied to white citizens. The court, additionally, used this opportunity to indicate the contours of the freezing remedy. Of primary importance, however, was the Fifth Circuit’s recognition that the 1960 Act erred in permitting significant

being subject to any test while blacks were not permitted to register at all because of their race, the Department of Justice suggested, it was far from coincidental that strict standards and difficult tests were adopted following initiation of federal court action—that is, only after the Registrar recognized that she would be forced to permit blacks to apply.

102 Memorandum from Frank Dunbaugh, attorney in the Civil Rights Division, United States Department of Justice, to Assistant Attorney General John Doar, Nov. 12, 1963. This assumption was borne out by the Fifth Circuit when Ward was appealed. 349 F.2d at 800. Judge Brown stated: “The decree entered by the District Court . . . although not using the exact phraseology of 42 U.S.C. § 1971(a) . . . found a discriminatory pattern and practice.” The court, additionally, took this opportunity to instruct that the “pattern or practice” finding was not discretionary and should be made in the terminology of the statute to expedite post-finding voter applications. Cf. United States v. Ramsey, 353 F.2d 650 (5th Cir. 1965), rev'g 331 F.2d 824 (5th Cir. 1964) (Rives, J., dissenting strongly) (holding that the finding was discretionary).

103 United States v. Ward, 349 F.2d 795, modified, 352 F.2d 329 (5th Cir. 1965).

104 First, the court characterized the freeze order as “an effective equitable tool to eradicate the consequences of past discrimination” rather than as an additional sanction to the 1971(e) “pattern or practice” machinery. 349 F.2d at 803. Second, Judge Brown repudiated past decisions denying the remedy, id. at 801; explained the necessity for a two-year conditional period of suspension, id. at 803 (but see United States v. Louisiana, 380 U.S. 145, 155 (1965); Note, supra note 53, at 1148); and extended coverage of related registration standards to all applicants, whether or not they were of eligible age and residence during the discriminatory period, noting that restricting eligibility created an “incongruous conflict” between requirements placed on the Registrar, who could reject applicants on the more rigid current standards, and those lax requirements used by the court once rejection had been established, id. at 803-04.
relief to depend on the discretion of Southern district judges.\textsuperscript{105} Accordingly, the Court instructed:

Voter registrars should come to learn that when the cases are tried on the application for permanent injunction and the facts establish a pattern or practice, the District Court must so find. Next, the Judge must make the finding to set in operation the §1971(e) machinery. Next, he must enter a decree, which, through suitable freeze provisions, effective for an adequate period of time, will assure that the evils of past discrimination be eradicated before new and more stringent state provisions may be exacted of Negro applicants. The handwriting is indeed on the wall—in Mississippi Ward, in Lynd and now Louisiana Ward.\textsuperscript{106}

The court also withdrew the district judge's discretion in apportioning costs.\textsuperscript{107} Although Judge Dawkins had taxed litigation expenses of $1,468.77 against Miss Ward in her capacity as Registrar of Voters, he had entered no assessment against the State of Louisiana. Characterizing the suit as a battle "between two sovereigns," the Fifth Circuit summarily instructed the State to assume these costs.\textsuperscript{108}

\textsuperscript{105} Not only did district judges avoid the "pattern or practice" finding, but even those who made the determination might decline to utilize 1971(e) machinery. See, e.g., United States v. Parker, 236 F. Supp. 511 (M.D. Ala. 1964); cf. United States v. Cartwright, 230 F. Supp. 873 (M.D. Ala. 1964) (not specifically rejecting a voter referee assignment but decreeing only that certain named individuals be placed on the rolls).

\textsuperscript{106} After four years of litigation, Congress also recognized its error. The omnibus 1964 Civil Rights Act authorized three-judge district courts to decide suits at the request of the Attorney General or the defendant when the Government requested a finding of discriminatory pattern or practice. Hearing would be immediate and the decision would be directly appealable to the Supreme Court. 42 U.S.C. § 1971(g) (Supp. V, 1965-69). The provision did aid in removing some delays. Prior to 1964 the time lapse between the filing of the complaint and the beginning of trial was 16.33 months, more than six months of which was spent awaiting an answer. Between July, 1964 and February, 1965, of the seven 1971(a) suits filed the average time lapse between complaint and answer was less than one month. One case went to trial during that time, and in two suits offers of consent judgments were made by the defendants. 1 Hearings Before the U.S. Comm'n on Civil Rights 259-60 (1965) (statement of Burke Marshall). The Act also established a rebuttable presumption of literacy, id. at § 1971(c), and prohibited, in elections held solely or in part for federal offices, registration procedures different from those used in the past, rejection of applicants for immaterial errors or omissions, and use of literacy tests as a voting qualifications unless administered and conducted wholly in writing, id at § 1971(a)(2).

\textsuperscript{107} 349 F.2d at 805. Additionally, the court framed a proposed uniform decree which would serve as a model for district judges and would be entered on remand, thereby cutting down the time lag between formal grant of judicial relief and implementation of that relief. Id.

\textsuperscript{108} Id. The court further characterized the state as having given Mrs. Ward aid and comfort, financial as well as moral. Cf. United States v. Duke, 332 F.2d 759, 770 (5th Cir.
C. The Effects of Litigation

It has been argued that once the Fifth Circuit established freezing relief and voter referee assignments to be mandatory, an effective barrier to discriminatory registrar procedures had been erected and no further federal legislation was necessary.\textsuperscript{109} Judge Tuttle, for example, stated that

the courts of our circuit . . . by the midsummer of 1965 had disposed of substantially all of the legal questions that had arisen from the continued reluctance of local officials in some counties to accept the century-old command of the Fifteenth Amendment.\textsuperscript{110}

It is admittedly idle to speculate whether the federal bench responded to the need for a radical remedy or to the pressure of impending federal legislation in developing the criteria for ordering and fashioning “complete” substantial relief.\textsuperscript{111} However, a reconsideration of the delays, costs, and consequences incident to county-by-county litigation vividly demonstrates the easily anticipated inadequacy of continuing dependance on the judiciary to effectuate voter registration policies.\textsuperscript{112}

First, it could not be assumed that the Fifth Circuit’s pronouncements would be followed. In the past, frequent and explicit instructions

\textsuperscript{109} It seems certain that if Congress had not invalidated discriminatory state voting provisions and provided means to correct the effect of prior disfranchisement, the judicial doctrines formulated by 1965 would have accomplished a similar result.

\textsuperscript{110} Tuttle, Equality and the Vote, 41 N.Y.U.L. Rev. 245 (1966).

\textsuperscript{111} The phrase is taken from Judge Johnson’s original formulation of the concept underlying freezing relief. United States v. Alabama, 192 F. Supp. 677, 682 (M.D. Ala. 1961), aff’d, 304 F.2d 583 (5th Cir.), aff’d mem., 371 U.S. 37 (1962).

\textsuperscript{112} United States v. Louisiana, 380 U.S. 145 (1965) (attacking use of the interpretation and citizenship tests in 21 parishes) and United States v. Mississippi, 380 U.S. 128 (1965) (challenging a variety of state voting procedures) represent attempts to avoid repeated suits, but alternative discriminatory methods were still available. See Note, supra note 53, at 1175-89.
to the inferior courts had not halted evasive tactics. There is little reason to conclude that further explication of controlling legal doctrines and specific articulation of the court's expectations would automatically produce compliance.

Second, eight years of litigation provided the most persuasive argument that adjudication and court-developed enforcement tools could not ensure extensive registration. In Madison Parish, for example, between the Ward trial and August 5, 1965, only 327 black citizens succeeded in passing the citizenship and literacy tests. While whites argued that this low registration demonstrated lack of interest in political matters, other factors seem to provide a more plausible explanation. Initially, apprehension of "incorrectly answering" the citizenship questions restrained many from applying to register. School teachers, among others, refused to permit white persons to gossip that "they didn't even have enough sense to pass that simple test." Once the district court ordered termination of the Registrar's unofficial discretion, threats of job loss replaced fear of failure. Additionally, some black residents alleged that discriminatory delaying tactics were used—admitting only one black applicant into the Registrar's office while permitting four and five whites to fill in the forms at the same time, using hypertechnical errors and omissions to invalidate application cards, and refusing such identification as electric bills to establish residency because the company-issued receipts did not include dates.

As the culmination of a concentrated effort to provide both the opportunity and the means for eradicating racially motivated disfranchisement, United States v. Ward and the seventy other Department of

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113 See, e.g., Katzenbach v. McClellan, 341 F.2d 922 (5th Cir. 1965) (per curiam); Kennedy v. Lynd, 306 F.2d 222 (5th Cir. 1962), cert. denied, 371 U.S. 952 (1963).
114 Progress has been painfully slow, in part because of the intransigence of state and local officials and repeated delays in the judicial process. Judicial relief has had to be gaged not in terms of months—but in terms of years. The judicial process affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.
115 By February 23, 1962, ten weeks after trial and eight months prior to Judge Dawkins' decree, 174 blacks had been registered. 349 F.2d at 799.
116 Wyche Interview, supra note 41.
117 Sheriff Hester's fiat that "as long as I am Sheriff, there won't be any [niggers] registered on the books," Record at 16, strongly negated the argument that the absence of black voters resulted from voluntary disinterest. Judicial recognition of the Sheriff's superordinate role and of the Registrar's complicity therein was established by the district court. 222 F. Supp. at 619.
Justice suits filed between 1957 and 1964 present a dismal recommendation for redressing grievances through legal action. After eight years of litigation, only 37,146 of 548,358 voting-age blacks had been registered in the 46 counties which had been subjects of government suits. Moreover, intensive litigation in Alabama, Louisiana, and Mississippi did not generate accelerated enrollment of black voters. Between 1956 and 1965, black registration rose by only 3.0 per cent in these three states as compared to an 18.3 per cent average increase for the eleven Southern states.

While these figures highlight certain inadequacies of judicial enforcement, secondary gains should not be overlooked when evaluating the effect of litigation. In addition to opening registration rolls, through voting rights suits the Government sought to influence behavior patterns of the white leadership. Department of Justice attorneys indicate that they succeeded, for example, in forcing some district judges to confront the blatant misconduct of local officials. They believe, moreover, that Judge Dawkins became so indignant over the refusal of officials to register blacks that he threatened in private to appoint a voter referee if intransigence persisted.

<table>
<thead>
<tr>
<th>1956 Black Registration</th>
<th>1965 Black Registration</th>
<th>1965 White Registration</th>
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<tbody>
<tr>
<td>Number</td>
<td>Per Cent</td>
<td>Number</td>
</tr>
<tr>
<td>Alabama</td>
<td>73,272</td>
<td>14.0a</td>
</tr>
<tr>
<td>Louisiana</td>
<td>152,587</td>
<td>31.7b</td>
</tr>
<tr>
<td>Mississippi</td>
<td>19,347</td>
<td>3.5e</td>
</tr>
<tr>
<td>Eleven Southern States</td>
<td>1,200,000</td>
<td>25.0d</td>
</tr>
</tbody>
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Sources:

- a 1959 Civil Rights Report, supra note 18, at 578 (unofficial 1958 figures).
- b Id. at 569 (official 1956 figures).
- c Id. at 580 (official 1956 figures).
- d Id. at 40.
- e U.S. Comm'n on Civil Rights, Political Participation 222 (1965) [hereinafter cited as Political Participation].
- f U.S. Comm'n on Civil Rights, The Voting Rights Act: The First Months 8 (1965) [hereinafter cited as The First Months].
- g Political Participation, supra, at 227-46.

White attorneys in northeast Louisiana discount the influence of informal discussions with federal judges. Interviews with northeast Louisiana attorneys, Oct. 26 & 28, 1970.

Department of Justice Interviews, supra note 71. Charles Hamilton recounts a
As a second objective, Government attorneys hoped to provide the black community with vital information. Referring to the Ward trial, one attorney stated:

I got the registrar on the stand and the galleries were packed with Negro leaders in the county. So I asked her questions for the benefit of the Negroes. Questions like: Now what are your office hours? What days are you in your office? Now just what do you require of persons who come to make application to register? And the Negroes are sitting right there and they leave the courtroom armed with all that information. Plus, you see, I purposely ask the registrar if she intends to register all persons who come in and who are qualified.

Now we just recently tried that case before Judge Dawkins and he is nowhere near a decision, but the next week seventy Negroes were registered. I expect they'll get 1000 Negroes registered in that Parish and it won't make much difference what sort of ruling we get from Dawkins.125

While black registration did not approach this optimistic prediction, the actions of community leaders acknowledge the efficacy of such trial technique. As soon as the trial was completed, and before the Registrar's books had arrived from the federal courthouse in Monroe, black residents appeared at Miss Ward's office to apply for certification.126

Additionally, a not wholly unintended benefit developed from this trial process:

When the suit was called up Wyche and four or five others were on the stand. Everyone listening to our story and writing it down. Miss Ward was called, also. And she found she was the only one involved. All the lawyers in town were there to watch but they couldn't help her. She just sat there, looking around, with no one to answer the questions but her.127

A civil rights attorney who had handled Madison Parish voting suits observed that when black leaders reminisce about the early stages of their struggle,

\[\text{one of the things they repeat over and over again is how great it felt to see the registrar without anyone to protect her. Also, I think the psychological lift of showing the sheriff to dis-}\]

126 When permitted to apply, black resident Joe Neal registered first, followed by Wyche and Brown. Interview with Moses Williams, in Tallulah, La., Oct. 27, 1970.
127 Brown Interview, supra note 118.
advantage gave many of the less activist Negroes the courage to register once the trial ended. After all that time and after all the misery those [white] people dished out, having their vulnerability revealed probably bothered them more than the knowledge that Negroes would register and vote.\textsuperscript{128}

However, these subsidiary benefits neither outweighed the futility of judicially policing the voting process nor blurred recognition that federally sanctioned litigation produced the same frustrations as those arising from out-of-court negotiation and private suits. To thwart state-supported disfranchisement required additional legislation which would not only withdraw all discretion from white registrars but also provide efficient enforcement mechanisms against post-registration discrimination by local officials.\textsuperscript{129}

### III. Post-Voting Rights Act Litigation

The Voting Rights Act of 1965\textsuperscript{130} provided three enforcement mechanisms against continuing deprivation of the franchise. First, Congress provided an alternative to enforcement through litigation by developing a plan under which the Department of Justice could automatically suspend literacy tests and similar discriminatory devices.\textsuperscript{131} These provisions, which are the only mandatory, administrative remedies under

\textsuperscript{128} Interviews with attorneys from the Lawyers Constitutional Defense Committee, in New Orleans, La., Oct. 23, 1970 [hereinafter cited as LCDC Interviews].

\textsuperscript{129} Compare the statement of Justice Holmes in Giles v. Harris, 189 U.S. 475, 488 (1903):

The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed on the [registration] lists . . . will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form.

\textsuperscript{130} 79 Stat. 437 (1965) 42 U.S.C. § 1973 et seq. (Supp. V, 1965-69). Several authors have noted the historical precedents to the Voting Rights Act in previous civil rights legislation, Christopher, supra note 40, at 2 nn.6-11, and have detailed its provisions, see id. at 9-15; Note, supra note 53, at 1195-1204; Statute Note, 44 Tex. L. Rev. 1411 (1966).

\textsuperscript{131} In any state or political subdivision in which fewer than 50\% of the eligible voters had been registered or had voted in the 1964 presidential election, suspension was automatic. 42 U.S.C. § 1973b(b) (Supp. V, 1965-69). The legislation provided an opportunity for the state to rebut the presumption of discrimination through a declaratory judgment proceeding, id. at § 1973b(a), but a judicial finding of voting rights denial through racially discriminatory tests concluded the issue until five years after final judgment, id., whether entered prior or subsequent to statutory enactment. See United States v. Ward, 352 F.2d 329 (5th Cir. 1965). Additionally, following suspension no new tests or devices could be adopted unless approved by the Attorney General or by the District Court for the District of Columbia in a declaratory judgment proceeding. Id. at § 1973c; see Allen v. Board of Elections, 398 U.S. 544 (1969), holding inter alia that private parties have standing to seek a declaratory judgment that a new state statute is subject to the § 1973c procedure and that such coverage questions may be brought in local district courts since they do not determine the substantive discriminatory effects of new state enactments.
the Act, withdrew from the district courts discretion to enforce federal law and to impose available sanctions. Additionally, the coverage formula eliminated the need for county-by-county litigation, the concomitant search for aggrieved parties, and the exhaustive preparation required under earlier voting rights legislation.

Although automatic suspension removed locally enforced barriers to registration, Congress did not trust county officials to comply voluntarily and to register blacks without delay. The legislation's second enforcement mechanism prevented dilatory tactics by providing the Attorney General with discretionary power to appoint federal examiners to any political subdivision designated under the automatic suspension sections. To insure that individuals once registered would be permitted to cast their ballots, Congress authorized the Attorney General to assign federal observers to oversee elections within any political subdivision designated an “examiner county.” This provision, like that mandating examiner appointments, differed in kind from the voting referee approach of the 1960 Act in that authority to exercise discretion was vested in the Attorney General rather than in the various district judges.

Finally, Congress proscribed voting-oriented intimidation, threats, and coercion by both private individuals and those acting under color of law. To enforce these provisions, the Act authorized both criminal sanctions and preventive, civil actions, which included specific power to request a court order directing state or local election officials to permit listed persons to vote and to count their ballots.

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134 Initially, the Department of Justice designated several counties as requiring an examiner merely to trigger the right to appoint observers. Political Participation, supra note 122, at 159. This was the case, for example, in Madison Parish, where incidents of harassment reported by blacks prompted the Department to appoint observers on August 12, 1966, one day prior to a Democratic primary. For the United States Commission on Civil Rights’ discussion of the observer program, see id. at 157-62 & nn. 23-26.


136 Id. at § 1973f. Note that the definitions of these crimes do not require purpose to render these acts criminal. Criminal contempt is provided for in id. at § 1973(f).

137 Id. at § 1973j(d). To expedite judicial determinations, Congress eliminated the exhaustion requirement for federal district court jurisdiction, id. at § 1973(j), and authorized examiners to receive and substantiate complaints from listed and eligible persons who alleged within 48 hours after the polls closed that they had not been permitted to vote. If the Attorney General agrees that the complaint is well founded, he can apply to the federal district court for an order requiring the individual’s ballot to be cast and counted before final certification of election results. The district court must hear and determine such applications immediately. Id. at § 1973(j)(d).
Measured as a means to register blacks, the shift from litigation to administrative procedures has achieved commendable results. In Madison Parish, for example, 1,819 voting-age blacks registered between August 7 and September 29, 1965, and by October, 1967, black registration reached 3,862 voters or 74.5 per cent of eligible black citizens. Concomitantly, local registrars in the nonexaminer counties of Alabama, Georgia, Louisiana, Mississippi, and South Carolina placed more than 110,000 blacks on the books during the first few weeks after passage of the Act. Throughout the South, registrars and federal examiners together brought black registration to 2,810,763 or 57.2 per cent.

Additionally, during this period 49 whites were accepted and three blacks rejected. The First Months, supra note 122, at 62; Political Participation, supra note 122, at 240-41.

Madison Parish was not designated an examiner county at this time.

The First Months, supra note 122, at 2. The first black to receive a certificate under the Voting Rights Act resided in Selma, Alabama. Mrs. Ardies Maulden was described as "typical of thousands of black people across the Deep South." Neither a civil rights leader, militant, nor activist, she was "simply an Alabama woman who feels she is entitled to the right to vote the same as anyone else." Hearings on H.R. 4249, H.R. 5538 and Similar Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 1st Sess., Ser. 3, at 192 (1969) (statement of Vernon E. Jordan, Director, Voter Education Project).

The comparable figure for whites is 14,750,811 or 76.5%. During congressional hearings to amend the Voting Rights Act (the automatic suspension provisions, among others, would have terminated on August 6, 1970, absent renewal), it was estimated that 800,000 blacks had been given the opportunity to register as a result of the Act. See Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st & 2nd Sess. 661-2 (1970) [hereinafter cited as Senate Hearings]. Despite this marked increase in registration, critics have contended that the Government refused to utilize fully the examiner provision. Political Participation, supra note 122, at 153. See also P. Watters & R. Cleghorn, Climbing Jacob's Ladder 245-47, 259-65 (1967). But see R. Claude, The Supreme Court and the Electoral Process 135-43 (1970). Arguing that, as a minimum, examiners were required in every county in which a judicial determination of discrimination had been made, observers rejected the Government theory that voter registration drives would have more impact locally than would the presence of examiners.

It is impossible to determine why local registrars in some areas performed their duties voluntarily, albeit grudgingly, while other officials refused to comply. However, a comparison of Madison and East Carroll Parishes indicates that failure by the Attorney General to exercise discretion through blanket appointments of examiners did not necessarily impede registration progress. The Attorney General designated examiners for East Carroll on August 9 (nonwhite voting-age population 4,183). The First Months, supra note 122, at 50. By September 29, only 33 blacks had been registered there, id. at 61, while in Madison Parish the local registrar had enrolled 1,819 blacks (nonwhite voting-age population 5,181), id. at 62. This initial imbalance abated, however, and on November 25, 2,647 blacks were on the rolls in East Carroll, compared with 2,086 in Madison Parish. Letter from Attorney General Katzenbach to Stephen Currier, Nov. 21, 1965. Since the Fifth Circuit's modification of Ward did not issue until October 21, 1965, voluntary compliance cannot have been caused by the court's decree, which included changes suggested by the Government "to eliminate any possible doubt as to the
However, Congress designed the Voting Rights Act not only to secure registration\textsuperscript{142} but also to facilitate enforcement of the constitutional right to vote in its entirety.\textsuperscript{143} Although the coverage formula protects against threshold discrimination through denial of registration, the Act fails to extend automatic, administrative protection to every stage in the electoral process. Moreover, the success of administrative sanctions depends upon strong executive pressure. Absent persistent enforcement, local officials will create increasingly subtle barriers to formal political participation, thereby increasing the situations which require judicial intervention. Accordingly, emphasis has shifted from denial of the vote to dilution of its effectiveness through discriminatory manipulation of election procedures, and the need for litigation has not diminished.\textsuperscript{144}

In comparing recent litigation to that undertaken prior to the passage of the Voting Rights Act, two familiar problems appear. First, judicial reluctance to invoke available sanctions substantially undercuts the value of adjudicated relief. Second, delayed compliance with congressional mandates burdens the court with continuous, repetitious litigation. However, post-1965 legal actions also present interesting contrasts to the registration suits. Reluctance to utilize available sanctions is no longer limited to the judiciary. Government policy repudiates the mandatory provisions of section 5\textsuperscript{145} and eschews the initia-

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Registrar's duty to process each applicant as expeditiously on the day he appears as possible."
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\textsuperscript{142} Southern reaction to unilateral displacement of state voting requirements is well presented in Brief for Louisiana as Amicus Curiae at 13-14, South Carolina v. Katzenbach, 383 U.S. 301 (1966):

Instead of carefully weeding out the remnants of resistance to the Fifteenth Amendment, Congress has been shooting from the hip with all sorts of trigger clauses which leave gaping holes in State statutes, however fairly they are administered. . . . There is no good reason for Congress to start a whole prairie fire and burn up State statutes wholesale to kill the few remaining weeds of discrimination still surviving in the South.

\textsuperscript{143} Many legislators recognized that the Act might prove inadequate to the task. \textit{See} 2 U.S. CODE CONG. & AD. NEWS, 89th Cong., 1st Sess. 2483 (1965) (statement of Congressman Lindsay); \textit{accord, Senate Hearings, supra} note 141, at 9-11 (statement of Senator Mathias); \textit{cf.} 18 U.S.C. \textsection\ 245 (Supp. V, 1965-69). However, the dominant trend of thought supported the predictions that the Act would make the fifteenth amendment "a real part of the United States Constitution" and that "much of the turmoil over the rights of citizens to participate in this basic governmental function will now be eliminated." Tuttle, \textit{Equality and the Vote, supra} note 110, at 263. But see Judge Wisdom's pre-enactment prediction in \textit{United States v. Barnett}, 346 F.2d 99, 108 (5th Cir. 1965) (dissenting opinion):

If Congress should adopt the proposed Voting Rights Act of 1965, that law too will change many local customs and further exacerbate state federal functions. . . . I cannot see into the unknown. But the dark realities of the past militate against the Court's taking a rosy, relaxed view of the future.

\textsuperscript{144} See \textit{POLITICAL PARTICIPATION, supra} note 122, at 162-67.

\textsuperscript{145} During the Congressional hearings to extend those provisions of the Voting Rights Act due to expire, Attorney General Mitchell submitted the Nixon Administration's proposal to eliminate the prior approval procedure (in favor of a plan which would
tion of legal proceedings.\textsuperscript{146} Abdication of executive responsibility for preventing discrimination in voting has therefore forced private attorneys to institute most litigation. Additionally, the delay inherent in using the courts for enforcement has disillusioned black leaders who expected simplified access to sanctions and has undermined belief in the electoral process. The following subsections document the limited efficacy of the Voting Rights Act by examining the new resistance\textsuperscript{147} and by analyzing the Madison Parish litigation necessary to redress continued voting rights infringement.

A. Brown v. Post\textsuperscript{148} (Post I)

One year after the Voting Rights Act suspended registration requirements,\textsuperscript{149} Harrison Brown successfully sustained a Democratic primary challenge against the white incumbent\textsuperscript{150} for a seat on the school board.\textsuperscript{151} Although the black community had assumed that the No-

\textsuperscript{146} In 1966, twelve suits were decided pursuant to the Voting Rights Act in which the United States had either initiated action or had been a party plaintiff. In 1970 the Department of Justice reported activity in only three suits, one of which is Toney v. White, Civil No. 15,641 (W.D. La., filed May 4, 1970), discussed in text and notes at notes 256-92 infra. An indication of the declining importance of voting rights can also be gleaned from the manpower distribution in the Civil Rights Division: education has thirty attorneys, employment 27, but voting and public accommodations only thirteen. Letter from Civil Rights Division, Department of Justice, to The University of Chicago Law Review, Mar. 17, 1971.

\textsuperscript{147} POLITICAL PARTICIPATION, supra note 122, at 21-131 (systematically documenting the various techniques utilized throughout the South).

\textsuperscript{148} 279 F. Supp. 60 (W.D. La. 1968).

\textsuperscript{149} The decision in United States v. Ward, 349 F.2d 795 (5th Cir. 1965) issued on August 11, 1965. However, its terms were superceded by the Voting Rights Act, which had been signed by President Johnson on August 5. See United States v. Ward, 352 F.2d 829 (5th Cir. 1965).

\textsuperscript{150} Brown defeated Dorothy Provine in the August 13, 1966 Democratic primary by 1,682 to 1,592 votes. The Attorney General had designated Madison Parish an examiner county the preceding day and had designated federal observers to oversee the primary contest, which proceeded without incident. 279 F. Supp. at 61-62 (W.D. La. 1968). Every subsequent Madison Parish election has been observed.

\textsuperscript{151} Madison Parish is divided into political subdivisions called wards from which the single-district school system recruits its board members. Ward 4 includes but is not coterminous with Tallulah.
vember 8 general election would be a mere formality.\textsuperscript{182} Brown was defeated by J.T. Fulton, a white write-in candidate who had not campaigned openly\textsuperscript{183} and whose 1,891- to 1,622-vote victory included 510 of the 512 absentee ballots counted, all of which had been cast by white voters.\textsuperscript{154}

The gravamen of the complaint\textsuperscript{155} in \textit{Brown v. Post} was that Clerk of Court Jerome C. Post and his deputies intentionally discriminated against black voters by illegally making absentee ballots available to ineligible white voters in the general election.\textsuperscript{156} Fifteen months after the contest, Judge Dawkins found that the defendant's administration of the absentee process, while undertaken in good faith, did discriminate in fact against blacks, rendering the election invalid.\textsuperscript{187}

\textit{Post I}, the first of three suits challenging the conduct of parish elections,\textsuperscript{158} highlights the changing nature of discriminatory practices

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{182} Since the Republicans had not selected a school board nominee in a primary, state law forbade designating a Republican candidate on the ballot. \textit{La. Rev. Stat. Ann.} \textsection 18:281 (1969). Proposed constitutional amendments were the only other contested items in the election.
\item\textsuperscript{183} Fulton, who qualified as a write-in candidate on October 4, conducted an intensive but discreet campaign. Until November 8, the day of the election, no radio announcement appeared and not a single poster or newspaper advertisement apprised voters of Fulton's candidacy. \textit{Brief for Plaintiff at 14}. Nor did the \textit{Madison Journal} inform voters that the school board seat was in contention. Although the paper had printed news stories about previous elections, including the August 13 primary, and carried an editorial commenting on the Ward 4 contest after the general election, Editor William Roundtree ordered a brief blackout on election news prior to November 8, later explaining: "It is a policy that I adopted." \textit{Brief for Plaintiff at 14 (deposition of William Roundtree)}. However, the campaign of white citizens between August 13 and October 8 increased Ward 4 white registration from 2,101 to 2,329. Figures available from Madison Parish Registrar of Voters.
\item\textsuperscript{154} 279 F. Supp. at 62.
\item\textsuperscript{156} On November 16, 1966, the Lawyers Constitutional Defense Committee had filed a class action on behalf of Brown and two other qualified electors, requesting that the Governor be enjoined from certifying the election returns and that Brown be declared the Ward 4 school board member. \textit{Brown v. Post}, Civil No. 12471 (W.D. La., filed Nov. 16, 1966). Although on November 9, Brown had protested the election in a letter to the Department of Justice, the Government took no action until January 9, 1967, when it brought a similar suit. \textit{United States v. Post}, Civil No. 12583 (W.D. La., filed Jan. 9, 1967). The delay was attributed to the "more thorough investigation" required before the Government brings suit. \textit{Department of Justice Interviews, supra note 71}. The defendant's answer, filed January 26, 1967, denied the relevant allegations of discrimination and denied the district court's jurisdiction. Additionally, the answer claimed that defendant Post acted according to state law and did not subject any Madison Parish citizen to unusual treatment. \textit{Brief for Defendant at 4-11}.
\item\textsuperscript{158} 279 F. Supp. at 63. The \textit{Brown} trial had been held on March 20-22, 1967, and the opinion was delivered on January 24, 1968. A preliminary injunction issued by Judge Dawkins on December 5 had prevented the issuance of a commission to any candidate for school board member.
\item\textsuperscript{187} This was also the first parishwide election in which a black candidate ran for public office or in which a significant number of black voted. See, however, allegations
\end{enumerate}
\end{footnotesize}
following passage of the Voting Rights Act. Specifically, local officials shifted their tactics from denial of the vote to reduction of its effectiveness. The court was therefore required to determine, first, if dilution, absent a finding of intentionality, constituted a remedial grievance and, second, what form of relief would most capably protect the fifteenth amendment's guarantee by insuring full weight to each ballot.

1. The Discrimination in Effect Standard. In the legislative context, Baker v. Carr has established that constitutional protection extended beyond absolute deprivation of the franchise. While judicial recognition of violations in electoral integrity had been limited to acts of fraud and circumstances in which racial motivations denied access to the polling place, in April, 1967 the Fifth Circuit recognized that acts which on their face are innocent but which in fact promote voting discrimination violate the fifteenth amendment. Post I established that a conclusion of unconstitutional dilution of the vote does not depend on a finding of discriminatory purpose.

In adopting the “discrimination in effect” standard, the court rejected strong evidence of intentional misconduct. The defendants had provided white residents with opportunities to vote absentee without extending the privilege to similarly situated blacks. Louisiana law provides that the clerk of court may establish substations to aid absentee voting. The procedure contemplates public notification and a permanent site, authorized by the police jury, at which regular hours are kept. Nevertheless, substations created by Clerk of Court Post...
did not meet these standards. Without notice, a temporary, one-day office was established at the Scott Plantation, which is located one and one-half miles from Tallulah and which employed only white field-hands.\textsuperscript{166}

Nor did fieldworkers' absentee ballots accepted by Post conform to Louisiana law. The procedure requires a qualified registered voter who expects to be absent from the parish on the day of a general election to apply between two to ten days before that election to the parish's district court clerk for an official ballot. In applying for his absentee ballot the voter must swear that he is duly registered and will be absent from the parish on election day. The applicant then executes his ballot in secret, seals it, and swears to its authenticity and secrecy.\textsuperscript{167} However, those voting absentee at the plantation uniformly testified that they had no genuine expectation of being absent from the parish on election day, that they were not asked if they would be outside the area, that their affidavits consisted of signing their names, and that they completed their ballots by marking an X next to the name of J.T. Fulton, which had already been written in for them.\textsuperscript{168}

Post repeated this procedure at the all-white Delta Haven Nursing Home because "[i]n a prior election Senator Brown, who was either a major stockholder or owner of the rest home called me up and asked me if these people would be allowed to vote and that they expressed a desire to vote."\textsuperscript{169} At this special substation, Deputy Clerk Jewell Willhite not only helped fill in the ballots, but also informed voters of Fulton's race and status as a write-in candidate.\textsuperscript{170}

Inpatients at the all-black Baptist Nursing Home received neither the opportunity to vote nor the assistance afforded whites in similar circumstances. Rev. Frank Wilson, unsuccessful candidate for Ward 2 school board member, testified:

I asked Mr. Post about bringing in some of the elderly people to let them sign an absentee ballot before the day of the election. Mr. Post said that I would have to bring them and they

\textsuperscript{166} Post established the station at the request of Scott Plantation managers. This was an unusual circumstance and during this period of time the place had been sold. The employees that worked there were trying very hard to finish the Scott plantation crop. During the time of absentee balloting they were busy in the field, as it were. There were a number of them that were anticipating leaving town. At the same time the majority of them, if the crop was harvested before the voting date, were to be transferred to another place to work. I felt like it would expedite matters if he set up a station there rather than have these people go to town to vote absentee because it would save him and them time, too.

\textsuperscript{167} LA. REV. STAT. ANN. §§ 18:1071-1076 (1969) describe absentee voting procedures.

\textsuperscript{168} Brief for Plaintiff at 40-43.

\textsuperscript{169} Record at 379 (emphasis added).

\textsuperscript{170} Record at 80 (testimony uncontradicted).
would have to swear an affidavit they would be out of town on the day of the election. But I said I had no intention of them being out of town and I thought maybe they could sign an absentee [ballot] since they were old and couldn't get about, but he said, no, they couldn't do that unless they would be out of town.\textsuperscript{171}

In addition to providing opportunities for voting absentee at substations,\textsuperscript{172} the defendants aided those white citizens who came to the clerk's office thinking they might like to avoid the polls on November 8 for reasons of personal convenience. Witnesses referred to being encouraged to vote absentee. While these encouragements were not attributable to the defendants, their conduct supported an inference of soliciting absentee ballots. Mrs. M. N. Ingram, who did not expect to be absent from the parish on election day, voted absentee because she might not have transportation to the polls on November 8. Mrs. J. J. Smith, who had never before voted absentee, did so in this election because she wanted to stay in her store all day. Mr. Roy Erwin was neither asked if he expected to be absent from the parish nor required to fill out his own affidavit—one of the clerk's employees did that for him. Other residents received absentee ballots in the mail without having requested them.\textsuperscript{173} However, when Moses Williams, Brown's campaign manager, inquired about absentee voting procedures, Post told him that "one must swear he is to be out of town or have reason to believe he will be out of town on election day," that "absentee should be cast in the Clerk's office," and that "it couldn't be cast nowhere but in the Clerk's office."\textsuperscript{174}

Intentional discrimination may also be inferred from the internal administration of the absentee voting process. Louisiana law provides that printed instructions for voting absentee be furnished to each absentee voter.\textsuperscript{175} These materials include detailed information on procedures to be followed in executing the ballot in person or by mail, and a simple statement of the method used to vote for a candidate whose name does not appear on the ballot. Each absentee voter received this material from the Clerk of Court's office. However, Deputy Clerk

\textsuperscript{171} Brief for Plaintiff at 49.
\textsuperscript{172} In addition to the offices described in the text, Post set up six substations in private homes in the white Willow Bayou section of Tallulah "without a corresponding opportunity being given to Negros similarly situated." 279 F. Supp. at 63. The plaintiffs offered fifteen witnesses to explain the circumstances of their voting absentee at places outside the Clerk of Court's office. Brief for Plaintiff at 19-46.
\textsuperscript{173} The plaintiffs offered thirteen witnesses to describe the circumstances surrounding their use of absentee ballots. Brief for Plaintiff at 19-46.
\textsuperscript{174} Brief for Plaintiff at 49.
\textsuperscript{175} LA. REV. STAT. § 18:1074 (Supp. 1964).
Grace Grimes also enclosed (1) a photocopy of an official ballot on which she wrote "J.T. Fulton" in the space provided for entering a candidate's name and (2) instructions telling the voter to "use a lead pencil containing black lead to mark your ballot, mark it as shown on the sample ballot enclosed. Mark the white square opposite the name in the blank column on your ballot." No comparable instruction guided voters desiring to mark their ballot in favor of Brown or the constitutional amendments.

Most incriminating of all, the defendants were unable to offer convincing reasons for having requested one thousand absentee ballots for the November election. Since fewer than 150 voters had cast absentee ballots in the August primary, lack of a substantial basis for expecting such a dramatic increase in absentee voting leads to the conclusion that the defendants intended to strengthen J. T. Fulton's write-in candidacy by promoting absentee balloting.

Ignoring the issue of intentionality for a moment, the tally of absentee ballots further supports an inference that the conduct of local officials aided Fulton's write-in campaign. While absentee ballots comprised thirteen per cent of the total votes cast in the election, nearly 27 per cent of the white voters cast absentee ballots. Moreover, Fulton's 169-vote margin of victory contained 26.9 per cent questionable absentee ballots while Brown's official tally included only two votes not cast at the polls. Thus Brown, whose supporters took the trouble to appear in person, trailed by 508 votes before the polls even opened.

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176 Brief for Plaintiff at 20.
177 The plaintiffs offered six witnesses to explain the circumstances and procedure for voting absentee by mail. Brief for Plaintiff at 19-46.
178 LA. REv. STAT. ANN. § 18:1072 (1969) requires the Secretary of State to provide absentee ballots equal to 10% of the registration thirty days prior to election.
180 The justifications offered include Mrs. Grimes' assertion that increased "colored" registration between April and August necessitated increased ballots, Brief for Plaintiff at 19 (this rationale appears questionable since only eight blacks had voted absentee in the August primary), and Clerk of Court Post's testimony that he knew the Ward 4 election to be causing unusual interest which would result in a heavier vote, Record at 17 (this reasoning is similarly suspect since by his own admission Post appears to have requested the additional ballots prior to learning of Fulton's candidacy, id. at 18).
Despite all this evidence, Judge Dawkins refused to find that the defendants intentionally granted whites illegal advantage in order to discriminate against blacks. Under this view, the defendants merely discriminated in fact by omitting to grant blacks similar privileges. Hence, no absentee ballots were found to be illegal; rather, those accepted at the substations resulted in a discriminatory effect. Since giving preferential treatment to one class of voters promotes impermissible racial distinctions, the defendants' motivation became irrelevant.

With Post I, Judge Dawkins extended the ambit of activities constituting effective dilution of the franchise. In Bell v. Southwell, where the defendants' "flagrant" and "completely indefensible" conduct included overt discriminatory acts on election day, the court held that an election tainted by such constitutional violations will be voided.

182 Judge Dawkins found, "[c]ontrary to the allegations of the complaint," that:

(a) There is no evidence whatsoever that defendant Post or his deputies obtained absentee ballots from the Secretary of State for white persons alone, or that the ballots were obtained to facilitate any particular class of voters. The unusual amount of interest in this election was known to defendants and therefore they obtained extra ballots commensurate with this unusual interest.

(b) The name of all persons voting absentee in the subject election were posted in a conspicuous place in the Clerk's office as provided by law.

(c) No conspiracy by defendants to deprive Negroes of their right to vote has been shown even in the slightest respect.

(d) There is no affirmative proof that it was the color of any candidate or any prospective voter which caused defendants to accept any allegedly illegal absentee votes. There is no basis or justification for the allegation that defendants accepted irregular absentee ballots from white voters merely because they were white and would therefore vote for J. T. Fulton because he was the white candidate.

(e) None of the defendants actively campaigned for J. T. Fulton.

Id. at 63.

183 Id. However, the defendants, as clerks of court acting under state law, had a duty under the Fifteenth Amendment to the United States Constitution and under the Voting Rights Act of 1965 not to engage in any acts or practices in the absentee voting process which have the effect of discrimination among qualified voters in elections of any kind. This duty included refraining from any conduct which results in allowing white voters opportunities to vote without affording the same opportunities to Negro voters.

Id. at 64.

184 "The result of the election would not have been different had the final tabulation not included absentee ballots cast outside the office of the Clerk in violation of Louisiana law." Id. at 63 (emphasis added).

186 "Reiterating for emphasis, we do not find defendants engaged in any intentional plan to deprive Negroes of their constitutional right to vote. However, the manner in which they administered the absentee process was discriminatory in fact." Id. (emphasis in original).

187 Judge Dawkins did not state that in recognition of a "discriminatory in fact [effect]" standard he was adding to the theoretical texture of franchise deprivation. His opinion, composed of sixteen findings of fact and nine conclusions of law, contains no jurisprudential discussion at all.

188 376 F.2d 659 (5th Cir. 1967). The plaintiffs had alleged two sets of irregularities, but the court's decision, which technically reversed a grant of summary judgment, treated only the maintenance of segregated voting lists and polling booths, which the defendants' answer had admitted. Id. at 664, 665 n.13.
even if the plaintiff cannot show they affected the final results. In Post I, however, Judge Dawkins predicated relief on discriminatory practices which neither influenced blacks not to appear at the polls nor personally intimidated individuals by deterring them from voting for black candidates. Therefore, a remedial grievance had been established even if election day activity was untainted and black voters lacked direct knowledge of racially motivated unequal conduct on the part of state officials, provided that the defendants’ practices added a new, intervening factor which directly prejudiced the integrity of the entire electoral process. The plaintiffs could satisfy their burden of proof by demonstrating “discrimination in effect.” Concededly, Judge Dawkins’ approach may have been motivated by his desire not to characterize the defendants’ acts as intentional. However, plaintiffs’ attorneys, who had strongly argued for a finding of intentionality, recognized that in the future the “discrimination in effect” standard would be a far simpler one to satisfy.

2. The Voiding Remedy. Having determined that the defendants’ actions constituted a violation of electoral integrity, Judge Dawkins faced two alternative forms of relief—he could either declare the loser victorious or void the election. Awarding the office to Brown required vote counting either by determining if Brown would have won on election day or by excluding illegally obtained and executed ballots. Assuming that Judge Dawkins would find all absentee votes invalid, the plaintiffs contended that on the facts as they appeared subsequent to the election, had the illegally obtained and executed ballots been excluded, Brown would have beaten Fulton 1,620 to 1,381. There is an obvious danger to this line of reasoning—it denies the franchise to possibly innocent victims of official misconduct, including the victorious candidate. First, an undetermined number of absentee ballots were legally obtained and executed. Should these not have been counted, some white voters would have been denied their right to vote because of actions to which they did not contribute and of which they had no knowledge. Second, of those who cast absentee ballots, a percentage did not intend to act illegally and relied on the defendant’s statements and procedures by virtue of his office. Had they not believed themselves to be eligible to cast absentee ballots, they might have personally voted at the polls on November 8.

While courts have traditionally refrained from interfering with the electoral process by voiding or enjoining elections, following the Voting Rights Act district courts have set elections aside under extraordinary circumstances in which plaintiffs have diligently pressed their claims so as to avoid unnecessary disruption of governmental processes. Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966). But see McGill v. Ryals, 253 F. Supp. 374 (M.D. Ala. 1966) (three-judge panel) (denying declaratory relief to plaintiffs who sought to have Lowndes County offices declared vacant on the ground that an array of past constitutional violations had collectively denied blacks the right to vote and enabled a white minority to seize political power); accord, Mississippi Freedom Democratic Party v. Democratic Party, 362 F.2d 60 (5th Cir. 1966) (denying a request to enjoin state primary elections for four months to permit additional registration which would compensate for one hundred years of racial discrimination); cf. Hamer v. Ely, 410 F.2d 152 (5th Cir. 1969) (involving the election ordered in Hamer); Gray v. Main, 309 F. Supp. 207 (M.D. Ala. 1968).
beaten Fulton had a certain number of "white votes" been rejected, or by adding to Brown's tally the hypothetical number of votes he could have secured at the Baptist Nursing Home and substations set up on plantations employing black fieldhands. Having refused to recognize the illegality of any absentee ballot, Judge Dawkins precluded any attempt at a vote count. Therefore, the question that ultimately confronted him was whether to void the election.\textsuperscript{191}

Judge Dawkins followed \textit{Bell v. Southwell}\textsuperscript{192} and recognized the defendants' offense to be against the election itself as a constitutionally guaranteed process. The plaintiffs, having shown a discriminatory effect and having seasonably filed their complaint one week following the contest, were entitled to relief. The decree ordered a special election between Brown and Fulton to be held within ninety days. Additionally, Judge Dawkins ordered the defendants not to engage in the practices which had caused invalidation of the first election or in any other practices discriminatory in fact.\textsuperscript{193}

Although plaintiffs' attorneys had anticipated a more stringent decree condemning the defendants' conduct, at this point they were willing to exchange restraint in applying judicial sanctions for the more flexible "discriminatory in effect" standard which would support future applications to void elections. Additionally, the general portion of Judge Dawkins' order enjoining any acts discriminatory in effect appeared a sufficient basis for invoking the court's contempt power should Post or the other defendants again disturb the election process.

The subsequent history of Brown indicates, however, that the voiding remedy does not erase all barriers to effective relief and further suggests

\textsuperscript{191} The two factors which underlie the courts' granting of voiding relief are timing and the intervening event test. Even if plaintiffs have filed timely objections, courts appear to have determined as a matter of policy not to interfere as long as the spirit of current legal standards is being met. The reward for acquiescence is thus judicial restraint that blacks request additional sanctions. See cases cited note 190 \textit{supra}. For example, in \textit{Mississippi Freedom Democratic Party} and \textit{McGill}, the plaintiffs desired to catch up in the political process although no \textit{new} official action impeded their progress. They argued that accumulated past wrongs depriving them of the right to vote entitled their class to preferential treatment, including the opportunity to time an election. In \textit{Hamer}, on the other hand, an additional causative factor intruded to affirmatively retard the effects of judicially granted freezing relief. Using state residency and poll tax payment laws, local officials sought to continue the condemned policy of disfranchising blacks. Cf. \textit{United States v. Democratic Executive Comm.}, 288 F. Supp. 943 (M.D. Ala. 1968); \textit{Smith v. Paris}, 257 F. Supp. 901 (M.D. Ala 1966), modified, 386 F.2d 979 (5th Cir. 1967).

\textsuperscript{192} 376 F.2d 659 (5th Cir. 1967). Although \textit{Hamer v. Campbell}, 385 F.2d 215 (5th Cir. 1966), had implicitly rejected the "affecting outcome" approach (only 1.1\% of eligible blacks were registered compared with 80\% of eligible whites), \textit{Bell}, handed down April 14, 1967, was the first case to so hold when pre-election relief had not been requested.

\textsuperscript{193} 279 F. Supp. at 64.
that the plaintiffs misconstrued the reach of Judge Dawkins' order. A purge of registered voters marred the conduct of the special election held on April 9, 1968. Judge Dawkins had issued specific orders respecting voter eligibility:

[The voters eligible to vote in the special election between J. T. Fulton, as a write-in candidate, and Harrison H. Brown, as Democratic nominee, shall be the same as those eligible to vote in the general election held on November 8, 1966, as determined by the eligible voters list used in that election.]

However, Registrar Myrtis Bishop issued instructions to the voting commissioners that 271 black voters and 208 white voters who were eligible to vote in the general election would not be permitted to vote in the reelection. The commissioners followed these instructions, which were based on a purge of voters undertaken subsequent to the November 8 election, and did not permit the named individuals to vote on April 9 whether or not they had reregistered. With the purge in effect, Fulton again defeated Brown, by 1,579 to 1,510 votes.

The Lawyers Constitutional Defense Committee (LCDC) filed a civil contempt motion against Mrs. Bishop, alleging that violation of the court order may have altered the April 9 election results and requesting...
ing that the 479 purged persons be permitted to cast their ballots within thirty days of entering the order. Three affidavits supported the complaint.

No hearing on the contempt proceeding was held. On August 21, the defendants filed a motion to vacate past injunctive relief and to require the governor to give Fulton his commission. Citing the civil contempt motion, the plaintiffs rejected the contention that "no proceedings have been filed herein contesting the result" of the special election. However, they decided to abandon the contempt proceeding because of insufficiency of proof. Accordingly, the plaintiffs did not contest that part of the defendant's motion to vacate that injunctive relief which prevented certification of the election of Fulton, but they did oppose the vacation of any permanent injunctive relief previously entered by the court.

The rationale offered by plaintiffs' attorneys for deciding to abandon the civil contempt proceeding is difficult to accept in light of the affidavits submitted with the complaint. Rather, it seems that the attorneys decided not to antagonize Judge Dawkins by requesting him to find a Madison Parish white official in civil contempt. By this time, the February 6 special election in which Republican Clayton Cox defeated Zelma C. Wyche for village marshal was being contested. When balanced against the remote possibility that counting purged persons' votes would reverse the April 9 results, the psychological importance of electing a chief of police and the greater influence of the office in the power hierarchy argued against continuing the contempt proceedings. Given the Judge's reluctance to find intentionality and his manipulation of the "discriminatory in effect" concept, such pressure could

202 Following this voting, the Board of Supervisors would add the additional ballots to the recorded tally and send the recompiled returns to the Secretary of State so that he could proclaim the winner and rescind any prior proclamation on the subject. Complaint at 2-3. For a discussion of the various bases of the purges, all of which were utilized by Registrar Bishop, see text and notes at notes 261-77 infra.

203 A May 8 hearing on the contempt motion was cancelled (attorneys involved do not remember why). Subsequently, counsel informed the court that defendants wished to abandon their as yet undocketed appeal of the decision and order in Post I. Information on file at the Lawyers Constitutional Defense Committee.

204 Letter from Richard Sobol, plaintiff's attorney, to The University of Chicago Law Review, Jan. 6, 1971. Although deterred from continuing the contempt proceeding, plaintiff's attorneys pressed Judge Dawkins to approve the bill of costs submitted following the January 4 opinion. After a year's delay, Judge Dawkins ordered Post to pay costs of $1,623.33 to the Lawyers Constitutional Defense Committee. This reimbursement has not yet been received. Information on file at the Lawyers Constitutional Defense Committee.

205 Similar difficulties with contempt actions have occurred in other district courts. See the history detailed in United States v. Lynd, 349 F.2d 790 (5th Cir. 1965).

206 See text and notes at notes 209-55 infra.
severely prejudice the second voiding case. This apprehension no doubt influenced plaintiffs’ attorneys not to request Judge Dawkins to void the special election and contributed to the Department of Justice’s decision not to invoke section 1973j of the Voting Rights Act, which would have permitted collection and tallying of illegally excluded votes and, additionally, would have provided a speedy resolution of the election challenge while still permitting the civil contempt proceeding to continue.

On September 3, Judge Dawkins granted the motion to vacate all injunctive relief, indicating that his general order not to engage in practices “discriminatory in fact” had been designed to cover only activities incident to the special election and not, as the plaintiffs had assumed, all future electoral conduct of defendants. Thus, after two years of litigation and a judicial determination that fifteenth amendment rights had been violated, no local official remained bound by court order not to discriminate and Fulton assumed Mrs. Provine’s Ward 4 school board seat on the strength of a questioned 69-vote majority.

B. United States v. Post (Post II)

The conduct of local officials during the February 6, 1968 special election, in which Cox defeated Wyche for village marshal, demonstrates the complete failure of Post I to deter future acts of discrimination. Only three weeks after an injunction was issued against him, Clerk of Court Post helped institute last-minute changes in election procedures which again discriminated against black voters. In United States v. Post, moreover, the evidence of the defendants’ intent to

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207 42 U.S.C. § 1973j(e) (Supp. V, 1965-69). It is arguable that when examiners are not present in the county, federal observers or Department of Justice attorneys could perform the function of receiving and substantiating complaints.


209 The death of the incumbent before his term expired necessitated special elections, which were joined with the Democratic primary of November 4, 1967 and the general election of February 6, 1968.

210 Wyche had defeated two white candidates in the special Democratic primary while Cox received the Republican nomination, after being appointed to fill the marshal’s seat on a temporary basis. Cox won the election in question by a margin of 1,954 votes to Wyche’s 1,659. Brief for Plaintiff Lawyers Constitutional Defense Committee at 14 [hereinafter cited as LCDC Brief].


212 Although Post was the principal defendant, suit was also brought against F.M. Magee, a voting machine mechanic; Douglas Fowler, State Custodian of Voting Machines; Wade Martin, Secretary of State; and Jack H. Folk, J.W. Huckabay, and Myrtis Bishop, members of the Board of Supervisors. On February 23 and 26, 1968, respectively, the Government and LCDC filed complaints under 42 U.S.C. §§ 1973, 1973a, 1971(a), 1971(c),
discriminate appears even stronger than in Post I. The fundamental significance of Post II, therefore, lies in the response of both the plaintiffs' attorneys and the trial judge to repeated infringement of voting rights. Despite convincing evidence that the defendants sought to defeat Wyche, the Department of Justice and LCDC chose not to press for a finding of intentional discrimination or to seek punitive measures that would deter future misconduct. Rather, the attorneys acknowledged Judge Dawkins' tendency to impose minimal sanctions and limited their requested relief to an order setting aside the election. Judge Dawkins, in turn, fashioned a politically adroit compromise, giving the plaintiffs the new election they clearly deserved while expressly exonerating the defendants.

1. Discrimination Through Adjustment of Voting Machines. The central issue in Post II is the decision to disconnect the master party lever from the marshal's race, thereby requiring Tallulah residents to pull the individual lever above the candidate's name in order to vote for town marshal.

Post convinced his superiors to adopt this procedure after the Secretary of State's office mistakenly listed the marshal's race on all Ward 4 ballots. The officials involved did not realize that Ward 4 is comprised of areas inside and outside Tallulah boundaries. As printed, the ballot would permit ineligible voters—those residing outside the village boundaries—to vote in the special election for village marshal. To remedy this situation, state officials considered several options but decided to disconnect the marshal's election from the master level in all Ward 4 voting machines. Election supervisors could prevent out-of-town voters from casting ballots in the marshal's race by using a "lockout" switch to freeze the individual levers in place. Accordingly, Tallulah voters could vote for marshal only by pulling the individual lever above the candidate's name.

and § 12(d) of the Voting Rights Act of 1965. These actions were subsequently consolidated for trial.

213 As Clerk of Court for the Sixth Judicial District of Louisiana, Post was ex officio custodian of parish voting machines.

214 Ward 4 contains seven precincts. Three precincts contain only Tallulah voters, while the remaining four contain voters living within and without the village limits.

215 The ballot indicated, moreover, that pulling the master lever would register a vote for all 24 offices, including village marshal, the last one listed.

216 See text at notes 228-29 infra.

217 Because of the mechanical limitations of the voting machines, however, the lockout switch could be used only on individual levers that were disconnected from the master party lever. 297 F Supp. at 48. In the special primary of November 4, the marshal's race appeared on all ballots in Ward 4. A primary, however, does not involve straight party voting or the use of the master party lever. It is always necessary to pull the individual candidate's lever in order to vote in a particular race. Hence, no problem arose
Post, however, did not announce the change in procedure, either to the general public or to the candidates involved. The only form of public notice was the posting of a revised sample ballot outside the Clerk of Court's office indicating the need to pull the individual lever in the marshal's race. Moreover, printed instructions inside the voting machines also indicated that the master party lever would cast votes for all party candidates. The election therefore proceeded in a state of confusion, with an indeterminate number of voters mistakenly pulling the master lever to vote for marshal.

While the decision to adjust the machines does not by itself seem racially motivated, a discriminatory purpose nevertheless appears from the selection of a highly prejudicial procedure and from the unaccountable failure to inform either the public or the candidates of the major change. First, the requirement of separate voting in the marshal's contest discriminated solely against Wyche, since he alone based his entire campaign on urging voters to pull the Democratic master lever.

218 The only form of public notice was the posting of a revised sample ballot outside the Clerk of Court's office indicating the need to pull the individual lever in the marshal's race. The revised ballot replaced the first sample ballot, which did not indicate the need to pull the individual lever. 297 F. Supp. at 49.

219 As the polls opened, commissioners in Precincts 2, 3, 4, 5, and 6 did not mention the necessity of pulling the individual lever, according to the testimony of federal observers. Record at 114-15, 121, 132, 152-54, 162. No information in the record concerned the remaining precincts 1 and 7, which were all-white. LCDC Brief at 13. At approximately 6:45 a.m., Wyche discovered that the master lever would not cast a vote in the marshal's race. When Robert Moore, a Department of Justice attorney supervising federal observers, learned of this situation, he protested the failure of election commissioners to offer the necessary information. Id. at 12. Thereafter, Jack Folk and Post went to all voting precincts and instructed the commissioners to advise each voter to pull the individual lever to vote for marshal. Accordingly, the correct information was generally offered, except in Precinct 4 where four white commissioners still did not volunteer the instructions. Record at 137-38. The plaintiffs estimated that more than three hundred black voters failed to receive the proper information, and therefore did not cast a vote for marshal that actually registered, although intending to do so. LCDC Brief at 13-14.

220 "To Vote STRAIGHT TICKET Turn Large Handle by Emblem to Right. This Marks X's for all Party Candidates but NOT for AMENDMENTS. To Vote AMENDMENTS Turn Each Pointer SEPARATELY." LCDC Brief at 12.

221 Wyche distributed three thousand campaign cards with the slogan "PULL THE LEVER WITH THE ROOSTER. Vote the Straight Democratic Ticket." (The Rooster is the emblem of the Democratic Party in Louisiana and is pictured next to the master party lever on the ballot.) On local radio, he made ninety announcements to promote the straight ticket, while the Voters League distributed a standard Democratic Party campaign leaflet which told people to "Vote [for] the straight MCKIETHEN-AYCOCK-PARKER TICKET and for all other Democratic Nominees" by pulling the party lever next to the rooster. Wyche's supporters also displayed 275 bumper stickers with his name printed beside a prominent picture of the rooster. Other campaign materials included handbills and leaflets, both of which emphasized the straight party ticket. Record at 15-25; LCDC Brief at 4-5.
The comparatively large number of illiterate voters in Tallulah, the majority of whom are black, made such a strategy advisable. These individuals invariably have difficulty in operating a voting machine correctly. Hence Wyche's campaign slogan, "Pull the lever with the Rooster," gave his supporters a tangible symbol to associate with his name and reduced the possibility of pulling the wrong lever. The use of voting machines, moreover, constituted a relatively new experience for the black community as a whole. Turning the master lever would simplify the procedure of voting for Wyche, who was listed on the ballot beside 23 other Democrats.

Cox, in contrast, could not have been affected by the lockout. His campaign consisted simply of asking his supporters to pull the individual lever above his name. Since he was one of only two Republican candidates, he did not expect the traditionally Democratic voters of Madison Parish to pull the Republican master lever.

In addition to being discriminatory, the procedure used by the defendants was unnecessarily misleading. Electors accustomed to voting a straight party ticket had no reason to assume that the master lever would record votes for only 23 of the 24 candidates listed on the ticket. Louisiana law in fact requires that the voters be able to cast a straight party ticket in all general elections. Arguably, these provisions also apply to special elections that are joined to general elections.

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222 Although illiterates are entitled to seek assistance in operating voting machines, many decline to do so, either out of pride, embarrassment, or unwillingness to let third persons witness their vote. See United States v. Louisiana, 265 F. Supp. 703, 715 (E.D. La. 1966), aff'd, 386 U.S. 270 (1967) (interpreting a Louisiana statute to require assistance to illiterate voters on request).

223 Brief for Plaintiff United States Department of Justice at 11. [hereinafter cited as Government Brief].

224 White Madison Parish residents ordinarily vote Democratic in state and local elections—as long as a black candidate has not won the primary. See, e.g., STATE OF LOUISIANA, GENERAL ELECTION RETURNS, NOVEMBER 5, 1968, at 56 (1968).

225 See text at notes 226-41 infra.

226 LA. REV. STAT. ANN. § 18:1168 (1969) provides:

Any voting machine may be leased, borrowed, or purchased and used which is so constructed as to fulfill the following requirements . . . .

(8) It shall permit the voter to vote for the candidates of one party as a unit at general elections.

LA. CONST. art. VIII, § 15, provides:

All elections by the people, except primary elections, ... shall be by official ballot . . . [which shall have] a specific and separate device adopted by [a] political party . . . . By stamping such device at the head of the list of the candidates of each political party, or nominating party, the voter may indicate that his vote is for the entire or straight ticket of the particular party . . . .

This provision has been incorporated into statute in LA. REV. STAT. ANN. § 18:671 (1969).

227 The voting machine mechanic, however, believed that the special election did not require connection with the master lever. 297 F. Supp. at 48-49.
Significantly, the defendants rejected three administratively feasible alternatives which were nondiscriminatory and straightforward. New ballots could have been printed, listing the marshal's race separately from the 23 other offices. This procedure would have clarified the special nature of the election and apprised voters that the party lever would not operate in the marshal's race. Additionally, separate machines could have been set up for the different classes of residents since the marshal's race would be locked out on nonresidents' machines. Finally, new ballots could have been used in which the marshal's race would be listed for Tallulah voters only.

Although the defendants denied any discriminatory purpose, they could not convincingly explain their choice of the most confusing procedure. An administrative assistant to the Secretary of State made the final decision on the basis of a January 24 telephone discussion with Post, who claimed to have already instructed election commissioners in the use of the lockout. Post urged retention of that procedure because it would be difficult to get the commissioners to attend another meeting. However, the strength of this justification is undercut by the testimony that Post never informed commissioners of the need to pull the separate lever and by the subsequent failure of commissioners to instruct voters as to the proper means to cast a ballot for marshal. Furthermore, it appears that a voting machine mechanic disconnected the marshal's lever on his own decision prior to the meeting of commissioners. His superiors were not informed of this.

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228 This alternative, considered by officials, would have listed Wyche and Cox on rows C and D of the ballot, below the other candidates. On the final ballot, 24 Democratic candidates were listed horizontally on row A and two Republicans on row B. LCDC Brief at 8. Notice would still have been required for the candidates and the public.

229 LCDC Brief at 7. Robert Hughes, Administrative Assistant to the Secretary of State, preferred this procedure before speaking with Post. LCDC Brief at 8. Another procedure considered would have disconnected the marshal's lever only in the four precincts that contained both Tallulah and outside voters. Id. In this way, at least the voters in the other three precincts could all use the straight party lever to vote for marshal. See note 214 supra.

230 LCDC Brief at 8.

231 Id.

232 Two election commissioners, Mary Veal and Emma Weston, claimed Post had not informed them that each voter had to pull the individual lever to vote for marshal. Government Brief at 28-34. Post and James Trichel, the voting machine supervisor, claimed, however, that the proper instructions were given. Government Brief at 27. Compare the court's opinion:

At the school [for commissioners] it was at least mentioned that the pulling of the master party levers would not affect the election of the Marshal for the Village of Tallulah, Louisiana. This condition of the machines, however, was not made clear to the persons in attendance.

297 F. Supp. at 49.

233 See note 219 supra.

234 Government Brief at 17-20.
fact until after the meeting was held, when Post could argue that a
change in procedure would confuse the commissioners. 235

Even if one assumes the decision to use the lockout resulted from
poor judgment, the defendants' failure to notify the candidates and
voters remains highly suspect. Post in particular realized that Wyche
was basing his campaign on straight ticket voting, but made no effort
to inform him of the basic change in procedure. 236 Nor did the Secre-
tary of State send Wyche a copy of the corrected sample ballot indi-
cating the necessity of pulling the individual lever for marshal. 237 Most
curious of all, no local official publicly announced that the marshal's
race would be disconnected. 238 While commissioners should have ex-
plained this fact on election day, public notice would have minimized
confusion. The defendants also failed to place the required demonstra-
tion voting machine in Ward 4 prior to the election, 239 failed to inform
Wyche of the sealing of the actual machines, 240 and failed to replace
the incorrect written instructions which had been inserted in the ma-
chines. 241

2. The Role of Compromise in Litigation. Despite the strong evi-
dence of wrongdoing, the Department of Justice 242 and LCDC 243 made
a conscious decision not to press the question of intentionality. First,
the attorneys declined to initiate contempt proceedings against Post,
even though he was under an injunction at the time of the election
not to engage in any "practices and procedures which may be dis-
criminatory in fact." 244 Since Judge Dawkins had avoided a finding of
intentionality in Post I, it was assumed that he would not respond
favorably to a request for sanctions directed at specific white officials.

235 Id.
236 Government Brief at 46-47. Post also knew that Wyche had inspected the incorrect
sample ballot on January 19. LCDC Brief at 4.
237 297 F. Supp. at 49-50. Wyche had written to the Secretary of State requesting
copies of the sample ballot for Ward 4. He received them on January 23, but never
received any corrected samples. Id. at 48, 49.
238 Government Brief at 6, 14, 47.
239 LCDC Brief at 17. LA. REV. STAT. ANN. § 18:1180 (1969) states in part that "at
least one machine for demonstration purposes shall be placed in each ward not more
than twenty five days and up to but not including the day of election." When the
machines were set up on election day, however, they contained erroneous instructions.
240 Mrs. Grimes testified that she mailed notice of the time and place of sealing of
the machines to Wyche in accordance with LA. REV. STAT. ANN. § 18-1176 (1969). Record
at 239-40. Wyche testified that he did not receive notice. Id. at 25. Cox, moreover, was
subpoened to produce all documents received from the Clerk's office relating to the
election, and did not produce any such notice. Id. at 147.
242 Department of Justice Interviews, supra note 71.
243 LCDC Interviews, supra note 128.
244 Brown v. Post, 279 F. Supp. 60, 64 (W.D. La., 1968).
Second, plaintiffs' attorneys recognized the lower standard of proof established in Post I and repeatedly emphasized the discriminatory effect of the defendants' action without impugning their motives.\textsuperscript{245} The briefs meticulously documented the various failures of each official, while carefully withholding any conclusions of intent. Although the plaintiffs argued the discrimination was harmful precisely because it was subtle, the analysis did not characterize the subtlety itself as purposeful.\textsuperscript{246} The Department of Justice and LCDC thus honored Judge Dawkins' gradualist approach\textsuperscript{247} by asking for a new election, their primary goal, at the expense of seeking sanctions for official misconduct.

The court's decision embodies this compromise approach by finding discrimination in fact and ordering a new election, while characterizing the defendants' actions as undertaken in "good faith."\textsuperscript{248} Although the decision provided a remedy for the immediate wrong, failure to find intentionality cost the plaintiffs additional relief. Officials were not only spared considerable embarrassment and political repercussions\textsuperscript{249} but were also protected against possible prosecutions for voting fraud.\textsuperscript{250}

\textsuperscript{245} It is interesting to note that the plaintiffs' briefs mention neither Post's role in Brown nor the injunction issued against him. In contrast, the injunction was raised by the State in Post's defense:

\textit{Mr. Post was under a restraining order as a result of a previous suit, Brown v. Post, 279 F. Supp. 60. Now the plaintiffs attack Mr. Post's alleged inactivity whereas in the above suit his activity was attacked. Plaintiff would apparently condemn Mr. Post for either his activities or his inactivity.}

Brief for Defendant at 13.

\textsuperscript{246} Repeated efforts to enforce the guarantees of the Fifteenth Amendment have made us aware of one indisputable fact; that as the prohibitions [on discrimination in voting] become more effective, the obstacles to Negro political participation become more ingenious. The instant case presents a classic example in subtle discrimination.

Government Brief at 51.

\textsuperscript{247} The phrase is that of Charles Hamilton, who has categorized Southern federal judges as "recalcitrant," "gradualist," and "aggressive." Hamilton, \textit{supra} note 124.

\textsuperscript{248} This action by defendant Post [failing to instruct the election commissioners properly] was not in bad faith. He and all other defendants at all times acted in good faith, never intending to deprive Negroes of their constitutional or statutory right to vote. . . . Where, as was done here, public officials, engaged in performing the duties of their offices, cause to be disseminated instructions to voters as to the manner of casting votes in a general election and, then, even though in good faith, without adequate notice to the voters, institute a new voting procedure contrary to the instructions previously disseminated, and a substantial number of Negro voters are induced to vote according to such erroneous instructions and are thereby prevented from casting effective votes, we conclude that Negroes have been discriminated against in the administration of the voting process . . . .

\textsuperscript{249} White parish residents have expressed increased dissatisfaction with the necessity of voting again for the same offices. Interviews with local residents, in Tallulah, La., Oct. 28, 1970.

\textsuperscript{250} Admittedly, it is not likely that state prosecutions under \textit{La. Rev. Stat. Ann.} §§ 18:269, 18:1194, or 18:221 (1969) would have followed a finding of intentional discrimination since one of Post's attorneys was Thompson Clarke, District Attorney for the Sixth Judicial District of Louisiana.
More important, however, the finding of good faith undercut any
deterrent effect the litigation might have on future conduct. First, the
decree did no more than order the defendants to obey the law: "The
defendants . . . shall administer the voting process in compliance with
the applicable Louisiana and Federal law in such a manner that will
afford equal opportunities to vote to all qualified voters regardless of
race or color." Second, the Judge warned the officials not to repeat
the same mistakes: "Defendants are specifically enjoined from engag-
ing in the practices which were found to be discriminatory in the Feb-
ruary 6, 1968, election and any other practices and procedures which
may be discriminatory in fact." Finally, the defendants' exculpation reduced the plaintiffs' ability
to improve their position in future lawsuits. Recent voting rights cases
have established that a documented history of purposeful discrimina-
tion casts a strong presumption of illegality over continuing attempts
to manipulate the electoral process. By specifically emphasizing Post's
"good faith" efforts on two separate occasions, Judge Dawkins implicitly
deprecated the existence of a conscious pattern of discrimination existed
in Madison Parish. In fact, the Judge's decision makes no mention of
Ward or Post I, as though Post II were sui generis rather than one in-
stance of a historical continuum.

In sum, Judge Dawkins imposed almost the same injunction in
Post II as in Post I. In the second case, it is true, the injunction re-
mained in effect, placing some element of deterrence on the principal
defendant. But on the whole, Judge Dawkins did not increase the
threat of sanctions on election officials. On the contrary, he showed
a willingness to give the defendants every benefit of the doubt in their
administration of the electoral process. The chance of punishment for
discrimination—whether by the criminal law, the civil law, or the
contempt power—remained remote.

Arguably, the Judge felt that after three government-supported suits,
local officials would recognize the futility of further denying black citi-
zens the right to participate fully in community politics. But sub-

251 297 F. Supp. at 51.
252 Id. Considering the generality of this injunctive order and Dawkins' refusal to find
intentionality despite the strong evidence, it is unlikely that he would ever punish
discriminatory conduct through contempt. Rather, the entire history of Post I and Post II
suggests that Dawkins would excuse a defendant who could show the thinnest justification.
1968); Smith v. Paris, 237 F. Supp. 901 (M.D. Ala. 1966), modified, 386 F.2d 979 (5th Cir.
1967); United States v. Alabama, 252 F. Supp. 95 (M.D. Ala. 1966); Sims v. Baggett, 247
254 Department of Justice attorneys themselves indicate that one government suit is
sequent events proved otherwise, as the final resolution of *Post II* indicates. In the new election, held on May 20, 1969, Wyche did in fact defeat Cox, by a margin of 1,949 to 1,796. Nevertheless, Wyche failed to receive his commission within the usual time. Apparently the thought of a black police chief still created consternation. On June 7, 1969, LCDC filed a motion for an injunction requiring the Governor and the Secretary of State to deliver the commission in question. Eventually the Governor complied, issuing Wyche the necessary document on June 23. LCDC subsequently withdrew its motion, but Wyche by this time had received the message. After winning one primary, one suit, and a second election, he still had to contend with white officials before he could take office.

C. Toney v. White

In April, 1970, the focus of Madison Parish litigation shifted from official interference with the process of general elections to a discretionary purge of voters prior to the Democratic primary. The black community had attempted to gain political control of Tallulah for the first time by nominating a full slate of eight candidates to run for town and party offices. Only Johnnie Crockett and Wyche, however, survived opposition in their respective races for the Democratic Executive Committee and for village marshal. LCDC then filed suit against the Registrar, alleging the purge of 159 black voters and eleven white voters to be illegal and discriminatory. The complaint requested that every election be set aside, except the village marshal's, because Wyche was the only winning candidate who still faced an opponent in the general election. One month later, the Department of Justice brought a similar suit but extended its prayer for relief to invalidation of the
entire April 4 primary. Wyche subsequently secured his post as village marshal by defeating Cox in the general election held on June 9.

Rather than argue the merits of *Toney v. White* prior to decision, the following discussion focuses on two problems of relief generated by the factual situation. First, the voiding remedy is analyzed to determine whether its conceptual underpinnings permit only part of an election suit to be set aside. Second, the appropriateness of additional relief is considered in the light of past Madison Parish litigation.

1. The “Selective” Purges. The key factual issue in *Toney* involves the Registrar’s allegedly illegal and discriminatory application of state voter eligibility statutes. Louisiana law requires registrars to purge from the rolls any elector who has not voted in the past four years and permits removal of individuals believed to be illegally registered. In either instance citizens must be given personal and published notice of the challenges and be provided an opportunity to reinstate themselves within a specified period. If they fail to seek reinstatement they may reregister by meeting standard state requirements. However, registration books are closed thirty days prior to any general or primary election, thereby foreclosing the opportunity for reregistration before the election for failure to meet the reinstatement requirements.

260 United States v. Bishop, Civil No. 15,747 (W.D. La., filed June 8, 1970). Private and government suits were consolidated for the purposes of trial, held on January 18-19, 1971 after an initial postponement.


264 The registrant is given ten days from the date of the letter, and three days from the date of newspaper publication, to appear at the registrar’s office. While a registrant who appears under § 18:240 must be reinstated upon satisfactorily identifying himself to the registrar, a person seeking reinstatement pursuant to § 18:132 must present affidavits of three bona fide registered voters of the parish that he is legally entitled to remain on the rolls.


The timing of purges by Registrar Bishop has been questioned because she did not mail letters of challenge to 130 blacks and eleven whites until March 4, effectively forcing the persons in question to appear at her office within ten days or forego voting in the April 4 primary. The newspaper announcement, however, did not contain the required notice of reinstatement rights. Nor did Mrs. Bishop keep her office open for more than five of the mandatory ten days, although she added three days to the reinstatement period without informing affected individuals.

While the above conduct is of questionable legality and affected a disproportionately high number of black voters, the principal evidence of discrimination appears from the selective purge of 29 black citizens for residing at addresses different than those listed on their registration records. The Registrar failed to challenge 141 whites who had moved or changed addresses prior to March 23 and failed to review the eligibility, as required, of 62 white voters who had voted by absentee ballot during the previous two year phase. Although it cannot be estimated how many of these white registrants would have been removed if challenged, it is known that 93 voted in the primary and

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267 According to the Louisiana Attorney General, no purge under § 18:240 can be made in good faith if the registrar waits until thirty days before an election. If, however, a registrant is called to appear within the thirty-day period when the books are closed, he must be reinstated and allowed to vote in the forthcoming election upon identifying himself to the registrar's satisfaction. [1956-1958] LA. ATT'Y GEN. REP. & OP. 210-11.

268 Brief for Plaintiff Lawyers Constitutional Defense Committee at 3 [hereinafter cited as LCDC Brief]. This purge was conducted under § 18:240 exactly thirty days before the April 4 primary, violating the requirements of good faith indicated by the Attorney General. See note 267 supra.

269 Four persons did appear at the Registrar's office after the ten-day period and were denied registration for this reason. Brief for Plaintiff United States Department of Justice at 37 [hereinafter cited as Government Brief].

270 The notice simply indicated the individuals would be removed from the registration rolls, although § 18:240 states that the publication must inform voters of reinstatement procedures. Government Brief at 12. This omission was of particular importance to 65 registrants whose letters were returned as undeliverable. The published list provided them notice of the purge but incorrectly implied they could not be reinstated.

271 Government Brief at 16.

272 Government Brief at 23. According to the Registrar, this purge was conducted under § 18:132, although she received notice of the registration defects from two white voters, including a candidate for alderman. LCDC Brief at 8.


274 Id. at 31-32. LA. REV. STAT. ANN. § 18:1080 (1969) provides that registrars must cancel an individual's registration if continued absentee balloting is unjustified. The failure to purge absentee voters might well have been the decisive factor in the primary. All eight black candidates out-polled their white opponents on the voting machines in every race; however, absentee ballots provided the winning margins for white candidates in six races. LCDC Brief at 6.

275 Government Brief at App. B.
that 97 were stricken from the rolls afterward for failure to justify continued registration.\footnote{276} In contrast, only three of the 159 challenged blacks voted in the primary, although eighty would have been eligible to do so had the purge not been effected.\footnote{277} In short, the plaintiffs charge Mrs. Bishop with selectively purging black voters, providing misleading notice, and allowing insufficient reinstatement time, while neglecting to challenge white voters with equally defective registration.

2. \textit{Refining Voiding Relief.} If Judge Dawkins makes a finding of discrimination in these circumstances, he should be prepared to grant immediate relief which will eliminate the effects of discrimination, and to impose remedies that will reduce the possibility of another unfair election. Previous cases suggest that manipulation of the electoral process will continue unless he increases the the severity of sanctions. Hence, his first option is to overturn only those elections lost by black candidates, thereby implementing the voiding remedy without rewarding those who engaged in discrimination. This solution could be reached by tailoring general equitable principles of voiding elections to fit the particular circumstances of Madison Parish. In \textit{Bell v. Southwell},\footnote{277} as previously mentioned, the Fifth Circuit authorized setting aside an election tainted by discrimination regardless of whether the discrimination affected the outcome. The court based its decision on the belief that discrimination caused "the body politic as a whole, both Negro and white," to suffer.\footnote{279} Voiding relief was therefore ordered to protect the right of voters to participate in an election conducted free of impermissible racial distinctions.

If rigidly applied, this doctrine would require overturning every April 4 primary contest. However, the underlying rationale of \textit{Bell} is that voiding relief provides one appropriate means of remedying discrimination—not that all tainted elections must be overturned. Since Wyche gained victory despite discrimination against his race, the necessity of setting aside his election disappears. New elections would not eliminate, but would perpetuate, the harm flowing from the initial dis-

\footnote{276 Id. at 30, 35. After the April primary, 72 of the 141 persons were removed following a challenge made by black voters under \textit{LA. REV. STAT. ANN. § 18:123} (1969), which authorizes third parties to present affidavits to registrars indicating that named individuals are illegally registered. LCDC Brief at 8-9. The Registrar also removed 25 persons for failure to justify continued absentee voting after the filing of the complaint made her aware of the applicable provisions. Government Brief at 35.}

\footnote{277 Government Brief at App. B. Assuming no purge had occurred, 79 black voters removed from the rolls were not eligible to vote in the primary because they resided outside Tallulah or were members of the States Rights or Republican Parties. \textit{Id.} The briefs do not indicate, however, how many black voters were discouraged from seeking reinstatement because of the deficient notice or limited office hours.}

\footnote{278 \textit{376 F.2d 659} (5th Cir. 1967).}

\footnote{279 Id. at 662.}
The black incumbent would be forced to campaign again, even though he had nothing to gain and everything to lose in a second primary. Wyche would thus be penalized for the Registrar's purge while his two defeated opponents reaped the benefits of discrimination by obtaining a second chance to beat the black candidate.\textsuperscript{280} Cox particularly does not deserve such a "windfall," because he was defeated by Wyche in an election that no one disputed.

Admittedly, the court cannot presume that Wyche would have won the primary had no discrimination occurred.\textsuperscript{281} On the other hand, Judge Dawkins must not blind himself to the reality that a racial power struggle exists in Madison Parish.\textsuperscript{282} The dilution of black voting strength could not conceivably help the black candidate or hurt the white one. Retaining Wyche's election would therefore recognize the plain fact that he overcame the discrimination.

A recent Fifth Circuit decision, \textit{Thompson v. Brown},\textsuperscript{283} provides a second reason for preserving Wyche's election. The court held that two white candidates could not wait until after the general election to contest the primary victories of their black opponents.\textsuperscript{284} The critical error was the failure to file a timely suit seeking to enjoin certification of the election results.\textsuperscript{285} The Fifth Circuit therefore found the primary

\begin{itemize}
\item Wyche's position must first be distinguished from that of the six black losers, who can claim that the purge may have deprived them of victory, and who can therefore benefit from the new election. \textit{See} note 274 \textit{supra}.

A more difficult problem exists in distinguishing the situation of the six white incumbents who must also face defeat at the polls in new elections. To this extent they would be punished for the discriminatory acts of other officials who caused the first election to be voided. However, traditional voiding theory has not considered this imposition too great when weighed against the necessity of redressing discrimination. In the case of the black incumbent, this is the very question to be asked—whether new elections will in fact redress the initial discrimination. Moreover, courts have assumed, however implicitly, that discrimination against black voters could only benefit white candidates. New elections, therefore, would strip the white candidate of an impermissible advantage.

\textsuperscript{281} The court would have to indulge in vote counting, either adding the votes of the purged black voters or subtracting the votes of the whites who should have been challenged. Although it is highly likely that each person would vote for the candidates of his race, this assumption is impermissible. \textit{Bell v. Southwell, 376 F.2d 659, 662 (5th Cir. 1967)}.

\textsuperscript{283} Judge Dawkins in fact made this observation at trial. Record at 79.

\textsuperscript{284} 434 F.2d 1092 (5th Cir. 1970).

\textsuperscript{285} \textit{Bearing in mind the fact that this was merely a contest of a primary, challenging the right of appellants to appear on the election ballot as candidates, and that \textit{no contest was filed after the election} . . . , the court asked counsel . . . to show why the primary . . . has not been mooted by the uncontested general election . . . . It is plain that the appellants have been serving for more than a year as aldermen under an election which was not contested. Any question touching on their qualifications to run in the election has been mooted for the failure of the appellees or anyone else to challenge the election results.} \textit{Id. at 1096 (emphasis in original)}.

\textsuperscript{285} The passage quoted in note 284 \textit{supra} does not clearly indicate whether the white candidates could have avoided the mootness problem by seeking to void the
challenge mooted because the aldermen in question had been serving in office for more than a year after the uncontested general election. Despite the obverse factual situation, this reasoning applies convincingly to Toney. Since neither the Department of Justice nor Cox sought to enjoin the general election or prevent certification of its outcome, both should be estopped from challenging Wyche’s continued tenure as marshal. Such an approach would again serve to limit the adverse effects of the initial discrimination.

3. Increased Judicial Intervention. Previous Madison Parish cases demonstrate that new elections for losing candidates provide only minimal relief. In the absence of strict judicial enforcement, local officials persist in using questionable discretionary procedures. Given a history of electoral misconduct and the necessity for intervention following a finding of discrimination, the judiciary should be prepared to impose sanctions with the potential to deter continuing discrimination.

To avoid future resentment and confusion, Judge Dawkins could insist that election officials regain the voters’ confidence by adhering to higher standards of care than the law requires. Judge Pittman, who recognized that local practices contributed to racial friction, adopted this position in Gray v. Main. Although he did not find discrimination requiring relief, the Judge ordered a board of registrars to carry out its duties under full public scrutiny and warned officials to improve their conduct:

This lawsuit probably could have been avoided, and similar law suits in the future can be avoided, if the defendants and all officials who occupy similar positions will take pains not only to observe the legal requirements with reference to racial discrimination, but also to avoid participating in and creating (and offer leadership to the electorate to avoid) situations which easily and quite naturally arouse suspicion of racial discrimination.

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286 The Government filed suit on June 8 to void the whole primary, but did not seek to enjoin the conduct or certification of the general election, held on June 9. The distinction may be a technical one, since the Department of Justice took some action before the general election, in contrast to the white candidates in Thompson.


288 Id.

289 Id.

290 Id. at 226. Judge Pittman’s assessment of the historical context offers an instructive comparison with Madison Parish:

As for the defendants and white population of Bullock County, the transition from dominant political control of their elected officials to the prospect of sharing or losing this control to the Negro population, with a great number of those
Despite repeated violations of electoral integrity, Judge Dawkins has never specifically indicated to officials their increased responsibility.

Should the Judge recognize the necessity of an additional sanction but reject imposition of a higher standard of care, he could institute a reporting system. This procedure would require the defendants to inform the court and counsel of all contemplated purges and changes in electoral procedure. The importance of such a remedy lies in making public officials accountable for their conduct in advance, thus eliminating the last-minute surprises which have characterized past elections. The reporting device also places the initial burden of justification on the defendants, where it appropriately belongs. Once the plaintiffs demonstrate irregularities which might taint the election, the questionable procedure would be scrapped—for example, the purged voter would be returned to the rolls or the dead elector removed. While requiring diligent activity by the plaintiffs, such an order would in fact only formalize efforts currently made to ascertain how local officials intend to sabotage key election campaigns.

Finally, Judge Dawkins could tighten the language of his injunctions to establish unambiguous foundations for contempt proceedings. Admittedly, this sanction has been used only in exceptional circumstances since it depends on judicial willingness to expose local officials to public obliquy. But contempt can be effective if the court makes explicit its intention to invoke the power when necessary.

While Judge Dawkins has shunned forceful measures in the past, he may now have recognized the need for higher standards and additional relief. In fact, a statement made during an interlude at the Toney trial suggests that he may be considering a procedure which will increase the defendants' accountability:

> The handwriting is on the wall and the entire country has to start working as a team and start pulling together—black and white—realizing that we need the best qualified persons of both races as our leaders, we must eliminate this polarization

registered being illiterate and untrained, was undoubtedly a searing emotional experience. The Negroes were haunted by slavery and historical discrimination, and the white population was haunted by 19th Century Reconstruction politics.  

[id. at 224.]


292 See In re Herndon, Criminal No. CR 12,421-N (M.D. Ala., Jan. 7, 1971) (criminal contempt), and Hadnott v. Amos, Civil No. 2757-N (M.D. Ala., Jan. 7, 1971) (civil contempt), in which a county probate judge was held in contempt of court for failing to follow an order requiring him to place black candidates' names on an election ballot. But cf. United States v. Barnett, 346 F.2d 99 (5th Cir. 1965), in which the Fifth Circuit had refused to hold former Governor Ross Barnett in contempt of court.
of the races if this country is to survive. If we don’t pull together as a team we’re lost.\(^{293}\)

IV. VOTING RIGHTS LITIGATION: AN EVALUATION

The effectiveness of voting rights litigation must be measured in terms of its immediate objective—securing the right to vote free from discrimination—and its ultimate goal—insuring black political participation.\(^{294}\) The foregoing discussion indicates that litigation did achieve minimal success by providing relief from specific discriminatory procedures, but that the sanctions invoked proved insufficient to deter repeated violations of electoral integrity. Consequently, judicial enforcement of voting rights has not brought direct political gains.\(^{295}\) White officials still control the parish by neutralizing the potential voting strength of the black majority.\(^{296}\) More important, the present admin-

\(^{293}\) Madison Journal (La.), Jan. 21, 1971, at 1. This shortened tolerance of subtle forms of discrimination reflects a gradual change in the Judge’s attitude toward racial hostility. Judge Dawkins, who had enjoined the holding of a 1959 Civil Rights Commission hearing with a curt “It is all part of the game,” 1959 Civil Rights Report, supra note 18, at 100-01 (for the complete story of this affair, see id. at 98-101), had been characterized as “torn—a segregationist with respect for the law,” Hamilton, supra note 124, at 88 (quoting a Department of Justice attorney), and had been severely criticized by the Fifth Circuit, see Reddix v. Lucky, 252 F.2d 930, 936-38 (1958). “Schooled” through reversals, Judge Dawkins now renders opinions which acknowledge violations of plaintiffs’ substantive rights. See the discussion of the Concordia Parish school litigation in 2 Race Rel. L. Survey, 174-75 (1970-71) (rejecting a school board’s plan for sex separation in the public schools). However, he adheres to the gradualist approach by granting limited and often inadequate relief.

\(^{294}\) It might be argued that the sole purpose of voting rights litigation is to guarantee the right to vote. Government attorneys involved in Madison Parish cases have expressed this view, stating that local leaders must develop their own political organization. Compare Attorney General Katzenbach’s statement, quoted in P. Watters & R. Cleghorn, supra note 141, at 265-67. Nevertheless, it is clear that blacks cannot exercise political power unless they can first organize effective votes. See generally H. Holloway, The Politics of Southern Negroes 68-90 (1969); E. Ladd, Negro Political Leadership in the South 233-318 (1966); D. Matthews & J. Frotho, Negroes and the New Southern Politics 203-235 (1966).

\(^{295}\) Only five black persons presently hold office in Madison Parish—two members of the school board, one member of the Democratic Executive Committee of Tallulah, the town marshal, and the town constable. All of these individuals have been elected by virtue of the black voting strength in Tallulah and none hold parishwide offices. The Voters League has not extended influence beyond the city limits, principally because those blacks who live on white-owned plantations face threats of eviction for political activity. See, e.g., Political Participation, supra note 122, at 117. Self-employed farmers, moreover, are not easily organized because they are located throughout the parish.

\(^{296}\) Another contributing factor to white electoral success is the difficulty of achieving full black registration for the reasons stated in note 295 supra. Approximately 1,300 persons or 25% of the black voting-age population remain unregistered despite intensive registration drives in 1966, 1968, and 1969. In contrast, virtually 100% of the white voting-age population is on the rolls, giving whites a numerical superiority in parishwide registration as of 1970. Figures, based on the 1960 census, available from Voter Education
istration has ignored black interests in accelerating school desegregation, securing urban renewal funds, attracting new industry, and regulating the hours of liquor establishments.

Nevertheless, it would be inaccurate to infer that litigation has made no impact on local politics. Resort to the federal court has provided blacks with the means to build organizational strength and to pressure local government. Initially, the private suit of Wyche v. Ward performed the function of solidifying black leadership at a time when no individual alone could hazard challenging the white power structure. The plaintiffs' resolve to unify at all cost created a viable nucleus which stimulated future registration efforts. Additionally, the litigants who suffered defeat in court gained the experience of confronting white officials.

United States v. Ward generated a second stage of development, the formation of a distinct political organization. Black leaders founded the Madison Parish Voters League to encourage registration by providing the extensive coaching needed to pass the citizenship and literacy test. Once the Voting Rights Act eliminated these obstacles, the League began massive registration drives. The utility of establishing a working organization prior to August, 1965 can best be appre-

297 The only voluntary improvement in the black residential community has been installation by the police jury of street lamps and paving of dirt roads.

298 See text at notes 319-22 infra.

299 Black residents found it necessary to secure their own source of federal funds to build a 120-unit public housing project under § 101 of the Housing Act of 1965. The police jury would not initiate an urban renewal plan designed to eliminate the serious housing shortage engendered by the prevalence of substandard housing. See 1967 DATA BOOK, supra note 12, at 154.

300 Members of the Voters League regard the attraction of new industry as an important means of stemming the flow of black emigration from the parish. See text and notes at notes 9-11 supra. Although the potential work force does not possess special skills, training, or education in abundance, black leaders point to the qualified success of Charles Evers in Fayette, Mississippi, indicating that rural areas can offer industry certain advantages. Whites, however, contend that no business will locate in an area that is politically unstable—that is, where blacks could assume control. Interviews with local residents, in Tallulah, La., October 26-28, 1970.

301 Bars presently operate on an unrestricted basis. The only police jury response to demands for control has been an ordinance requiring segregation in such establishments. Madison Journal (La.), Jan. 28, 1971, at 8A.

302 The League's primary financial support comes from local blacks who contribute prior to election campaigns and at weekly meetings held to sustain enthusiasm for political participation and to coordinate all civil rights activities. Additional funding to support eight-week voter registration drives has been received from the Voter Education Project. The first grant was made to the Congress on Racial Equality in 1966. Letter from Marvin Wall, Director, Voter Education Project, to The University of Chicago Law Review, Dec. 31, 1970.

303 See Sanders, supra note 21, at 64.
Voting Rights

associated by comparing Madison with East Carroll Parish. One month after the passage of the Voting Rights Act, the Registrar enrolled 1,800 of the 5,181 eligible blacks in Madison Parish;\textsuperscript{304} registration did not exceed that figure in East Carroll, where federal examiners\textsuperscript{305} were appointed, until February, 1966. The difference, according to Attorney General Katzenbach, could be explained in terms of the Voters League campaign.\textsuperscript{306}

Subsequent voting rights litigation continued to unify the black community. Candidates explained their losses by arguing that no black had ever received a fair election,\textsuperscript{307} while leaders pointed to the favorable court decisions as proof that the white administration could not be trusted.\textsuperscript{308} Moreover, the increasing presence of federal observers,\textsuperscript{309}

\textsuperscript{304} While complying, local officials did not process applications with dispatch when mass registration began:

This was the wonderful part about the people in Madison Parish. They were so patient standing in line for days, weeks, and months, until finally we had more people registered on the books in Madison Parish than the whites and were able in the end of 1965 to enter the political arena.

Wyche Interview, supra note 41. Moreover, the Registrar originally listed some 283 black voters on the rolls of the State Rights and Republican Parties, thus rendering them ineligible for at least six months to vote in the Democratic primary, Madison Parish's most important local election. Field Reports on file at Voter Education Project (copies on file at The University of Chicago Law Review).

\textsuperscript{305} In deciding which of these neighboring parishes should initially receive examiners, the Government probably selected East Carroll rather than Madison because the Fifth Circuit's decision in United States v. Ward, 349 F.2d 795, modified, 352 F.2d 329 (5th Cir. 1965), had not issued by August 6, 1965.

\textsuperscript{306} P. WATERS & R. CLEGHORN, supra note 141, at 265-67, quoting Attorney General Katzenbach. Parish blacks appear to agree. Rather than give credit for increased registration to federal presence, residents cite their own organizing efforts as the controlling variable in achieving political participation. Interviews with local residents, in Tallulah, La., Oct. 26-28, 1970.

\textsuperscript{307} Compare Wyche's contention that white officials "rigged" the voting machines in the February 6, 1968 general election. Sanders, supra note 21, at 59.

\textsuperscript{308} Note the April 4, 1970 primary campaign in which black candidates pledged to keep the voters of Tallulah properly informed of all coming elections and any and all changes in election procedures." Madison Journal (La.), Mar. 26, 1970, at 4A (advertisement).

\textsuperscript{309} The cost of sending federal observers to Madison Parish gives some idea of the heavy expense involved in monitoring elections:

<table>
<thead>
<tr>
<th>Date</th>
<th>Election</th>
<th>Number of Observers</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aug., 1966</td>
<td>Primary</td>
<td>30</td>
<td>$11,500*</td>
</tr>
<tr>
<td>Nov., 1966</td>
<td>General Election</td>
<td>20</td>
<td>7,700*</td>
</tr>
<tr>
<td>Nov., 1967</td>
<td>Primary</td>
<td>32</td>
<td>12,300*</td>
</tr>
<tr>
<td>Dec., 1967</td>
<td>Primary</td>
<td>34</td>
<td>13,000*</td>
</tr>
<tr>
<td>Feb., 1968</td>
<td>Municipal Election</td>
<td>23</td>
<td>8,500*</td>
</tr>
<tr>
<td>Apr., 1968</td>
<td>Brown-Fulton Special Election</td>
<td>18</td>
<td>6,500*</td>
</tr>
<tr>
<td>Aug., 1968</td>
<td>Municipal Election</td>
<td>22</td>
<td>8,000</td>
</tr>
<tr>
<td>Nov., 1968</td>
<td>Municipal Election</td>
<td>19</td>
<td>6,275</td>
</tr>
<tr>
<td>May, 1969</td>
<td>Wyche-Cox Special Election</td>
<td>20</td>
<td>8,150</td>
</tr>
<tr>
<td>Apr., 1970</td>
<td>Primary</td>
<td>18</td>
<td>7,440</td>
</tr>
<tr>
<td>June, 1970</td>
<td>Municipal Runoff</td>
<td>18</td>
<td>7,440</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td></td>
<td><strong>254</strong></td>
<td><strong>$97,605</strong></td>
</tr>
</tbody>
</table>

* Estimated.
attorneys, and agents,\textsuperscript{310} who monitored parish elections, gave credence to both points of view. \textit{Post I} and \textit{II}, therefore, strengthened the resolve to run a black ticket that would gain control of local government. Concurrently, the Voters League assumed the role of a black Democratic Party, organizing Tallulah by street, block, and precinct. The racial polarization\textsuperscript{311} and bloc voting\textsuperscript{312} that characterized past elections made such a strategy advisable.

By providing the Voters League with an effective bargaining instrument, voting rights litigation facilitated the development of black political organization in a second way. The white community realized that should blacks bring suit to assert their rights, the success of voiding suits could be repeated in other areas. Local officials, therefore, chose to compromise on certain issues that did not directly challenge their political control. The integration of businesses and public accommodations demonstrates this phenomenon. When the Voters League first attempted to negotiate the hiring of black employees on a fifty-fifty basis, local merchants refused to cooperate. In response, black leaders organized an economic boycott of the town which forced seventeen establishments to close before businessmen capitulated.\textsuperscript{313} The boy-


\textsuperscript{310} The Federal Bureau of Investigation periodically inspects the Registrar’s records and generally observes parish elections. \textit{Department of Justice Interviews, supra} note 71.

\textsuperscript{311} Editorial\textit{s} in the \textit{Madison Journal} suggest the underlying bitterness of recent elections:

The Journal prints many checks for Negro societies, churches and other organizations, and everyone of them must have a check book printed so that three people can sign the checks. This shows that they cannot trust one another—even brother and sister church members. If a Negro cannot be trusted with a small amount of church or society funds, how could he be trusted with thousands—even hundreds of thousands of public money?

When one Negro sees a so called leader driving around in a big car with a cigar in his mouth, telling others what to do, it is only natural for them to think they are underdogs and the one doing the ordering is the one who is getting the gravy. The Negro sooner or later will come to realize that when he needs help or wants a favor it is to the white man that he will have to appeal.

\textit{Madison Journal (La.),} Sept. 1, 1967, at 2. Compare a recent editorial which reprinted an 1880 “To Our Colored Voters” policy statement and then warned, under the title “To Our Colored Voters—1969”:

\textit{Just as the Madison Journal warned you of ‘political tricksters’ nearly 90 years ago, we are today cautioning you against voting for Zelma C. Wyche for marshal of this community.}


\textsuperscript{312} The two most recent elections indicate the extent to which voting follows racial lines. In the August 15, 1970 Democratic primary for town constable, white candidate D’Elmer Williamson received 536 votes in all-white Precinct 1 but only twelve votes in all-black Precinct 5. His opponent Huey Daily received six and 577 votes in the respective precincts. Similarly, Cox recorded 750 and nineteen votes in the two precincts while Wyche obtained 28 and 685 votes. \textit{Madison Journal (La.),} Aug. 29, 1970, at 1.

\textsuperscript{313} See Sanders, \textit{supra} note 21, at 58.
cott's effectiveness turned partly on the knowledge that blacks could rely on the federal government for legal assistance.\textsuperscript{314} Store owners recognized that continued resistance could only bring economic disaster and a possible law suit as well.

The boycott, in turn, established a pattern of self help in which litigation plays a supporting role. Rather than wait for local government to act, blacks have built a public housing project,\textsuperscript{315} contracted for a rural development program,\textsuperscript{316} and lobbied for anti-poverty funds.\textsuperscript{317}

It should be noted, however, that the threat of litigation has no effect where the white community sees its political control challenged. While the voting rights cases illustrate this point, reapportionment and desegregation suits demonstrate further the difficulty of effecting meaningful change. Despite general acknowledgment that the configuration of ward boundaries caused extensive dilution of black voting strength, the local administration refused to reapportion. When black leaders filed suit,\textsuperscript{318} the police jury and the school board passed resolutions which further diluted the black vote\textsuperscript{319} and made the election of a nonwhite candidate virtually impossible. Under the aegis of the district court, however, the parties have accepted a temporary compromise until 1970 census figures become available in full detail. The

\textsuperscript{314} Bee see Wyche v. Louisiana, 394 F.2d 927 (5th Cir. 1967), and Wyche v. Hester, 273 F. Supp. 131 (W.D. La. 1967), rev'd, 431 F.2d 791 (5th Cir. 1970), arising out of attempts to integrate a truck stop. In the first case, Wyche was charged with aggravated burglary for "unauthorized entry" into the premises. The Fifth Circuit ruled that he was entitled to an evidentiary hearing on his petition to remove the state prosecution to federal court, remanding for a determination whether Wyche's entry was in the exercise of his rights to enjoy equal access to a place of public accommodation. In the second case, Wyche was convicted of simple battery, but the court held that he was entitled to an evidentiary hearing in a habeas corpus proceeding brought to test the validity of the state conviction.

\textsuperscript{315} See note 299 supra.

\textsuperscript{316} Wyche Interview, supra note 25.

\textsuperscript{317} The Voters League was instrumental in establishing the Delta Community Action Project, funded by the Office of Economic Opportunity, to run social welfare programs. The project initially had difficulty in attracting sufficient white interest. A Head Start pre-school program was terminated by the Department of Health, Education and Welfare because it did not meet in the white part of town and did not enroll a proportion of black and white children equal to the racial composition of Madison Parish.

\textsuperscript{318} Wyche v. Madison Parish Police Jury, Civil No. 14,503 (W.D. La., filed Apr. 7, 1969). Ward 1, for example, had one police juror and school board member for 348 inhabitants while Ward 4, where most of the parish's blacks live, had three representatives for 11,754 people. \textit{Id.} Reapportionment problems are quickly replacing registration denials as the most litigated area in voting rights discrimination. \textit{See} 39 U.S.L.W. 2535 (June 3, 1971).

\textsuperscript{319} Exhibits A, B. The resolutions called for representatives to run on an at-large basis throughout the parish. Since white voters constitute a majority of the voters registered in the parish, see note 296, \textit{supra}, the plan would effectively undercut the black power base in Tallulah.
reapportionment case therefore remains unresolved, three years after its commencement.

Litigation has also proved necessary to implement and structure school desegregation. Stated simply, the school board has refused to take any steps toward integration, unless unequivocally required to do so by court order.\(^3\)\(^2\)\(^0\) Despite years of judicial enforcement,\(^3\)\(^2\)\(^1\) moreover, integration has progressed gradually, without dismantling of the dual school system.\(^3\)\(^2\)\(^2\) This situation is not likely to change in the near future unless blacks gain control of the school board. However, blacks cannot obtain that position unless reapportionment and fair elections come first.

Litigation thus provides the essential means of pressuring whites to compromise on basic issues of voting, reapportionment, and desegregation. While it is clear that blacks have not made dramatic gains this way, they have nevertheless compelled white officials to effect a minimum degree of change that would not have been undertaken otherwise. Yet the continued reliance on private and government suits points to the very weakness of the black position—for litigation is the tool of the politically powerless.\(^3\)\(^2\)\(^3\)

Burke Marshall has observed that

\[\text{[O]nly political power—not court orders or other federal law—will insure the election of fair men as sheriffs, school}\]

\(^3\)\(^2\)\(^0\) Moreover, the school board would not sign a voluntary compliance agreement, required by the Government for the grant of federal funds, until the district court ordered integration.

\(^3\)\(^2\)\(^1\) The litigation history may be traced as follows: suit filed August 20, 1965; integration order on a freedom-of-choice plan beginning in September, 1968, Williams v. Kimbrough, 12 RACE REL. L. REP. 1899 (W.D. La. 1967); freedom-of-choice plan considered best available, Conley v. Lake Charles School Bd., 293 F. Supp. 84 (W.D. La. 1968); reversed on statistical showing that freedom-of-choice did not offer prospects for effectuating transfer to a unitary school system, 417 F.2d 801 (5th Cir. 1969); on remand, new desegregation plans required of school board, 303 F. Supp. 394 (W.D. La. 1969); Fifth Circuit set aside three-step zoning procedure ending in 1971-72, accepted by the district court, and ordered immediate adoption of effective unitary school plan, Williams v. Kimbrough, 421 F.2d 1351 (5th Cir. 1970). See also Williams v. Kimbrough, 295 F. Supp. 578 (W.D. La. 1969), aff'd, 415 F.2d 874 (5th Cir. 1969), cert. denied, 396 U.S. 1061 (1970) (wrongful dismissal of four non-tenured black teachers prior to court-ordered faculty integration).

\(^3\)\(^2\)\(^2\) As of January 1, 1970, only 183 black students had entered formerly all-white schools under the freedom-of-choice plan. Madison Journal (La.), Oct. 18, 1970, at 1. After the February 1, 1970 court order implemented a zoning scheme, 764 white students and eighteen teachers left the school system. A private school, Tallulah Academy, was formed to accommodate this exodus of pupils. By September, 1970, however, more than three hundred white students returned, bringing the total white enrollment to 20%. Nevertheless, the majority of black students still attended all-black schools while white students predominate at formerly all-white institutions. Id.

\(^3\)\(^2\)\(^3\) See Matthews, Political Science Research on Race Relations, in I. Katz & P. Gurin, Race and Social Sciences 113, 118 (1969).
board members, police chiefs, mayors, county commissioners, and state officials. It is they who control the institutions which grant or deny federally guaranteed rights.\textsuperscript{324}

Madison Parish's experience supports Marshall's conclusion with bitter irony.\textsuperscript{325} Three successful lawsuits have not brought fair elections. But in the absence of fair elections, blacks cannot use their votes to gain political power or to force recognition of black interests. Hence they have no choice but to continue litigation.

The Voting Rights Act did not eradicate the need for litigation. It was not intended to. Rather, this legislation was designed as the watershed between denial of the right to vote and participation in the electoral process. Registration is an accomplished fact. But the Act's potential has been lessened by reluctance to use enforcement provisions and to invoke available judicial remedies. Arguably, it is still too early to evaluate the impact of the Voting Rights Act by examining the effects of litigation in Madison Parish. The dark realities of the past continue to haunt the present. To paraphrase Judge Wisdom, even though the stranglehold of racial discrimination may be broken, the paralyzing effects remain.\textsuperscript{326}

\textsuperscript{324} B. MARSHALL, FEDERALISM AND CIVIL RIGHTS 12 (1964).

\textsuperscript{325} Indeed, in light of the Madison Parish experience it must be asked: Is the only affirmative obligation protection against discrimination at the threshold of the electoral process, or does the fifteenth amendment include a duty to insure that deprivation of the right to vote does not continue once individuals are in a position to influence political life? The corollary to that question is, of course: Who must accept the responsibility for protecting participation in the political process—the executive, the legislature, the judiciary, or the people themselves?

\textsuperscript{326} Mississippi Freedom Democratic Party v. Democratic Party, 362 F.2d 60, 63 (5th Cir. 1966).
American housing policy is characterized by a twofold failure. The first is the inability to provide adequate housing for low- and moderate-income families. The most recent estimates indicate that housing costs have risen to a level that puts unsubsidized housing beyond the reach of seventy per cent of American families. Moreover, the present rate of housing starts must double in order to replace existing substandard housing and to provide for new families entering the market.

The second failure is the perpetuation of artificial restrictions in the suburban housing market which have effectively excluded lower income groups from these communities. The residential segregation which has resulted from this policy has frequently developed along racial lines. This imprisonment of the poor within the inner city has significantly frustrated national efforts toward social equality.

A partial solution to both aspects of the current housing crisis may lie in the cost reductions made possible through the use of new materials and mass production methods. Plastic pipe, fiberglass fixtures, and plastic baseboards, as well as pre-assembled plumbing and electrical systems, reduce required skill levels and offer the potential for major

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2 Id. at 3. For a detailed analysis of American housing needs, see generally National Comm'n on Urban Problems, Building the American City, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 66-93 (1968) [hereinafter cited as Douglas Report].
3 National Advisory Comm'n on Civil Disorders, Report 474 (1968). Racial segregation is only one aspect of the problem. Equally significant is the high cost of housing which effectively segregates along economic lines. "Even if new housing were made available on an open-occupancy basis, economic barriers...would exclude most Negroes." G. GRIER & E. GRIER, Equality and Beyond 84 (1966). Restrictive building practices play an important part in maintaining the high price levels of the American housing market. See generally Douglas Report, supra note 2, at 465-75.
4 G. GRIER & E. GRIER, supra note 3, at 17-25.
5 "Segregation in housing makes desegregation in many other areas of society much more difficult to attain than it otherwise might be—in education (where it is almost impossible despite 'busing' programs and similar arrangements); in many types of public facilities; and in employment. By impeding the efforts of Negroes to obtain equal preparation for work and life, and by hampering America's two chief racial groups from achieving a secure relationship based upon mutual understanding and respect, residential segregation thus perpetuates the social and psychological barriers that complete the vicious circle." G. GRIER & E. GRIER, supra note 3, at 84. "Home ownership...would provide many low income families with a tangible stake in society for the first time." National Advisory Comm'n on Civil Disorders, supra note 3, at 477.
increases in output coupled with decreases in cost to the consumer.\textsuperscript{6} The close relationship between high housing costs and the present pattern of residential segregation\textsuperscript{7} indicates that significant reductions in construction expense may have several important effects. Not only will mass production methods provide adequate housing for a greater proportion of American families, but they also will make possible the integration of economic and social groups into suburban communities where the high cost of home ownership has previously prohibited entry.

However, opportunities implicit in the juxtaposition of new building techniques and vacant suburban land are often frustrated by municipal building codes. The municipal code, which defines the allowable materials and construction processes within a particular area, is determinative of the process of American home building on two levels. First, the substantive requirements of archaic building codes exclude the new materials associated with manufactured housing;\textsuperscript{8} second, the variety which exists among the thousands of separate codes precludes the use of new mass production techniques.\textsuperscript{9} Moreover, the power of municipalities to determine the cost of new housing is an effective mechanism for segregating disadvantaged groups from the closed communities of suburban areas.\textsuperscript{10}

\textsuperscript{6} See U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, IN-CITIES EXPERIMENTAL HOUSING RESEARCH AND DEVELOPMENT PROJECT: PHASE I COMPOSITE REPORT II-1, -3 (1969). While in Europe "manufactured housing systems have established themselves and are sharing a good portion of the housing market," there has been an actual retrogression in the United States since World War II. W. ALONSO, S. HASID & W. SMITH, INFORMATION ON AND EVALUATIONS OF INNOVATIONS IN HOUSING DESIGN AND CONSTRUCTION TECHNIQUES AS APPLIED TO LOW COST HOUSING 34 (1969). See also G. BEYER, HOUSING AND SOCIETY 515 (1965) and DOUGLAS REPORT, supra note 2, at 431-50.

\textsuperscript{7} See note 3 supra.

\textsuperscript{8} "[C]odes have a pervasive influence on building and are crucial regulators in the evolution of building technology." Wright, \textit{Performance Criteria in Building}, 224 \textit{Scientific American}, Mar., 1971, at 18. "On a component level, the morass of building codes . . . have been instrumental in blocking adoption of technological advances which could contribute to lowering costs." Fisher, \textit{Low Cost Housing Systems}, 2 \textit{URBAN LAW.} 146, 159 (1970). \textit{See also} ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM 81 (1966): "Too many building codes contain unnecessarily high standards, prevent the use of economical methods and materials in building, and include provisions extraneous to the basic purposes and objectives of building controls."

\textsuperscript{9} See G. BEYER, supra note 6, at 497. For some indication of the diversity of code regulations with respect to specific practices, see A. MANVEL, LOCAL LAND AND BUILDING REGULATION 3, 11-13 (1968). \textit{See also} ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, supra note 8, at 81: "Obsolete code requirements, unnecessary diversity of such requirements among local jurisdictions, and inadequate administration and enforcement, taken together tend to place unjustified burdens on the technology and economics of building."

\textsuperscript{10} See G. BEYER, supra note 6, at 219; ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, supra note 8, at 7.
Despite its potential for abuse, the municipal building code finds vigorous support at the local level, and attempts at reform are not likely to succeed. Some factions within the financing industry have strongly opposed new housing techniques. The elimination of the interim financing expense that is accomplished by mass-produced housing could result in a reduction of almost ten per cent in financing costs. As one commentator explained, "[T]hese interests fear a carry-over of the modular technique to more highly priced conventional housing." The most powerful opponents of mass production, however, are the craft unions. Pro-automation statements from their national leadership have failed to prevent local craft union resistance to changes which might reduce the number of skilled jobs. According to the Department of Housing and Urban Development, "[O]ff-site performance of union tasks by non-union labor directly threatens the position of the union and its relationship to the entire construction process." As a result, unions have become involved in the creation and perpetuation of building codes, and their viewpoint is frequently incorporated into the enforcement process through building inspectors sympathetic to organized labor. Furthermore, local craft unions are apt to receive strong reinforcement from the materials industries that are closely linked to traditional building processes. The influence of the unions is manifested by their role in effectively restricting the growth of factory-built housing even in urban areas, where the demand for low-cost housing is greatest.

When the development of low-cost housing systems is so successfully opposed by organized interests in the cities, little code reform can be

11 Advisory Comm' on Intergovernmental Relations, supra note 8, at 7. This opposition evidences a competitive struggle within the financing industry itself. Housing produced by traditional methods is financed largely by savings and loan institutions which are limited by statute to making long-term loans on security of real estate. On the other hand, sales finance companies have garnered much of the burgeoning mobile home market. Thus, the introduction of new housing technology has the effect of reallocating the home financing market and triggers automatic opposition by the institutions detrimentally affected.

12 Fisher, supra note 8, at 156.

13 Id.

14 Id. at 164. See also Douglas Report, supra note 2, at 465-75.


16 Id.

17 Note, Suburban Zoning Ordinances and Building Codes: Their Effect on Low and Moderate Income Housing, 45 Notre Dame Law. 123, 133 (1969).

18 Advisory Comm' on Intergovernmental Relations, supra note 8, at 7; Douglas Report, supra note 2, at 467.

19 As late as 1968, Chicago alone had managed to provide even a limited factory-built housing development, and this was achieved only after significant concessions to the unions. Fisher, supra note 8, at 153, 164.
expected in the suburbs. In addition to the restricting forces which are operative in urban areas, the suburban dwellers resist any influx of low-income groups. Provoked by fears of antisocial behavior and educational deterioration, communities characteristically respond to low-cost housing by rezoning and by oppressively enforcing building regulations. As one report concluded, "The problem of community opposition at desirable sites . . . shows little hope of being overcome now or in the future."

In the face of this powerful opposition, the federal government has relied on an incentive approach to encourage the alteration of building codes and the development of modern techniques of home construction. The most recent program is Operation Breakthrough. Under this program, a number of communities have accepted prototype housing developments through which the government hopes to demonstrate the feasibility of new construction methods. This incentive approach to housing reform is not new. In a series of legislative enactments reaching back to 1949, the federal government has attempted to use housing money as a stimulus for code reform. Furthermore, the President's Task Force on Housing has urged HUD to use eligibility requirements for participation in federal housing and community assistance programs to develop a national certification program for factory-built housing.

The use of federal money as an incentive for building code reform is nonetheless subject to severe limitations. While cities are becoming increasingly dependent on federal housing aid, suburban communities are usually able to forego contingent grants which contain unattractive compliance requirements. Although suggestions have been made to expand the contingent grants to areas other than housing, success would be dependent on a continuous supply of money in order to "buy

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20 Id. at 172.
21 Id. at 164.
22 G. Greer & E. Greer, Privately Developed Interracial Housing: An Analysis of Experience 29 (1960).
23 Operation Breakthrough, launched in May, 1969, is an effort to channel sophisticated technological, legal, and financial mechanisms into the mainstream of housing production. "It is directed at government and private constraints which effect the quantity and quality of housing production and environment." Burstein, A Lawyer's View of Operation Breakthrough, 2 Urban Law. 137 (1970).
24 Id. at 141.
25 G. Beyer, supra note 6, at 468. For a survey of federal aid program requirements affecting building construction and codes, see Advisory Comm'n on Intergovernmental Relations, supra note 8, at 37-38.
27 Fisher, supra note 8, at 165.
in" to each suburban community. Also, there are indications that attempts to expand the number and kinds of contingent grants may be politically unrealistic.\(^2\) Although more direct federal intervention in local police powers could be an effective alternative, such action may be beyond the range of affairs which the federal government can constitutionally regulate.

I. The State Response: Statutory Alternatives

The state appears to be the only level of government holding real promise of establishing opportunities for the implementation of factory-built housing. At the outset, there appear three principal alternatives involving state action: (1) the model building code, (2) the mandatory building code, and (3) the factory-built housing statute.

Politically, the model code is the optimal solution at the state level. It authorizes the state to evaluate new construction techniques and materials and to incorporate the results in an optional code available to all municipalities. Yet model codes have been notoriously unsuccessful on the national level. Presently, there are in operation at least four different national uniform codes which a large number of municipalities purport to follow.\(^2\) Despite these efforts, recent studies indicate that fewer than fifteen per cent of the large municipalities have maintained modernized versions of the model code.\(^3\) The state effort in the direction of a model code appears to be little more than a duplication of preexisting national efforts with an equally unsatisfactory prospect of success. Whatever its advantages as an informational tool, the optional nature of a model code places the primary decision-making power in the hands of local governments. Predictably, these municipalities have been unresponsive to reform measures designed to serve statewide and national needs that may be antithetical to the felt necessities of their local constituencies.\(^4\)

At the opposite end of the spectrum stands the mandatory code, a solution recommended by the National Commission on Urban Prob-

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\(^2\) Recently HUD has been urged to cut back on attempts to tie low-income housing strings to water works development grants. H.R. Rep. No. 91-1556, 91st Cong., 2d Sess. 7754-56 (1971).

\(^3\) See also Minn. Stat. Ann. §§ 16.83-16.87 (1967); N.J. Stat. Ann. § 13:1B-7 (1968). The model code solution is also recommended by the Advisory Commission on Intergovernmental Relations as making available the resources of the state without disturbing the traditional authority of the municipalities. Advisory Comm'n on Intergovernmental Relations, supra note 8, at 99-95.
lems. This alternative calls for the complete replacement of local codes by a state code regulating all building construction. Unquestionably, a modern statewide code would destroy the local barriers to low income housing presently created by municipal building regulations. However, proposals for such a comprehensive law can be expected to evoke determined political resistance by local interest groups. Unlike the model code, mandatory legislation challenges deeply imbedded traditions of home rule, which in some states have been accorded protection through specific constitutional guarantees. Moreover, there may be legitimate arguments for the retention of the general building code power at the local level. At present, most housing is constructed entirely at the building site. This localized nature of the building function has been the keystone of the argument that building is a purely municipal affair within the meaning of home rule constitutions. Where local sovereignty is protected by constitutional mandates, the complete removal of the code function from the municipality may prove legally impossible. Only one state has been able to enact a comprehensive mandatory building code. In general, centralized state control presents a long-term goal, rather than an immediate solution to problems that have already reached a critical stage.

Recently, attempts have been made to balance the political and constitutional imperatives for local building regulation against the statewide need for a broad low-cost housing market. The resulting statutes have been termed "factory-built housing" laws, and constitute a response to what the President's Task Force on Housing called "the single most important need today . . . a system of off-site certification that will (a) [provide] every reasonable encouragement to producers to use the most economical methods and materials, and (b) assure that off-site certification will be accepted locally at the construction site.

Factory-built housing legislation has recently been enacted in California, Virginia, Washington, and Ohio. The statutes provide for the development of state standards for factory-built housing which supersede conflicting local regulations. A specified department of the state government is vested with the responsibility to set official standards, to inspect factory-built homes, and to issue insignia of certifica-

32 DOUGLAS REPORT, supra note 2, at 269-70.
34 PRESIDENT'S TASK FORCE ON LOW INCOME HOUSING, supra note 26, at 6.
38 OHIO REV. CODE. ch. 3781 (1970).
tion to complying housing units. The impact of that certification is indicated by the language of the California statute:

All factory built housing bearing an insignia of approval . . . shall be deemed to comply with the requirements of all ordinances or regulations enacted by any city, city and county, county, or district which may be applicable to the manufacture of such housing.\(^{39}\)

The statutes thus embody an attempt to isolate a category of housing according to its method of construction, and to remove from local control the regulation of that housing. Their success depends on four factors: (1) scope of coverage, (2) the certifying agency, (3) flexibility of the standards, and (4) a mechanism for interstate certification.

In scope of coverage the statutes diverge significantly. Mobile homes are included under the concept of factory-built housing in Virginia\(^ {40}\) and specifically excluded under the Washington statute,\(^ {41}\) while California and Ohio are silent on the question. The issue has major practical significance since mobile homes currently provide an extremely economical form of mass-produced housing.\(^ {42}\) Their exclusion severely limits the practical impact of any statute. Factory-built housing laws could also be designed to cover new processes by which factories are erected on the construction site for the manufacture of a large number of housing units which are to comprise a single development.\(^ {43}\) Such processes alleviate the costly diseconomies of transporting prefabricated housing over long distances.\(^ {44}\) Despite these advantages, Virginia's definition of factory-built housing includes only buildings assembled or systems manufactured "off-site,"\(^ {45}\) and Washington's statute deals only with a structure or room "substantially prefabricated or assembled at a place other than a building site."\(^ {46}\) California allows assembly on-site, but manufacture must take place off-site to be included under the statute.\(^ {47}\) The Ohio statute is silent on the question. These difficulties in drafting appropriate coverage may be indicative of a gap


\(^{42}\) E. Eaves, How the Many Costs of Housing Fit Together 100-01 (1968). See also DOUGLAS REPORT, supra note 2, at 438-40.


\(^{44}\) See E. Eaves, supra note 42, at 99.


between developing technology and even the most recent legislative response.

The second factor in the success of a factory-built housing statute is the existence of an appropriate regulatory agency. Since craft unions and associated industries are a major source of conservatism in building code regulation, an independent agency, not closely associated with industrial interests, can be expected to adopt the most progressive approach to factory-built housing standards; the agency selected should be one for which the provision of housing is a primary duty. More important, however, are the qualifications of the personnel who formulate the regulatory standards. Significantly, the Washington statute specifies that local government, building trades, and manufacturing interests will receive representation on its new advisory board. The California statute goes so far as to mandate that of its eleven-member board, "five members shall be appointed from the legislative bodies of cities and counties." Ohio, in contrast, makes no provision for representation of private or municipal interests, but provides instead for a board of building standards composed entirely of professional experts and government employees from the several state agencies.

The third factor, flexibility of standards, is closely tied to the second. The agency should have the statutory responsibility to adopt the most modern technology available, with the flexibility and speed demanded by the present housing shortage. Three states require the state commission to take due regard of national model codes. Virginia goes furthest in this regard by providing for annual review of its code in relation to the developing housing needs of the state. Ohio, on the other hand, provides no statutory guidance for modification of its code.

48 See notes 11-19 supra.
49 This appears to be the situation in California, where the agency is the Department of Housing and Community Development. CAL. HEALTH & SAFETY CODE ANN. § 19966 (Deering Supp. 1970). However, in the other states the selected agency does not appear to have a similarly specialized focus. In Virginia, the certifying agency is the State Corporation Commission, Ch. 305, § 2(2) [1970] Va. Acts 393; in Washington, the Department of Labor and Industries, Ch. 44, § 1(1) [1970] Wash. Laws 1st Ex. Sess. (41st Legis., 2d Ex. Sess.) 310; and in Ohio, a board of building standards within the Department of Industrial Relations, Ohio Rev. Code ch. 3781.07 (1970).
A mechanism for interstate certification, the fourth factor, is especially important to the success of factory-built housing. Any significant reduction in housing costs can be achieved only by the creation of a nationwide housing market responding to a multi-state reform in housing code provisions. The state factory-built housing law can provide the means to effectuate interstate cooperation in the realization of cost reductions through mass production. However, only Washington's statute establishes a framework for such a development:

If the director of the department determines that the standards for factory built housing prescribed by statute, rule or regulation of another state are at least equal to the regulations provided under this act, and that such standards are actually enforced by such other state, he may provide by regulation that factory built housing approved by such other state shall be deemed to have been approved by the department.

While none of the four statutes presently enacted incorporates all four above mentioned factors, taken together they illustrate the most promising route to the successful development of a factory-built housing market on a nationwide scale. Moreover, the statutes embody a minimal governmental function—the state acts simply as an enlightened licensee of private entrepreneurial activity. As such it steers clear of the government-as-developer role, an alternative which, because it demands extraordinary funding and dramatic extensions of state power, has severe political limitations. Finally, the factory-built housing law avoids the massive confrontation with home rule tradition engendered by an attempt to remove the entire building regulation function from local control by a mandatory code.

II. OBSTACLES TO IMPLEMENTATION

The factory-built housing statute holds the promise of a significant alteration in the pattern of American housing development. However,
such a statute is faced with three obstacles: (1) possible invalidation under home rule constitutions, (2) impact dilution due to suburban zoning ordinances, and (3) substitution of the union contract as the functional equivalent of the municipal building code.

A. Constitutional Home Rule

While the limited scope of the factory-built housing statute avoids the major legal conflicts of a mandatory code, the statute's constitutionality in some home rule states is still questionable. Home rule involves a legislative or constitutional grant of power to localities to adopt a government charter for the control of local affairs. About half of the states provide home rule guarantees in their state constitutions. Usually, the wording is vague; it may, for example, grant local control over "municipal affairs." Consequently, where state and local legislation conflict, the courts have been required to play a major policy-making role in determining which shall yield.

In most instances the courts are strong adherents of legislative supremacy, so that unless preemption by the state is not explicit the home rule doctrine will seldom pose a problem. Thus, in two of the three factory-built housing states with home rule, a legislative intent to supersede local building code regulations will usually be determinative in any court challenge. The language of the Ohio Supreme Court is characteristic: "Surely, statutory enactments representing the general exercise of police power by the state prevail over police and similar regulations adopted in the exercise by a municipality of the powers of local self-government."

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60 C. RYNNE, MUNICIPAL LAW § 4.3 (1957); 1 E. McQuillan, MUNICIPAL CORPORATIONS § 3.21 (3d ed. 1949); Sandalow, The Limits Of Municipal Power Under Home Rule: A Role for the Courts, 48 MINN. L. REV. 643, 645 (1964).
61 Sandalow, supra note 60, at 660.
62 Allocation of responsibilities for effective governing is a matter that, in comparison with the legislature, the judiciary may be ill-equipped to decide. Note, Conflicts Between State and Municipal Ordinances, 72 HARV. L. REV. 737, 742 (1959).
63 Id. at 742. Both the political relationship of the parties and basic principles of democratic politics argue for a legislative determination of what constitutes "municipal affairs." Compare F. MICHELMAN & T. SANDALOW, supra note 59, at 363-64, with Hanson, Toward a New Urban Democracy: Metropolitan Consolidation and Decentralization, 58 GEO. L.J. 863, 888 (1907).
64 For the difficulties of finding preemption in the face of vague legislative intent, see generally Feiler, Conflict Between State and Local Enactments—The Doctrine of Implied Preemption, 2 URBAN LAW. 398 (1970).
65 The applicable state constitutions with home rule provisions are CAL. CONST. art. XI, § 6; OHIO CONST. art. XVIII, § 7; and WASH. CONST. art. XI, § 10.
California, however, is representative of those states in which the courts have jealously guarded constitutional home rule in its most doctrinaire form. The California courts separate the question of constitutionality (which arises when the state attempts to legislate on a municipal affair) from the issue of preemption (in which the municipality passes an ordinance regulating some matter on which the legislature has previously enacted a statute.) In the former, the test effectively favors state action by declaring that only "exclusive municipal concerns" will preclude state legislation. In contrast, a twofold test is applied to the preemption question, and the standards adopted appear to favor municipal ordinances. First, the state must show that the subject is a state concern rather than a purely municipal interest. Second, even if the subject is a statewide concern, the municipality is not preempted unless that is shown to be the intent of the legislature.

Since the legislative intent in enacting the factory-built housing statutes clearly was to preempt the area, the essential question to be determined in both instances is whether the regulation of factory-built housing is to be considered a "municipal affair." In California, this issue has been reserved to the courts. As stated in Bishop v. City of San Jose, "[T]he legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern." The courts have traditionally held that building codes, like zoning, are a municipal matter appropriate for the valid


67 For a characteristic example of the operation of California law in this field, see Note, Income Taxation and Preemption, 17 Hastings L.J. 635 (1966).


69 Id.

70 Id.


72 See text at note 39.


74 Id. at 63, 490 P.2d at 141, 81 Cal. Rptr. at 469. There has been considerable uncertainty as to the effect of a legislative definition of municipal affairs. Compare Note, Municipal Corporations, 53 Cal. L. Rev. 902 (1965) with Note, 50 Cal. L. Rev. 740 (1962).
exercise of local police power. Yet the courts have recognized the dynamic nature of the "municipal affair" concept:

[T]he constitutional concept of municipal affairs changes with the changing conditions on which it is to operate. What may at one time have been a matter of local concern, may at a later time become a matter of state concern controlled by the general laws of the state.

Today, as in the past, the large volume of home building takes place on-site with few or no manufactured parts. As a local process, it fits easily into traditional geographic concepts of what constitutes a municipal concern. However, as population and community interdependence increase, the simplistic geographic model appears progressively inadequate. Land use requirements can have a major impact beyond local borders, trapping large numbers of the population within narrow urban confines. Significant economic effects can result from the ability of the municipality to constrict the growth of a nationwide industry by what amounts to local trade barriers. Closely tied to the concept of extraterritorial impact is the failure of the local political process to represent those groups most directly affected by the exclusionary consequences of regulatory policy.

While the argument springing from extraterritorial impact might just as easily apply to all kinds of housing, factory-built housing lays

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76 Bishop v. San Jose, 1 Cal. 3d 56, 63, 460 P.2d 137, 141, 81 Cal. Rptr. 465, 469 (1969).

77 "Recent reevaluation of municipal home rule is primarily a result of increasing awareness that the powers exercised by municipal governments wholly within their boundaries may have consequences in surrounding areas." Sandalow, supra note 60, at 700. See also Report of the California Commission On Preemption, 2 Urban Law Annual 130 (1969), concluding that the need for statewide uniformity in regulation becomes greater than the need for the city to impose its will when "local regulation would have significant adverse effects on the movement of persons or goods within the state." Id. at 138.


80 Sandalow, supra note 60, at 710-11. "A use of governmental power which threatens . . . established state policies might not be deemed a 'local' or 'municipal' affair for the same reason that 'municipal' regulations with too great an extraterritorial impact are not considered to be 'local' . . . the inadequacy of the political process at the local level to cope with such problems." Id. at 717. At least one author sees the home rule struggle as an attempt to prevent municipal Balkanization in areas of special concern. "Only a standard of statewide uniformity can fully implement the values of free speech and due process, the rights of privacy, and other fundamental values." Blease, Civil Liberties and the California Law of Preemption, 17 Hastings L.J. 517, 569 (1966).
claim to an extralocal category on an independent ground. Unlike other kinds of housing, the factory-built process takes place off-site and even out-of-state. This form of construction, even under traditional rules based on the location of the activity, is not a purely municipal concern.

A further ground for the recognition of mass-produced housing as a statewide concern is the inability of local procedures to provide adequate protection against defects in safety. In its modern context, housing has become a "scientific" area which cannot adequately be administered by local authorities who lack the requisite expertise to supervise health and safety regulation. As stated in the Virginia code:

Industrialized building units, . . . because of the manner of their construction, assembly and use and that of their systems components . . . having concealed vital parts, may present hazards to the health . . . . [T]here is also the possibility of defects not readily ascertainable when inspected by purchasers, users, or by local building official.81

Recent studies for the National Commission on Urban Problems indicate that most of the regulating governments are too small to retain full-time employees for such work.82 Moreover, even in those situations in which people are employed on a full-time basis, salaries are too low to attract those who are well trained in professional or technical skills.83 The Advisory Commission on Intergovernmental Relations concludes:

The qualifications possessed by many building officials are inadequate to properly advise on the administration of modern performance-type building codes. While it is possible that these officials can deal competently with the ordinary run of traditional buildings, the advances expected in building technology will demand a more expert knowledge of a wide variety of building practices and materials.84

When local processes are inadequate to protect health and safety, and would in any case be wasteful and duplicative with respect to mass-produced housing, the matter should be treated as a statewide concern.

The isolation of a particular kind of building for special treatment is not foreign to the law of California or indeed of most other states. For example, in Hall v. Taft,85 the Supreme Court of California held

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82 A. MANVEL, supra note 9, at 2.
83 Id.
84 ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, supra note 8, at 99.
85 47 Cal. 2d 177, 302 P.2d 574 (1956).
that school construction could not be controlled by municipal building regulations where the state legislature had established regulatory agencies and adopted standards for such buildings. Moreover, the courts of a majority of jurisdictions have, under the doctrine of sovereign immunity, exempted state agencies from local building regulation.

While the factory-built housing law represents an infringement on traditional areas of local control, little justification exists for invalidation in light of the widespread social and economic effects, the non-local construction process, and the necessity of expertise in creating and implementing health and safety standards. Activities once clearly local now take on larger proportions. This transformation raises the fundamental question: Can the home rule concept maintain its integrity and at the same time respond flexibly to the fluid concept of “municipal affairs”? In view of the growing pressures to strip municipalities of all control of land use, it may be that the survival of home rule in any form depends on the kind of compromise embodied in the factory-built housing law.

B. Zoning

Although the factory-built housing statutes provide a possible solution to the problem of exclusionary building codes, they are careful to protect a classic alternative device. Exclusionary zoning can be effective in limiting any breakthrough in mass-produced housing by barring those low-income groups among whom the demand for such housing is greatest. It is on zoning, however, that the statutes of California, Virginia, and Washington appear to have achieved absolute agreement. In the language of the California statute:

Local use zone requirements, local fire zones, building setback, side and rear yard requirements, site development and property line requirements, as well as review and regulation of architectural and aesthetic requirements, are hereby specifically and entirely reserved to local jurisdictions notwithstanding any requirement of this part.

While legislative silence on the issue of zoning would not automat-

86 Id. at 188, 302 P.2d at 581 (1956).
87 Note, Municipal Power To Regulate Building Construction and Local Land Use by Other State Agencies, 49 Minn. L. Rev. 284, 286 (1964).
88 "The most effective subterfuge for segregating disadvantaged minority groups is the device of economically discriminating zoning restrictions." Note, supra note 17, at 128.
ically have invalidated local land use requirements, it could have set the stage for a judicial challenge to zoning practices that contravened the broad policy set forth in both the California and Virginia statutes. As the former states:

The legislature further finds and declares . . . its intention to encourage the reduction of housing construction costs and to make home ownership more feasible for residents of this state.\(^9\)

With a clearly enunciated policy of removing barriers to low-cost housing, sympathetic state courts could have been expected to frown upon zoning practices which vitiated the legislative intent. The major paradox of the factory-built housing statutes is that they invite, in explicit terms, what the courts probably would have found to be antithetical to the statutory scheme—the construction of zoning barriers to replace those previously provided by building codes.

The express statutory reservation of the zoning power to local governments calls into question the practical significance of the factory-built housing laws. Undoubtedly, when exclusion is the objective, no instrument is more effective than the zoning power.\(^9\) Yet to conclude that nothing has been achieved by factory-built housing laws may be to ignore both the complexities of the problem and the significant case law developments that have invited increased judicial scrutiny of the zoning power.

While the suburban communities have directed their antipathy toward low-cost housing, they have simultaneously shown a greater willingness to accept middle class inflows of both whites and blacks.\(^9\) One of the characteristics of a building code is that it increases the cost of housing at all levels regardless of the group that was intended to be excluded. If the building codes are eliminated, suburban communities must take new initiatives to effectuate a policy that selectively excludes certain social groups. In this context, there is little reason to


\(^9\) See note 88 supra. This is not to suggest that zoning is the only weapon of local control still available. Delays and costs may be imposed on a developer by local regulation of access to sewers, water, and roads as well as by property valuation and requirements of licenses and construction bonds. See Fischer, supra note 8, at 164. Moreover, where the developer plans on an economically integrated housing development (consisting of low-income manufactured homes and high-income conventional housing), the conventional housing portion of his construction will still be under local control. A home producer who plans a large development over a ten- or fifteen-year period may be unwilling to sacrifice the goodwill and cooperation of local authorities by taking advantage of unpopular state-controlled factory-built housing options.

\(^9\) Fisher, supra note 8, at 172.
believe that factory-built, middle-income housing will be confronted with the same zoning obstructions as will low-income developments. While failing to maximize economic integration, the statutes thus at least could be instrumental in alleviating the large portion of the housing shortage that extends to the middle-income group. Moreover, any significant movement of middle-income families may be expected to create vacancies for low-income families as part of the so-called "filtering down" process.\(^9\)

The systematic exclusion of low-income housing, on the other hand, probably will not be overcome without further action by the courts. The advantage gained by the factory-built housing law is that it removes the barrier least susceptible to judicial erosion. The traditional zoning weapons, including such mainstays as minimum lot and floor sizes, and aesthetic requirements, have been the object of increasing criticism.\(^9\) And although judicial challenges have so far produced uneven results,\(^9\) some commentators maintain that the courts will eventually place sharp restrictions on the use of the zoning power.\(^9\) At the same time, the courts are more inclined to leave building codes

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\(^9\) F. Kristof, *Urban Housing Needs Through the 1980’s: An Analysis and Projection* 69 (1968). "Most of the gains in Negro housing have occurred through the turnover which occurs as part of the ‘filtering down’ process—as the white middle class moves out, the units it leaves are occupied by Negroes. Many of the units are very old. Without proper maintenance, they soon become dilapidated, so that the improvement in housing resulting from the filtering-down process is only temporary." *National Advisory Comm’n on Civil Disorders, supra note 3*, at 473.

\(^9\) See generally Sager, *supra* note 78. Michelman suggests that exclusionary municipal regulation may be attacked under three theories: "1) by the same style equal protection argument which ... may also yield a constitutional right to be housed; 2) by arguments focused on the political or participatory claims of those who must suffer the consequences ... though afforded no voice in the fashioning of exclusive regulations, or 3) appeals to the conflict between such regulations and federal policies calling for provision of subsidized housing outside areas of racial concentration." Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 207, 216 (1970).


\(^9\) See Michelman, *supra* note 94, at 216-17. As late as 1969, Sager’s assessment was that “[e]qual access to housing is regarded by the Court as a matter of the most serious social and constitutional concern. ... While it has been manifest in the context of racial discrimination, there is reason to expect it will be evoked on behalf of the indigent as well.” Sager, *supra* note 78, at 790. On the other hand, the Court’s recent decision on the California public housing referendum law was an implicit refusal to apply fourteenth amendment protections to cases of economic discrimination. James v. Valtierra, 91 S. Ct. 1331 (1971). Nevertheless, it is doubtful whether that decision, supported by only a narrow majority, has finally put to rest the question of equal access to housing for all income groups. Moreover, lawyers are arguing persuasively that because a large proportion of blacks have low incomes, racial implications are inherently linked to the economic issue, and that economic discrimination consequently becomes an appropriate basis of fourteenth amendment relief. See *The Wall Street Journal*, April 27, 1971, at 2, col. 4 (Midwest ed).
untouched. Courts avoid making judgments about "technical" matters related to engineering and physics, which are far from their own area of competence. Nor are they willing to sacrifice safety considerations, even in the face of the most pressing social needs. Thus, where the legislature has acted to limit the effect of building regulations, the path is cleared for judicial initiatives to restrict zoning practices and to open the suburbs to low-cost housing for all economic groups.

Finally, a failure to realize statutory goals due to local zoning practices may quickly give rise to statewide zoning legislation to provide selective protection for factory-built housing. The most recent proposals of the Council of State Governments suggests exactly this kind of legislation. Moreover, limited state zoning regulations have already been adopted in Massachusetts in connection with state-approved non-profit efforts to erect low-cost housing. As Michelman notes, "[A] claim not to have housing choice restricted on account of one's socio-economic status as a practical matter entails a claim to be free of unreasonable land use restrictions; it calls for legal limitations on cost

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97 See K.C. Davis, 4 Administrative Law Treatise § 30.09, at 240 (1958). Professor Davis analyzes the factors which guide the exercise of judicial discretion in choosing either to substitute judgment or to use the rational basis test in reviewing administrative action. "Among these factors the one that stands out above all others is the comparative qualification of the agency and of the court to decide the particular issue. Variation in intensiveness of review in accordance with comparative qualifications is so natural as to be inevitable whatever the theory." Id. at 241. "In some cases, of course, the specialization of the agency or its staff is so clear as almost to compel use of the rational basis test. When problems 'touch matters of geography and geology and physics and engineering,' hardly surprising is the Supreme Court's action in announcing that 'Plainly these are not issues for our arbitrament ....'" Id. at 243, quoting Railroad Comm'n v. Rowan, Nichols Oil Co., 310 U.S. 573 (1940).

98 Council of State Governments, supra note 3, at 58 n.2. Clearly, a nationwide breakthrough in low-cost housing may be dependent on the willingness of a large number of states to adopt effective legislation. Yet the brunt of the housing crisis falls on the cities, and the state governments have traditionally been indifferent to the wide range of urban problems. Coleman, Making Our Federal System Work: A Challenge for the 70's, 1 Urban Law. 302, 304 (1970). Moreover, the same opposition can be expected from the craft unions in the statehouse as appeared at the local level. On the positive side, there is evidence that reapportionment may have altered the traditional rural-urban balance, even though seniority procedures may delay its impact. See generally Hawkins & Whelchel, Reapportionment and Urban Representation in Legislative Influence Positions: The Case of Georgia, 5 Urban Affairs Q. 69 (1968). In addition, while the housing shortage is most acute in the city, the extent of the demand reaches deep into suburban communities as well. "The stereotype of the wealthy suburb is misleading." Douglas Report, supra note 2, at 74. Finally, the new study by the Citizens Conference on State Legislatures, while critical of the limited input resources available to legislators, nevertheless admits to a general improvement in the quality of state lawmaking bodies. See time, Feb. 15, 1971, at 16. With four states passing factory-built housing laws within one year, it may not be unrealistic to expect continued positive development with its origins in the state capitols.

inflating municipal regulatory powers. Such limitations are plainly in the offing.”

C. The Union Contract

Should the craft unions fail to prevent the passage of factory-built housing statutes, it is reasonable to expect attempts to incorporate the substance of the traditional building code into their construction contracts. The Supreme Court decision in National Woodwork Manufacturers Association v. NLRB101 appears to legalize union efforts contractually to protect members from job loss due to "onrushing technological change."102 The impact of the decision is to allow the unions both to restrict widespread use of prefabrication through building contracts, and to cast the determinative vote as to the supply of housing and its costs.103

The right of the unions to bargain so as to restrict materials and processes is especially significant when the weakness of the employer contractors is juxtaposed with the unified economic power of the unions.104 However, union opposition to prefabrication may be misplaced. Selling more homes at lower prices could provide a stable

100 Michelman, supra note 94, at 216. Recently, the American Law Institute gave tentative approval to the Model Land Development Code (Tent. Draft No. 3, 1971). Article 7 of that draft sets up a device for limited state government interference with local zoning in matters of state interest. Developments may be matters of statewide concern (1) because of natural resources or previous development, as in the case of new towns, id. at § 7-201; (2) because of their very nature, including developments substantially subsidized by state and federal agencies, id. at § 7-301; or (3) because of their size, for example, a huge housing development, id. at § 7-401. While the initial decision on these matters is made by the local land development agency, standards are set up which insure that the state interest is considered, and the local decision is subject to a right of appeal to a state board.

This model legislation may become especially important in light of legislation currently proposed by the Nixon Administration which would require states to maintain a system by which local land use regulation could be superseded. S. 992, 92d Cong., 1st Sess. (1971).

101 386 U.S. 612 (1967). The Court upheld a union agreement under which union members were excused from handling preassembled door units. The contract was challenged under § 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e) (1964): "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract . . . whereby such employer ceases . . . or agrees to cease . . . handling, using . . . or otherwise dealing in any of the products of any other employer . . . and any contract . . . containing such an agreement shall be to such extent unenforceable [sic] and void." Nevertheless, the Court held that § 8(e) does not prohibit primary agreements, and that exclusion of products is a legitimate subject of bargaining where such products threaten job security.

102 386 U.S. at 649.


104 Note, supra note 103, at 278.
labor demand. While skilled wages may be expected to decline in the face of mass production methods, the worker's annual income may remain the same due to the more regular work schedule. As the Douglas Commission concluded, "[M]any of the onerous practices that seem insoluble in the framework of widely fluctuating employment and construction patterns could more readily be resolved if the construction industry were expanded and stabilized." Such a transition, however, cannot be made without sacrificing the interests of some. Until the craft unions become convinced of the long-run potential of the mass production market, the union contract will remain a substantial limitation on the factory-built housing statute.

III. CONCLUSION

The factory-built housing statute provides unique opportunities for state governments to shape a more productive and equitable pattern of housing development. The impact of these statutes will be measured by the extent to which state legislators can deal effectively with groups having a vested interest in the maintenance of an archaic construction process. However, the difficult issues of home rule, zoning, and the union contract have yet to be squarely faced. Whether in the statehouse or in the courtroom, it is the resolution of these issues that will determine whether the full promise of factory-built housing statutes will in fact be realized.

105 Id. at 285.
106 Id. at 286.
107 DOUGLAS REPORT, supra note 2, at 465.
Copyright Protection for Mass-Produced, Commercial Products: A Review of the Developments Following Mazer v. Stein†

By holding that commercial use does not invalidate copyright registration, the Supreme Court in Mazer v. Stein¹ ushered in a brave new world of copyright law, filled with costume jewelry,² toy dolls,³ fabric designs,⁴ artificial flowers,⁵ and plastic Santa Clauses.⁶ The extension of copyright status to such mass-produced, two- and three-dimensional objects⁷ has placed great stress on a system designed

† Entered in the Nathan Burkan Memorial Competition.
¹ 347 U.S. 201 (1954). The plaintiffs in Mazer had secured copyrights on statuettes of male and female dancing figures and subsequently used the statuettes as lamp bases. When the defendant marketed identical lamps, the plaintiffs sued for infringement of their copyrights. The defendant claimed that the intended and actual commercial use of the statuettes invalidated the copyright registration. The Court rejected this defense. Id. at 218.
³ See, e.g., Uneeda Doll Co. v. Goldfarb Novelty Co., 373 F.2d 851 (2d Cir.), cert. dismissed, 389 U.S. 801 (1967); Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021 (2d Cir. 1966); Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2d Cir. 1962); Rushton v. Vitale, 218 F.2d 434 (2d Cir. 1955).
⁴ See, e.g., Concord Fabrics, Inc. v. Marcus Brothers Textile Corp., 409 F.2d 1315 (2d Cir. 1969); H.M. Kolbe Co. v. Armus Textile Co., 315 F.2d 70 (2d Cir. 1963); Millworth Converting Corp. v. Slifka, 276 F.2d 443 (2d Cir. 1960); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960).
⁷ The term "mass-produced products" as used in this comment refers to items which do not fall within the normal concept of works of fine art, for example such items as toy dolls, fabric designs, artificial flowers, and plastic Santa Clauses. It is not intended to include mass-produced works of fine art. Although this distinction is not self-defining, the courts should not have great difficulty in administering the test. After all, before Mazer the courts denied copyright protection to two- and three-dimensional objects which did not qualify as works of fine art.

On the other hand, it should be remembered that commercial products and works of
basically for literary works. Strict notice requirements have been virtually ignored in order to avoid denying protection to some copyrighted articles. Thus, courts have approved notice located on the underside of an artificial flower leaf, the clasp of a necklace, and other places where close scrutiny is required to locate the inscription. Moreover, even this obscure, nearly microscopic notice is unnecessary on fabric designs. Notice may be placed on the selvage of the cloth, which often winds up on the cutting room floor as the fabric is made into finished retail products. Consequently, anyone attempting to copy a dress design acts at his own peril, unless he can prove that notice could have been incorporated into the design without destroying its market value. Furthermore, some courts have sug-

fine art are not totally separate concepts. Therefore, many of the comments made about the former are also applicable to the latter. However, any detailed analysis of works of fine art is beyond the scope of this comment.

8 The first copyright statute, the Statute of Anne, 8 Anne, c. 19 (1710), covered only books. While insuring statutes over the next 250 years gradually added other forms of expression, the basic conceptual framework of the copyright law remained tied to the literary model. See generally B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 1-7 (1967).

9 The notice provisions of the Act have been described as "do-or-die" requirements, KAPLAN, supra note 8, at 81, and the sine qua non of copyright protection, Nimmer, COPYRIGHTS § 82, at 302 (1970) [hereinafter cited as NIMMER].


15 See, e.g., H.M. Kolbe Co. v. Armgus Textile Co., 315 F.2d 70, 73 (2d Cir. 1963); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 490 (2d Cir. 1960).

16 Publication ... is considered to have occurred on sale of the printed goods to the dress manufacturers, and notice at that time is to be held constructive notice to all dress manufacturers, provided the notice was sufficient. In that event, a copier acts at his peril if he takes the design from a finished dress.

gested that even that defense is not available to a willful infringer with actual notice.  

Despite these significant changes in the notice rules, the greatest impact of the *Mazer* decision has been in more substantive areas—the concept of originality, the test for infringement, and the distinction between ideas and expression. This comment will examine the substantive problems raised by *Mazer*, focusing particularly on the idea-expression distinction, which is central to the entire concept of copyright protection. This survey will then be used as a basis for re-examining the *Mazer* decision itself.

I. COMMERCIAL COPYRIGHT AND THE IDEA-EXPRESSION DISTINCTION

The idea-expression distinction is a basic tenet of copyright law. It marks the boundary line between the protected and the unprotected, between the elements of a copyrighted work which others may not copy and those elements which may be freely appropriated. Ideas have traditionally been placed in the unprotected category, because of the fear that

> [t]o grant property status to a mere idea would permit withdrawing the idea from the stock of materials which would otherwise be open to other authors, thereby narrowing the field of thought open for development and exploitation.

Expression, on the other hand, falls squarely within the ambit of the protected classification. Curiously, the justification for granting copyright status to expression is quite similar to the rationale for denying it to ideas. That is, expression must be protected in order to persuade authors to share their ideas and thereby “advance the public welfare.”

Unfortunately, the idea-expression distinction defies exact definition. Over forty years ago, Judge Learned Hand tried to describe it in terms of a series of abstractions:

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19 For early formulations of the idea-expression distinction, see Holmes v. Hurst, 174 U.S. 82, 86 (1898); Baker v. Selden, 101 U.S. 99, 102 (1879).

20 The unprotected status of ideas, at least those contained in some tangible medium of expression, does not seem to be constitutionally required. *Nimmer* § 8.4, at 22; *Kaplan, supra* note 8, at 64.

21 *Nimmer* § 143.11, at 621.

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than a general statement of what the play is about, and at times might only consist of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas" to which, apart from their expression, his property is never extended.  

Obviously Hand's formulation is not a definition at all, but rather a way of viewing the problem. Although everyone seems dissatisfied with such a hazy solution, attempts to articulate more concrete standards have largely failed. Chafee has suggested that copyright protection covers the pattern of the work, which, in the case of a play, includes "the sequence of events and the development of the interplay of the characters." Chafee, Reflections on the Law of Copyright: I, 45 Colum. L. Rev. 503, 513-14 (1945). Others have urged reformulating the idea-expression distinction in terms of a "spine-idea" test or a content analysis. However, none of the above concepts provides a precise definition of where to draw the line between ideas and expression; like the abstractions test, they remain means of approaching the problem, not an answer to it.

These definitional problems apparently led Judge Hand to abandon any attempt to find a unifying principle. Almost thirty years after enunciating his abstractions test, he remarked:

Obviously, no principle can be stated as to when an imitator has gone beyond copying the "idea," and has borrowed its "expression." Decisions must therefore inevitably be ad hoc.

The complex task of separating ideas from expression becomes more complicated in the area of commercial copyright. First, the subject matter involved is usually a two- or three-dimensional object whose impact is quite different from that of a novel or play: more visual and immediate, appealing more to the aesthetic and less to the

23 Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931).
25 Nimmer § 143.11, at 623.
27 Sorensen & Sorensen, Re-examining the Traditional Legal Test of Literary Similarity: A Proposal for Content Analysis, 57 Cornell L. Q. 638 (1952).
intellectual sensibilities of the viewer. Since articles such as fabric designs, costume jewelry, and artificial flowers evoke a Gestalt response, they cannot easily be broken down into component parts like plot, theme, and character development and, thereby, analyzed in terms of a series of abstractions or a pattern test. As a result, the idea-expression distinction becomes "even more intangible." 29

These difficulties are compounded by a second factor—the absence of major substantive barriers to obtaining copyright registration. Unlike patent law, copyright law does not demand novelty or invention. 30 Nor must a copyrighted work possess a great degree of creativity. Although the Copyright Regulations state that a work of art "must embody some creative authorship in its delineation or form," 31 the courts have been quite unwilling to sit in judgment of artistic merit. 32 As Justice Holmes stated:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet, if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetical and educational value—and the taste of any public is not to be treated with contempt. 33

29 Id.
30 Mazer v. Stein, 347 U.S. 201, 218 (1954). Two courts have stated that a copyrighted work must possess some degree of novelty. Dan Kasoff, Inc. v. Novelty Jewelry Co., 309 F.2d 745, 746 (2d Cir. 1962); Rushton v. Vitale, 218 F.2d 434, 435 (2d Cir. 1955). However, in both cases the term "novelty" seems to have been used interchangeably with "originality" and use of the former term did not impose any requirements on copyright registration other than those already contained in the latter concept.

Similarly, the patent law standard of contribution to the prior art has been employed in one case, but only to support the conclusion that the copyrighted product possessed the requisite originality. Trifari, Krussman & Fishel, Inc. v. Charel Co., 134 F. Supp. 551, 553 (S.D.N.Y. 1955).
31 37 C.F.R. § 202.10(b) (1971).
32 Lack of creativity has been used to bar copyright protection only where the Register of Copyrights refused registration, Bailie v. Fisher, 258 F.2d 425 (D.C. Cir. 1958), or where the copyrighted work also failed to meet the originality requirement, Gardenia Flowers, Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776 (S.D.N.Y. 1968).
33 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1902). Much the
The courts have also failed to make use of a Regulation\textsuperscript{34} disqualifying from copyright registration works whose sole intrinsic function is utility. Here, however, the inaction of the courts does not reflect judicial restraint. Rather, the Regulation itself has little applicability. There are no two-dimensional works and few three-dimensional objects whose design is absolutely dictated by utilitarian considerations. In essence, then, the initial burden of excluding commonplace matters in the public domain, such as ideas, from copyright status has been left solely to the originality requirement. Unfortunately, it does not perform this function very effectively.

The originality requirement is extremely minimal. Most courts ask only that the "artist" contribute something more than trivial to his work.\textsuperscript{35} Frequently, all that is required of the copyrighted work is that it not be an exact duplicate of another article.\textsuperscript{36} Thus, sufficient originality has been found in the reduction of an existing three-dimensional design to two-dimensions;\textsuperscript{37} in the reduction in size a Rodin statue;\textsuperscript{38} in the printing of nineteenth century drawings of Beethoven, Brahms, and Bach on sweatshirts;\textsuperscript{39} and in the production of a three-dimensional plastic Santa Claus.\textsuperscript{40}

The effect of these and numerous other decisions\textsuperscript{41} has been to grant copyright status to objects comprised mainly of material in the public domain. Furthermore, in many cases the attractiveness or commercial value of the copyrighted work, public domain elements included, depends on its incorporation into another product. Few of the numerous design cases in the Southern District of New York

same philosophy also seems to have pervaded the \textit{Mazer} decision: "Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art." 347 U.S. at 214.

\textsuperscript{34} 37 C.F.R. § 202.10(c) (1971) provides in part:

If the sole intrinsic function of an article is its utility, the fact that the article is unique and attractively shaped will not qualify it as a work of art.

\textsuperscript{35} Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 103 (2d Cir. 1951).


would likely have arisen if the designs involved had been sold by themselves as works of art instead of incorporated into fabrics which could be made into dresses and other retail products. The courts are, therefore, forced to distinguish protected expression not only from public domain elements in a particular design, but also from the product into which that design is incorporated. As previously mentioned, the subject matter of most commercial copyrights makes drawing such fine distinctions exceedingly difficult.

Instead of facilitating this task, a third factor—the standard of infringement—exacerbates the problem. The normal test for infringement is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Thus, despite the difficulty of distinguishing between ideas and expression in commercial copyright cases, the court is forced to formulate its judgment on the basis of an overall impression—precisely the level at which the public domain elements are most likely to predominate. Close examination to detect disparities is discouraged; expert testimony is viewed with distrust, if not hostility. In short, the test for infringement may deprive the court of the very tools it needs to handle the complicated idea-expression distinction.

Faced with such complex and bewildering problems, most courts have seemed to follow human instinct—they have simply ignored the questions raised by the idea-expression distinction. Frequently, the courts conclude their inquiry by pointing to evidence of actual copying. Such a resolution of infringement proceedings, however, is less than satisfactory. In terms of the idea-expression concept, evidence of actual copying is irrelevant if only ideas are appropriated. A careful judicial examination is still needed to determine specifically which elements of the copyrighted work may or may not be protected. With-

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42 Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966).
44 The traditional hostility to expert testimony in copyright cases was expressed by Judge Learned Hand in Nichols v. Universal Pictures Corp., 45 F.2d 119, 123 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931):

We cannot approve the length of the record, which was due chiefly to the use of expert witnesses. Argument is argument whether in the box or at the bar, and its proper place is the last. The testimony of an expert upon such issues, especially his cross-examination, greatly extends the trial and contributes nothing which cannot be better heard after the evidence is all submitted. It ought not to be allowed at all; and while its admission is not a ground for reversal, it cumbers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal.

This attitude may have changed somewhat in recent years. See the use of expert testimony in Mattel, Inc. v. S. Rosenberg Co., 296 F. Supp. 1024, 1027 (S.D.N.Y. 1968).
out such an investigation, reliance on actual copying will provide
unwarranted protection for many items within the public domain.
Two cases involving toy dolls illustrate this point.

In the first case, Remco Industries, Inc. v. Goldberger Doll Manu-
facturing Co., the plaintiff claimed that the defendant had infringed
its copyright on dolls resembling the Beatles. The court found sim-
ilarity and copying without discussing either concept. On this basis,
it issued a preliminary injunction forbidding the defendant from
manufacturing or selling "a doll approximately five inches tall, rep-
resenting a male figure wearing a dark suit and exhibiting a 'mop'
haircut associated with the musical group known as the Beatles."

The problem with the decision is in attempting to define the orig-
inal expression that is protected. Certainly the plaintiff could not
claim the exclusive right to make dolls resembling the Beatles. The
Beatles were in the public domain and any semi-accurate repre-
sentation would, of necessity, have to involve a male figure with a "mop"
haircut. Arguably the original expression came either in dressing a
Beatle figure in a dark suit, or in making the doll five inches high,
or both. But what if the defendant had put a different color suit
on its doll? Or altered the height of the doll by a half inch?

Similar problems are raised by a second doll case, Hassenfeld
Brothers, Inc. v. Mego Corp., in which the plaintiff held a copyright
on a soldier doll called "GI Joe." After the plaintiff had spent over
four million dollars in advertising and the product had sold seven
million copies, the defendant attempted to market a considerably
less expensive version called "Fighting Yank." Actual copying seemed
obvious, since both dolls had an identically misplaced right thumbnail.
Considering the average lay observer test satisfied, the court granted
a preliminary injunction.

Again, specifying the original expression which justified the injunc-
tion is a difficult if not impossible task. In reaching its decision, the
court pointed to three types of similarities: first, features of the head,
torso, legs, arms, and hands, including the misplaced thumbnail; sec-
second, the fact that the dolls were sold with a variety of accessories
and changes of clothing; and finally, the mechanical construction of
both dolls, which allowed them to be posed in various attitudes. The
defendant surely had the right to copy the mechanical construction,
which was unpatented and not part of the registered copyright. Simi-
larly, the defendant should not have been prohibited from either

47 Id. at 899.
selling dolls with accessories or dressing those dolls in standard Army uniforms and equipping them with standard guns and hand grenades. Thus, the plaintiff's original expression, if it subsisted at all, must have been in the dolls themselves. The court purported to find such expression and to find it infringed. Although differences existed in the face and head of the two dolls, "they are both faces which depict a well groomed young man with black hair with head and nasal features which are very similar."49

Yet if copyright protection rests on the clean-cut appearance of the soldier, obvious problems arise. Must one who manufactures an American soldier doll with standard uniforms and weaponry also give that doll an unshaven appearance? More basically, is it even possible to change the facial expression of the dolls sufficiently to alter the overall similarity which is undoubtedly comprised of elements within the public domain—the human body, the soldier's uniform, and the military weapons? The fact that the defendant's doll is an obvious copy of the plaintiff's may explain the court's avoidance of these questions, but it can hardly serve as a justification.

Not all courts placing primary reliance on evidence of actual copying ignore these implications. In Sunset House Distributing Corp. v. Doran,50 the court examined two painted plastic bags which, when completely stuffed with crumpled newspaper, turned into three-dimensional Santa Clauses. Characterizing the defendant's product as a "lazy copy,"51 the Ninth Circuit affirmed judgment for the plaintiff. Perhaps troubled by the possibility of giving the plaintiff a monopoly on all three-dimensional plastic Santa Clauses, it sought to clarify its decision:

The court below has not enjoined defendants from making a Santa Claus, a red and white plastic Santa Claus, or a Santa Claus with a slit in his back to permit him to be stuffed with newspapers.52

The result is doubletalk. The defendant's product had a different belt buckle than the plaintiff's; different material was used for the figure's face and the hood of its tunic.53 The only points of identity between the two products seem to be the very features the court said the defendant could appropriate—a three-dimensional figure of Santa

49 Id. at 788.
50 204 F.2d 251 (9th Cir. 1962), aff'g 197 F. Supp. 940 (S.D. Cal. 1961).
51 Id. at 252. The defendant had even copied plaintiff's instruction sheet.
52 Id. at 252.
Claus, plastic material, and the slit in the back to permit the bag to be stuffed with newspapers. In short, the defendant could have copied the plaintiff's product if they had not been so "lazy" in doing so.

The obvious course of conduct for potential copyists, therefore, is not to be lazy. A knowledgeable entrepreneur can usually place the courts in a position in which they cannot ignore the problems raised by the idea-expression distinction. At least one New York firm of fabric converters, the Slifkas, seems to have pursued this strategy successfully. They were able to win three cases, despite admitting in each case that the plaintiff's copyrighted design had been the basis for their own design.54 A variety of techniques were used to focus judicial attention on the idea-expression distinction. In one case, the Slifkas took a copyrighted design and "cross-bred" it with pictures found in a design form book. Although their product was strikingly identical to the copyrighted article in those features most likely to attract consumer attention—structural characteristics, spatial arrangements, and use of shadings, stippling, colors and color combinations,55 they could point to specific pictures in the design form book which served as the basis for their own design.56 The court concluded that the Slifkas had "sedulously borrowed each of plaintiff's ideas" but denied relief because "defendant's designs are aesthetic mutations, reflecting major changes and significant alterations that keep clear of plaintiff's expression."57

Another tactic used successfully by the same defendants was to show that the copyrighted article was appropriated from a public domain work.58 The plaintiff had taken an embroidery known as "Schiffli," photographed it, and worked for months to develop an arrangement of colors that would give the flat-surface design a three-dimensional effect. The Slifkas bought one of the plaintiff's dresses, softened some of the features including the three-dimensional effect, and used the design for their own product. Although the Second

56 Id. at 413-14.
57 Id. at 415.
Circuit found that the plaintiff's design possessed the requisite originality, it denied relief. Since the design was in the public domain and therefore could be freely copied, the court applied a stricter test of infringement:

We need not determine whether if the basic design had been original with plaintiff, defendant's fabric might not be sufficiently imitative to infringe under the test laid down by Judge Hand in Peter Pan. For here, in contrast, the basic design was in the public domain and plaintiff was entitled to relief only if the defendants copied its "expression".

Another successful stratagem the Slifkas employed was to change the colors used in the copyrighted design. Since the normal test for infringement encourages the court to make a judgment based on an overall impression, identity of public domain elements such as color or dress design may cause the viewer to disregard or minimize differences in detail. This psychological effect, however, works both ways. While identity of color obscures differences in design, disparity in color highlights those differences. Thus, in copying a fabric design consisting of flowers enclosed in staggered rectangles, the Slifkas made some minor alterations in the design and then changed the color on some but not all of their fabrics. In denying a request for a preliminary injunction, the court concluded:

The designs are enough alike so that a woman wearing plaintiff's Capri #751 in brown and green would exclaim "There goes my dress" if she saw a woman wearing Slifka Fabrics No. 9074 in the same color scheme. My belief is, however,

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59 Millworth Converting Corp. v. Slifka, 276 F.2d 443, 445 (2d Cir. 1960).
62 Uncopyrighted dress designs have the same effect as color in obscuring differences in fabric patterns. Therefore, the defendant's chances of success are increased if the court compares the plaintiff's and the defendant's designs as they appear on rolls of cloth before they are made into dresses. See, e.g., Manes Fabric Co. v. Miss Celebrity, Inc., 246 F. Supp. 975 (S.D.N.Y. 1965).
63 The flowers in the plaintiff's designs were impressionistic masses which would overflow the boundaries of the rectangles if not cut by them. The Slifkas made their flowers individual sprays, clearly defined and fitted into the rectangles with unoccupied margins. Clarion Textile Corp. v. Slifka, 139 U.S.P.Q. 340, 341 (S.D.N.Y. 1961).
64 "Among the various color schemes of the fabrics bearing defendant's design there are three which exactly duplicate the three color schemes used by plaintiff on fabrics bearing its design." Id. at 340.
that there would be no such exclamation if the Slifka Fabrics No. 9074 were in light green and cerise.\textsuperscript{65}

Had the defendants in the toy doll and plastic Santa Claus cases employed tactics similar to the Slifkas', the results might have been different. After examining the copyrighted work, the defendants in all three cases could easily have obtained pictures in the public domain upon which to base their products.\textsuperscript{66} Furthermore, at least on the Beatle dolls, the color of the outer clothing could have been changed on some of the copies without destroying their commercial value. Confronted with this set of facts, the court would have been hard pressed to find infringement.

Nevertheless, there is no guarantee that the issue would have been resolved in this manner.\textsuperscript{67} In attempting to advance human thought and development by protecting expression, some courts have lost sight of the public purpose involved; eliminating appropriation or commercial piracy has become an end in itself.\textsuperscript{68} As a result, even careful copyists may find the idea-expression distinction of no help in an infringement action. Three recent court of appeals cases vividly illustrate this possibility.

In \textit{Roth Greeting Cards v. United Card Co.},\textsuperscript{69} a case involving copyrights on seven studio greeting cards, the Ninth Circuit was confronted with a defendant who had covered his tracks well. For example, the defendant duplicated the public domain aspects of one of the plaintiff's cards—the uncopyrighted caption was the same; the general mood of the two cards was similar.\textsuperscript{70} However, the artwork was quite different—the plaintiff's card had a forlorn boy sitting on a curb weeping; the defendant's portrayed a forlorn and weeping man.\textsuperscript{71}

Despite the obvious difference between the two cards, the court reversed judgment for the defendant. The majority concluded that

\begin{itemize}
\item \textsuperscript{65} Id. at 341.
\item \textsuperscript{66} Of course, even this strategy may involve extra expense for toy doll copiers who use the copyrighted work itself to make a mold for their own product.
\item \textsuperscript{67} Even the resourceful Slifkas felt the sting of judicial wrath. Loomskill, Inc. v. Slifka, 330 F.2d 922 (2d Cir. 1964); Cortley Fabrics Co. v. Slifka, 317 F.2d 924 (2d Cir. 1963).
\item \textsuperscript{68} [T]he intensity of the search to find what was the plaintiff's original contribution, then to judge whether that was somehow taken by the defendant . . . has sometimes driven out other considerations. When thus detached, the law of plagiarism drifts toward excessive protection, with reciprocal excessive constraint, out of proportion to any needed incentive to the producer (the major consideration), and unjustified by any collateral objectives of copyright.\textsuperscript{72}
\item \textsuperscript{69} Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).
\item \textsuperscript{70} Id. at 1109.
\item \textsuperscript{71} Id. at 1110.
\end{itemize}
"in total concept and feel the cards of United are the same as the copyrighted cards of Roth." In reaching a decision which seems to extend copyright protection to an intangible mood, the court appeared influenced by the manner in which the plaintiff and the defendant operated their respective businesses. The plaintiff employed both a writer who developed textual material and an artist who designed the comprehensive layout of the cards. The defendant, on the other hand, employed no writers or artists. Its vice-president admitted that he did the art work himself after obtaining many of his ideas while visiting greeting card shops and gift shows. In other words, the defendant simply pirated its ideas from other card manufacturers.

The court's apparent reliance on the business morality of the respective litigants represents a significant departure from traditional copyright principles. The amount of time, money, and effort the plaintiff expended in developing his product has no legal significance under the idea-expression distinction. If his original expression has not been appropriated by the defendant, the plaintiff should not be able to buy protection for his ideas no matter how much money he has spent. Likewise, the defendant should not be punished solely because he deliberately capitalized on an idea that the plaintiff made commercially successful. The unprotected status of ideas under copyright law is not confined to those which are commercially valueless. If an idea did not have any worth or value, no one would care whether it were copied. Furthermore, the rationale for leaving ideas unprotected is to expand the field of thought open for development and exploitation; that public purpose can be achieved only if the most valuable ideas are available for appropriation. Therefore, commercial success should be viewed as a reason for encouraging, not restricting, copying of an idea.

The same considerations of business morality, however, also seem to pervade the Fifth Circuit's decision in Tennessee Fabricating Co. v. Moultrie Manufacturing Co. The plaintiff had secured a copyright on a twelve-inch square architectural metal casting unit intended for use in combination or singly for a decorative screen or room divider to "finish up" space. A filigree pattern of intercepting straight and arc lines covered the surface of the unit. The defendant had come into possession of one of the plaintiff's products on which the copyright notice had been obscured. Using the unit to make a mold, the defendant marketed the identical product. After receiving actual notice of

72 Id.
73 Id. at 1108.
74 421 F.2d 279 (5th Cir. 1970).
75 Id. at 280.
the copyright, it redesigned the unit by "adding four intercepting straight lines in the form of a diamond to the filigree pattern."\(^{76}\)

The court held such action insufficient to avoid infringement. Without actually analyzing the features of the two units, the court concentrated on the defendant's conduct. Having emphasized the commercial success of the plaintiff's product, the court concluded that "the defendants displayed a persistent desire to reproduce or capitalize on the unit."\(^{77}\) As in the Roth case, the right of the defendant to "reproduce or capitalize" on the public domain elements of the plaintiff's product seems to have been ignored.

The extent to which concern for commercial morality can blind a court to the problems raised by the idea-expression distinction was again demonstrated in Concord Fabrics, Inc. v. Marcus Brothers Textile Corp.\(^{78}\) The fabric design involved was used primarily on women's handkerchiefs. It consisted of a series of squares, each containing a smaller square which in turn contained a circle. Not only did the Second Circuit minimize differences in the color and design of the defendant's fabric, but it also viewed those changes as evidence of its culpability:

> [W]e feel that the very nature of these differences only tends to emphasize the extent to which the defendant has deliberately copied from the plaintiff.\(^{79}\)

Although the court was not without precedent in viewing the "studied efforts" of the defendant to change the plaintiff's work as proof of infringement,\(^{80}\) its reasoning seems clearly incorrect. By protecting expression and not protecting ideas, copyright law encourages authors and artists to make individual variations on common themes. Certainly actions which the law encourages should not be used as evidence of infringement.

Moreover, even if the differences between the plaintiff's and the defendant's products are taken as evidence of copying, the court's inquiry should not end. In order to find infringement, the court still must determine that the defendant has appropriated the plaintiff's protected expression, not merely his ideas. However, the Second Circuit never took this necessary step. Concerned mainly with prevent-

\(^{76}\) Id. at 281.
\(^{77}\) Id. at 282.
\(^{78}\) 409 F.2d 1315 (2d Cir. 1969).
\(^{79}\) Id. at 1316.
ing commercial piracy, the court brushed aside all differences between the two products as unsubstantial without ever discussing what those differences were.\textsuperscript{81}

Despite the court's curt treatment of the issue, an examination of the lower court opinion suggests that the differences between the two products were anything but insignificant. The district court had found that the motifs of the two handkerchiefs were distinguishable in that the defendant's work had approximately 25 daisies which did not appear in the plaintiff's while the latter had twelve geometrical shaped designs which had no counterpart in the defendant's pattern.\textsuperscript{82} More importantly, the district court noted that the basic design of the plaintiff's handkerchief—the series of larger squares—had been common and popular throughout the women's clothing industry for many years—a fact never mentioned by the court of appeals.\textsuperscript{83} Thus, only by concentrating on the defendant's conduct and ignoring the type of detailed examination which the district court conducted could the Second Circuit escape the conclusion that

\begin{quote}
[a]t worst, what defendant has done here is to use an idea of plaintiff's, to wit, the imposition of a smaller square and a circular design therein within the framework of a large handkerchief design.\textsuperscript{84}
\end{quote}

The real importance of these three decisions is not that they depart from traditional doctrine, but that they threaten to introduce an amorphous, far-reaching principle into the already unsettled world of substantive copyright law. The factors which support the decisions—the commercial success of the plaintiff's product, the amount of time, money, and effort expended by the plaintiff, the defendant's actual use of the plaintiff's work in making his own product—are many of the constituent elements of the common law doctrine of unfair competition.\textsuperscript{85} Moreover, the prevailing philosophy in all three opinions appears to be identical to that of unfair competition cases: that the primary function of the courts is to prevent the "competitor from reaping the fruits of complainant's efforts, and expenditures, to the partial exclusion of complainant."\textsuperscript{86}

\begin{footnotes}
\item[81] 409 F.2d 1315, 1316 (2d Cir. 1969).
\item[83] Id.
\item[84] Id.
\end{footnotes}
The problem with this misappropriation principle is that it has no bounds. Carried to its logical extreme it might completely eliminate all competition, since any time a businessman uses a competitor's idea he is "reaping the fruits" of the latter's efforts and expenditures. Because of these implications, attempts have been made to limit the doctrine.\(^7\) Only seven years ago, the Supreme Court in *Sears, Roebuck & Co. v. Stiffel Co.*\(^6\) and *Compco Corp. v. Day-Brite Lighting, Inc.*\(^8\) appeared to place severe restrictions on the area in which state unfair competition law could operate. However, what may be occurring in the three recent court of appeals decisions is that the misappropriation doctrine is being resurrected phoenix-like from the ashes of *Stiffel* and *Compco* and enshrined in substantive copyright law. Such a development would replace the ephemeral idea-expression distinction with a concept of even more uncertain and baffling proportions.

II. *Mazer v. Stein Revisited*

The developments in the seventeen years following *Mazer v. Stein* represent a departure from traditional copyright principles that should be unsatisfying to all but ardent protectionists. Due to the misapplication or non-application of the idea-expression concept, commercial copyrights have been upheld on a plethora of objects which belong in the public domain. Moreover, the introduction of the misappropriation doctrine threatens to destroy the few enclaves of non-protection which still exist. Copyright law, therefore, stands in danger of becoming "a game of chess in which the public can be checkmated."\(^9\)

Some of these problems can be eliminated or at least controlled by a rigorous analysis of each case in terms of the idea-expression distinction. However, one wonders whether it is worth the trouble. The idea-expression distinction has always been an ephemeral concept, a hazy guide to analysis rather than a well-defined standard for decision. In the commercial copyright area, the difficulties of application have been accentuated. The logic of the situation demands not merely the reappropriation of a nebulous principle, but a complete reevaluation of the *Mazer* decision itself.

\(^7\) For example, in *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1930), Judge Learned Hand tried to confine the International News Service case to its facts. "The difficulties of understanding it otherwise are insuperable." *Id.* at 280.

\(^6\) 376 U.S. 225 (1964).

\(^8\) 376 U.S. 234 (1964).

\(^9\) Morrissey v. Procter & Gamble Co., 379 F.2d 675, 679 (1st Cir. 1967).
Given the manner in which the Supreme Court formulated the issue in *Mazer*, it is hard to see how it could have reached a different decision:

This case requires an answer . . . as to an artist's right to copyright a work of art intended to be reproduced for lamp bases.\(^9\)

The purpose of copyright law is to protect the commercial value of copyrighted works, thereby providing the monetary incentives necessary to encourage the activities of authors and artists. Since the entire copyright system is so commercially oriented, it would seem absurd to deny copyright status to a statuette merely because it was to be put to a commercial use.

However, changing the characterization of the problem yields a different perspective. According to the defendant's petition for certiorari,

Stripped down to its essentials, the question presented is: Can a lamp manufacturer copyright his lamp bases?\(^9\)

Viewed in this manner,\(^9\) the wisdom of the Supreme Court's decision is highly questionable. The copyright system has run into problems whenever it has been applied to something other than the type of literary work for which it was originally designed.\(^9\) Therefore, extending the system to items such as lamp bases which did not even fall within the ordinary conception of a work of art was bound to cause extreme difficulties. Seventeen years of experience has only confirmed the weaknesses inherent in the basic policy of attempting to fit fabric designs, artificial flowers, and plastic Santa Clauses within the mold of standard copyright law.

The sensible solution would be to take the problem of protecting mass-produced, commercial articles entirely out of the copyright system. This action would necessarily involve concurrent restrictions on copyrights covering works of fine art. Otherwise, fabric converters could copyright their fabric designs as paintings, or doll manufacturers register their dolls as sculpture. A more subtle means by which a commercial user could achieve the same end would be secretly to hire another to do the necessary art work under his guidance; this "inde-

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91 *347* U.S. 201, 205 (1954).
92 *Id.* at 205.
93 The Supreme Court might have had difficulty in accepting the defendant's characterization because the statuettes were not used solely as lamp bases. The plaintiffs also sold them separately as works of art.
94 *Kaplan*, *supra* note 8, at 85.
pendent” artist would then secure a copyright and immediately grant an exclusive license to the manufacturer. In either case, the courts would remain beset with the same perplexing problems which they presently endure.

These difficulties could be overcome by completely eliminating the right of copyright holders to bring infringement actions for unauthorized use of their works in mass-produced, commercial products. However, that solution may conflict with the legitimate interest of artists in protecting the value of their creations as works of fine art. Conceivably, that value could be diminished or destroyed if their works were used in mass-produced, commercial articles.

Fortunately, protecting this legitimate artistic interest can easily be reconciled with the removal of mass-produced, two- and three-dimensional objects from the realm of copyright law. For example, owners of copyrights on works of fine art could be allowed to bring regular infringement actions against commercial exploiters of their work, as long as the copyright owner (1) did not use the copyrighted work in his own commercial product; (2) did not license others to use the work in their commercial products; and (3) did not enforce his copyright in such a way as to grant de facto licenses to certain people. Under this approach, the copyright owner would retain all his present powers to protect his work as a work of fine art; he merely would be prevented from profiting from the use of that work in mass-produced, commercial products.

While the elimination of commercial copyright problems need not substantially affect the amount of protection afforded works of fine art, the same statement naturally cannot be made concerning the commercial products themselves. They will be completely deprived of copyright protection. Yet such action does not necessarily mean that these products will be left entirely without legal protection. The withdrawal of copyright status might serve as an impetus for special legislation tailored to the particular subject matter involved. Such legislation would, in fact, provide greater security for present commercial copyright owners who must still face the prospect that some courts will engage in a rigorous idea-expression analysis, an analysis usually leading to the conclusion that

> there were few similarities that could figure as unexcused limitations of “expression,” and those so discrete and of such a dimension as to be nonactionable.\(^9\)

In any event, whether mass-produced, commercial articles remain

\(^9\) *Id.* at 49.
legally protected or unprotected, they should be judged on their own merits. They should not receive protection because of their tenuous connection to a system which was not originally designed for them and remains unequipped to handle them.
The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation

The recent growth of public employee unionism poses a serious challenge to the control which civil service commissions have traditionally exercised over the terms and conditions of public employment. Public employee unions are seeking collective bargaining over a broad range of issues—hiring, promotions, transfers, discipline, and discharge—which are presently governed by civil service. Union attempts to supplant civil service may be attributable to several considerations, including alleged civil service bias against employees, union conflicts...

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1 The term "civil service" as used in this comment refers to the broad range of constitutional provisions, statutes, administrative rules, ordinances, and ad hoc administrative determinations relating to the terms and conditions of public employment. It encompasses the activities of personnel boards, agencies, and directors as well as of civil service commissions. The discussion in this comment is applicable to all centralized state or local laws relating to public employment.

Usually a state constitution (see, e.g., Mich. Const. art. XI, §§ 5-6), state statute (see, e.g., Wis. Stat. Ann. §§ 63.01-02 (Supp. 1970)), or city charter (see, e.g., Grand Rapids, Mich., Charter tit. VII, § 3) authorizes the establishment of civil service agencies and prescribes certain minimal requirements for these agencies to meet (see, e.g., Wis. Stat. Ann. § 63.25 (Supp. 1970)). The civil service commission then establishes its own rules within this grant of power, setting standards which it will follow in every case (for example, setting the exact amount of credit to be given seniority in awarding promotions, Cook County, Ill., Rules of the Civil Service Commission, Rule VIII (1968)) or making case-by-case determinations (leaving the weight to be given seniority to be determined as each promotional opportunity arises, Grand Rapids, Mich., Civil Service Rules § 701.3 (1965)).

2 Twenty-three states have civil service systems covering more than 50% of their employees. Every city of more than 500,000 and 95% of cities with 100,000 or more population also have some form of civil service. However, fewer than 5% of the nation's counties have such a system. U.S. Comm'n on Civil Rights, For All the People . . . By All the People 63-64 (1969).


4 All compilations of civil service regulations do not cover the same matters. However, subjects generally covered by such regulations are procedures to be followed by the civil service commission, coverage of the regulations, examinations, appointments, probationary periods, demotion, dismissal, discipline, appeals procedures, and political activity. See, e.g., Nevada Personnel Division, Rules for State Personnel Administration (1969); Oregon State Civil Service Rules (1966); Institute for Urban Policy and Administration, Graduate School of Public and International Affairs, University of Pittsburgh, Model Rules and Regulations and Forms for Civil Service Commissions in Pennsylvania (1970); League of California Cities, A Suggested Personnel System (1966).

5 The opinion of Thomas Beagley, of Cook County District Council 19, American Federation of State, County, and Municipal Employees, reflects the union rhetoric:
dence in its ability to make better decisions than civil service concerning working conditions, and a possible desire by unions to assume greater importance in the eyes of their members. Whatever the cause, the conflict between collective bargaining and civil service in the public sector presents a choice between two separate decision-making processes—one on hand, unilateral determinations by a civil service commission, and, on the other, collective bargaining between public employers and public employees. At stake is final decision-making power over many aspects of the employment relationship.

To reconcile civil service laws and public sector collective bargaining, and to assign distinct roles to each, is not an easy task. Any resolution of the conflict necessarily involves making assumptions concerning a plethora of issues—the extent of similarity between the public and private sectors, the possibility that public employees may strike to enforce demands on bargainable matters, the desirability of uniformity imposed by civil service regulation in lieu of individually bargained terms of employment, and the potentiality of using civil service to achieve important governmental objectives.

Moreover, the difficulty in reconciling civil service laws and public unionism may reflect their origins in different historical eras as responses to totally different forces. Civil service, which evolved in the late nineteenth and early twentieth centuries, was intended to eliminate the evils of the spoils system—inefficiency, extravagance, and arbitrary dismissals of personnel following each change of political power.

[If a person seeks employment through the Civil Service Commission procedures in the City of Chicago, he finds that the Civil Service Commission ... is appointed by the Mayor who also appoints the department heads, one of which will be his boss. Since 2 of the 5 commissioners may be members of the same political party, the incumbent Mayor is reasonably sure of majority support on the Commission. Politics being what it is, it is difficult to believe that the Commission is not subject to pressure and/or suggestion from the person appointing it. Beagley, Problems from the Viewpoint of Employees and Unions, in COLLECTIVE BARGAINING FOR PUBLIC EMPLOYEES 13, 14 (18th Annual Central Labor Union Conference 1966). See also the account of striking Waukegan, Illinois policemen who refused to appear before a civil service commission hearing because of its alleged management bias. BNA GOV'T EMPL. REL. REP. No. 362, Aug. 17, 1970, at B-15.

6 As two surveys have indicated, the dichotomy between civil service decisions and collective bargaining is not absolute. The Advisory Commission on Intergovernmental Relations found that a civil service commission was the city's representative in collective bargaining in twelve out of 978 cities. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LABOR MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENTS 38 (1969). A survey by the California State Personnel Board found that civil service was a negotiating party in one out of twelve cases. BNA GOV'T EMPL. REL. REP. No. 303, June 30, 1969, at D-5.

7 These issues are discussed in text and notes at notes 68-82 infra.

8 K. HANSLOWE, THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT 7 (1969); LEAGUE OF WOMEN VOTERS OF MASSACHUSETTS, THE MERIT SYSTEM IN MASSACHUSETTS 3 (1961); Kassalow, Prospective on the Upsurge of Public Employee Unionism, in
mitted to the creed of individualism, reformers sought to assure every citizen the opportunity to present his qualifications for government employment and to guarantee that the hiring decision would be based solely on merit. Their effort resulted in the establishment of an independent civil service commission, a bipartisan agency appointed by the executive which formulated rules for recruiting, examining, and certifying individuals for appointment by the executive-employer.9

The work of the civil service expanded with the passage of time. Personnel practices scientifically developed in private enterprise were adopted to classify and to rate employees for efficient performance.10 And since there were no other administrative bodies supervising public employment, civil service authority was gradually extended to include a number of tasks not related to merit hiring, such as training, salary administration, attendance control, morals, safety, and grievances.11 With the expansion of responsibilities, the original justifications for civil service—to protect against the evils of the spoils system and to assure equal opportunity to compete for public employment—no longer explained the full range of civil service authority. Thus, civil service administrators justified their agencies as a means to protect advancement opportunities for minority groups,12 to determine qualifications for new scientific and technical government positions,13 and to attract the most efficient employees to government service.14

Public employee unionism, with a few exceptions, developed after the introduction of civil service.15 Public employees realized, as did

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9 Civil service commissions traditionally nominated a group of three candidates who scored highest on civil service examinations, from which the executive could select one. Such a practice deferred to the executive's appointment powers. F. Mosher, Democracy and the Public Service 69 (1968).

10 Id. at 71.


13 See generally Achieving Excellence in Public Service (S. Sweeny & J. Charlesworth ed. 1969), indicating that civil service will be instrumental in filling the highly technical and scientific government positions opening up in the future.

14 "[M]any local governments are vitally concerned with the 'quest for quality' and . . . the public service is making a real effort to obtain the best person and not only those who have minimum qualifications." Hearings, supra note 12, at 197.

15 W. Heisel & J. Hallihan, Questions and Answers on Public Employee Negotiation 8 (1967).
their counterparts in private enterprise, that they could achieve better wages and working conditions if they organized—a conclusion which instantly placed public unionism in complete opposition to the individualistic bias of civil service. Some commentators offer an additional explanation for the growth of public employee unionism. The amount of remuneration they could obtain from legislatures which set pay scales being restricted, employees attached more importance to the less tangible satisfactions found in participation in the formulation and administration of personnel policy. The pursuit of this goal, as well as the tendency of public employees to identify civil service commissions with the state, county, and city employers which they served, brought unionism into direct conflict with civil service.

As might be expected, the responses of state legislatures to this complex, and at times highly controversial, problem have varied greatly. Since collective bargaining by public employees is of questionable legality in the absence of express statutory authorization, the conflict between collective bargaining and civil service is somewhat muted in the nineteen states which have no public collective bargaining laws. And although public employees in these states occasionally engage in collective bargaining, the power of civil service is virtually absolute.

In those states with both collective bargaining laws and civil service regulations, the response to the conflict has been uneven. One group of fourteen state legislatures has attempted to reconcile the conflict by statute—six of these states give absolute primacy to civil service, four give primacy to civil service only on certain specifically defined issues, and four leave the public employer free to determine whether to pursue collective bargaining or to preserve civil service. In these fourteen states, the statutory resolution provides a degree of certainty. And although the wisdom of the various reconciliations may be open to question, the particular distribution of authority is at least clearly defined.

16 Mosher, supra note 9, at 176. See also Morse, Shall We Bargain Away the Merit System?, supra note 9, at 50. See also Mosher, supra note 9, at 50. See also Morse, Shall We Bargain Away the Merit System? in Developments in Public Employee Relations 154, 158 (K. Warner ed. 1965).


18 Arizona, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Kentucky, Mississippi, North Carolina, Ohio, Oklahoma, New Mexico, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia.

19 Hawaii, Massachusetts (municipal employees), New Jersey, Pennsylvania, Rhode Island (state employees), and Vermont. The statutes of these states are discussed in text and notes at notes 86-88 infra.

20 Connecticut, Delaware, Louisiana (transit employees), and Maine. The statutes of these states are discussed in text and notes at notes 101-03 infra.

21 California, Nevada, Washington, and Wisconsin (state employees). The statutes of these states are discussed in text and notes at notes 97-100 infra.
Employers, employees, civil service commissions, and courts are guided by relatively fixed standards. In another group of nineteen states, however, no statutory attempt has been made to resolve the conflict. As a result, the parties are left in an uncertain and often confused position.

This comment will first proceed to examine judicial attempts to resolve the conflict in those states in which no legislative guidance is provided. It will then discuss several alternative solutions to the problem, including those adopted by various state legislatures.

I. Judicial Responses to the Conflict in the Absence of Legislative Direction

In the nineteen states having both collective bargaining and civil service statutes without legislative reconciliation, the courts themselves must reconcile the two competing decision-making processes. Three states in particular have had extensive judicial consideration of the conflict. The New York courts have established absolute civil service authority over questions concerning the conduct of examinations, the use of performance ratings, the arbitration of discharges, and the classification of positions. Wisconsin and Michigan, on the other hand, have permitted bargaining on position classification and reclassification, department reorganization, fringe benefits, and agency shop provisions.

22 Alabama (firefighters), Alaska, Idaho (firefighters), Florida (firefighters), Kansas (teachers), Massachusetts (state employees), Michigan, Minnesota, Missouri, Maryland (teachers), Montana (nurses), Nebraska (teachers), New York, North Dakota (teachers), Oregon, Rhode Island (municipal employees), South Dakota, Wisconsin (municipal employees), and Wyoming (firefighters). A discussion of court attempts to resolve the collective bargaining-civil service conflict follows.

The New York judiciary, in resolving the conflict in favor of civil service, has relied on the absence of any specific indication in the Taylor Law (New York's public employee bargaining statute) that collective bargaining was intended to supplant civil service procedures and powers. As a result, the courts have denied union requests for injunctions against civil service examinations which were to be conducted contrary to the procedures specified in collective bargaining agreements, holding that a bargaining agreement between a municipality and its employees "although basically sanctioned by the Taylor Act has . . . [no] precedence and makes no claim to any precedence over the Civil Service Law." In another case, a court voided a contract provision calling for arbitration of discharge disputes because the General Municipal Law specifically excluded discipline and discharge disputes from arbitration. While noting that the Taylor Law authorizes negotiation of grievances, the court relied upon the failure of the statute to define "grievance" in ruling that the General Municipal Law voided the contract arbitration clause.

Similarly, in an administrative agency decision, the New York City Office of Collective Bargaining denied a union claim that the city must negotiate on the issue of the creation of additional positions for elevator starters, citing bargaining unit considerations and the management rights provision in the contract between the city and the union. Although the Taylor Law authorized collective bargaining over salaries, wages, hours, and other terms and conditions of employment, the Office ruled that to require mandatory bargaining would violate the right of the city to determine the method, means, and personnel by which its operations were to be conducted. In addition, the Office noted that bargaining over the creation of new positions would interfere with the jurisdiction of another union which represented the elevator starters.

New York, then, has construed the Taylor Law narrowly by requiring explicit statutory language authorizing bargaining on provisions con-
trary to the civil service laws. In adopting this approach, the courts have refused to consider the merits of the questioned agreements and have failed to explain why they were rejected. Any policy considerations the courts may have relied upon, such as the cost involved in arbitration or doubts about the desirability of arbitration arising from its performance in the private sector, went unstated. Neither public policy nor legislative history was cited.

In striking contrast to the New York decisions is the variety of rationales developed in Wisconsin and Michigan to allow employees to negotiate on some matters covered by civil service regulations. These rationales are of two types—those relating to any conflict of statutes and those relating specifically to the unique problems of the civil service-collective bargaining conflict.

In the former category, the general doctrine establishing the superiority of state statutes to local ordinances has been relied upon by at least one Michigan court in resolving the conflict between civil service and collective bargaining. In that case, the court rejected the claim of the Detroit Civil Service Commission that it had exclusive jurisdiction over classification and position allocation. To reach this result, the court cited Michigan constitutional provisions subordinating city ordinances to state statutes and concluded that the state public employee bargaining statute prevailed over the local civil service regulations.

This approach, however, has only limited potential for resolving the conflict between civil service and collective bargaining. Later decisions noted, for example, that the establishment of local civil service commissions is authorized by the Michigan state constitution, and that a civil service system cannot be modified or discontinued without approval by the majority of voters within a chartered locality. Since civil service regulations are products of constitutional authorization and popularly enacted city charters, they cannot be supplanted by collective bargaining agreements which derive their legitimacy only from statutes.

The general supremacy argument is even less convincing where the

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37 Id. at 2028.
40 "To permit the Common Council by simple ordinance to summarily sweep aside a merit system established by constitutional authority and by a vote of the electorate would be a mockery of our democratic process which in this day is already battered and bruised with too much abuse." Nagy v. City of Detroit, 71 L.R.R.M. 2362, 2369 (Mich. Cir. Ct. 1969).
state has constitutional provisions for home rule. In these jurisdictions, the court's inquiry would only begin, not end, with the determination that a state statute conflicted with a local ordinance. The court would also have to determine whether the state statute was intended to preempt the field and whether the interests involved were statewide or local in nature. As past experience in constitutional home rule states has shown, these determinations are anything but automatic.41

Finally, the entire general supremacy theory collapses in those states in which either local civil service commissions are authorized by state statute or civil service itself is operated by a state commission. Under the general supremacy theory, courts in these states would be confronted with the Orwellian task of determining whether one state statute was more equal than another state statute.

A second general theory of reconciling statutes that has been employed in the civil service-collective bargaining context involves the argument that specific statutes override more general legislation. Thus, one Michigan court42 ruled that collective bargaining took precedence over civil service because the Michigan Public Employment Relations Act was specific while the local civil service regulations were general. Employees, therefore, could choose whether they were to be governed by collective bargaining agreements or by civil service regulations.43

The major defect in this approach is that, like the general supremacy theory, it is difficult to apply. Whether a particular statute is "general" or "specific" and whether it is "more specific" than another piece of legislation are complex and rather unrealistic questions. Indeed, prior to the decision noted above, the Michigan Attorney General had ruled that the public bargaining statute was general, and that it did not take precedence over specific statutes allowing school administrators to set fringe benefits for teachers unilaterally.44

Similar criticism can be leveled against a third method of statutory reconciliation—the subsequent enactment doctrine. The Wisconsin

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41 See, e.g., the problems California courts have had in determining whether state statutes overruled local ordinances. In re Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962) (concurring opinion) (court must determine conflict between local ordinance and state statutory scheme by examining statute and facts and circumstances under which the statute operates); In re Hubbard, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964) (chartered counties and cities can legislate in regard to municipal affairs unless state legislature has preempted field or expressed desire to preempt, or if transient citizens will be harmed); Bishop v. City of San Jose, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969) (overruling Hubbard, stating that legislature's desire to deal with subject on statewide basis is not conclusive).


43 Id. at 2978.

Employment Relations Commission (WERC) and Wisconsin courts have resolved some conflicts between collective bargaining and traditional employer-civil service prerogatives by viewing Wisconsin's public bargaining statute as a subsequent enactment which has modified or limited earlier statutory provisions. Under this approach, the public employment statute's prohibition of discharge for union activity has been interpreted as limiting the statutory power of employers to discharge their employees; and fire and police chiefs, formerly given complete control over the working conditions of their men by state statute and city charter, have been required to bargain over wages, hours, and working conditions. The subsequent enactment approach assumes legislative awareness of existing statutes and, in the event of unreconcilable conflict, infers that later statutes were intended to limit previously adopted legislation. Such a presumption, however, is particularly suspect on the state level, since few states publish legislative hearings, committee reports, or floor debates. Thus, while the subsequent enactment doctrine may provide a simple means for reconciling the collective bargaining-civil service conflict, it fails to consider the important policy issues raised by these competing approaches.

Eschewing these more general approaches to statutory resolution, some courts in Michigan and the WERC have employed methods of analysis tailored more specifically to the collective bargaining-civil service conflict. Two lines of cases have relied heavily on specific statutory language to compensate for the dearth of materials recording legislative intent. The first concentrates on the words "wages, hours, and other terms and conditions of employment" which define the bargaining duty in most public bargaining statutes. Emphasizing that this language is used also in the National Labor Relations Act and in many state employment peace acts, these courts assume that legislators using such language in public bargaining statutes were aware of the meaning attributed to it in the private sector. Because the public employee bargaining statutes usually contain no provisions limiting the bargaining obligation (as is noted below, some statutes require

47 Moberly, Developments in Municipal Labor Law, 42 Wis. BAR BULL. 16, 17 (1969).
48 See, e.g., CONN. STAT. ANN. § 7-469 (Supp. 1970) (duty to bargain "with respect to wages, hours, and other conditions of employment").
49 29 U.S.C. § 158(d) (1964) ("wages, hours, and other terms and conditions of employment").
50 See, e.g., MICH. STAT. ANN. § 17.454(32) (1968).
51 See text and notes at notes 85-87 infra.
bargaining over "wages, hours, and terms and conditions of employment" but then exclude civil service matters from this bargaining duty), the statutory language has been broadly interpreted to include any aspect of employment that "has any reasonable relation to" or which "directly and intimately affects" wages, hours, and working conditions. Under this approach, the courts and the WERC rely upon decisions from the private sector and upon their own interpretations of the bargaining duty in requiring bargaining over many matters traditionally under civil service regulation, such as job classification, union security, and department reorganization (which involves reclassification, determination of new job duties, and elimination of jobs). And employees have been allowed to bargain in these areas even where previously enacted statutes specifically foreclosed them from bargaining.

The reliance of this approach on private sector case law is questionable, however, and may not be well suited to the resolution of the collective bargaining-civil service conflict. The analogy between the public and private sector is tenuous at best. Since public employers lack the same profit motive as private employers, they might forego hard bargaining in favor of a mutually acceptable accommodation with public unions. No guarantee exists that such an accommodation would not completely eliminate civil service and reinstate, to some extent, the spoils system. It is at least doubtful whether state legislators, in using the words "wages, hours, and terms and conditions of employment," meant to invite the complete destruction of civil service.

A second line of cases relying on statutory construction examines the language of city charters which outline the powers of city governing commissions over the working conditions of their employees. In a case in which the city charter granted the city commission "the legislative and administrative powers of the city," and in which prior court deci-

57 See cases cited notes 46 & 52 supra.
sions had upheld the right of the city commission to dismiss employees on good faith grounds, the court allowed the city to enter into a bargaining agreement requiring payment of the equivalent of union dues as a condition of employment and dismissal of employees who failed to meet this condition. The civil service board was limited to a procedural adjudicatory function. It could only examine whether the employee had in fact failed to pay union assessments; it could not determine whether failure to pay was a valid ground for discharge. Such an interpretation allows the public employer to enter into collective bargaining agreements which infringe upon the substantive rule-making power of civil service, provided he submits to its procedural adjudicatory power.

Thus, although the two statutory language approaches relate specifically to the problems of the collective bargaining-civil service conflict, they, like the more general methods of reconciliation discussed previously, attempt to resolve the conflict on an all-or-nothing basis. The inquiry centers on whether, on an abstract level, the collective bargaining statute is superior or inferior to the civil service authorization. To avoid this problem, some courts and the WERC have adopted an entirely different approach. Rather than establishing an all-encompassing hierarchy, this approach considers the public policy reasons behind both civil service and public employment bargaining statutes and attempts to evaluate individual contract terms in light of those policies.

Under this approach, a number of collective bargaining agreements have been upheld even though contrary to civil service regulations. Agency shop clauses, for example, have been validated on two grounds. In some cases they were found compatible with the goals of civil service—retaining competent employees and insulating them from arbitrary political and personal interference, and in another case the court ruled that "the more logical rationale behind the agency shop outweighs the more emotional arguments of its opponents." The logical rationale to which the court referred stipulated that members of a


89 The court compared the requirement of agency fees to mandatory contributions to a pension fund: the employer could require employees to contribute to both. The court illustrated the procedural role of civil service by noting that if an employer sought to discharge an employee for constant tardiness, civil service could determine only whether in fact the employee had been tardy; it could not decide whether 8:30 rather than 8 a.m. is a reasonable starting time.


Civil Service-Collective Bargaining

bargaining unit should pay for their representation by the union and that failure to observe a union security provision could well "undermine the whole principle of fair collective bargaining," since strong unions were needed to stand up to employers and to make negotiations productive. No empirical data were cited to support this rationale.

Similarly, public policy has been invoked as the basis for the extension of collective bargaining to both fringe benefits and department reorganizations. The court which allowed fringe benefit agreements relied on a legislative purpose to give public employees "many of the rights and kinds of contractual benefits gained by workers in private employment by the collective bargaining process, except as the same would be repugnant to existing laws or an abuse of the authority of the public employer ...." The department reorganization rested on the possibility that union suggestions would contribute to government efficiency:

If the petitioner is given an opportunity to bargain with respect to the decision to reorganize the department of public welfare, as well as its effect on the work of bargaining unit employees, it can attempt to persuade the municipal employer that the proposed reorganization might not be as efficient as contemplated. It would be able to propose suggestions and comments as to how the reorganization might better be implemented to achieve the goals desired by the municipal employer.

Public policy considerations have not, however, operated consistently to expand the scope of collective bargaining. One court, for example, refused to allow the employer and union to exclude the civil service commission from bargaining sessions, relying on the need to prevent the return of the spoils system.

It is difficult to deny the inherent advantages of a policy-oriented

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62 Id. at 2364.
65 71 L.R.R.M. at 2178. Instead of relying upon legislative hearings, reports, or debates, the court turned to an article concerning the Michigan Public Employment Relations Act, written by Robert G. Howlett, Chairman of the Michigan Labor Relations Board.
analysis. Only an academic heretic would prefer either a mechanical legal standard or a test based on bare statutory language to a reasoned decision reflecting underlying policies. Yet it would be wrong to minimize the difficulties which arise from this approach. The court must consider a number of issues which may touch upon the legislative domain and, as previously mentioned, it will usually have to do so without much assistance from legislative hearings, committee reports, or floor debates. The attendant difficulties may readily be perceived. To determine the scope of public collective bargaining, for example, the court must evaluate the effect of public employee strikes. It may be desirable to give public employees greater control over their working conditions because theoretically they cannot strike to obtain higher pay from cost-conscious officials. One may also seek alternate ways of settling disputes—among them, arbitration of grievances—so that strong public employee unions will not feel forced to strike illegally to gain satisfactory resolution of such disputes. Conversely, the tendency of public employees to engage in strikes, legal or illegal, over bargaining issues may militate against expansion of bargaining into civil service matters. The legislature may not have wanted some matters, such as examinations, hiring practices, and promotions, to be determined by strikes and other displays of force. It may be better to exclude such matters from bargaining altogether.

A more basic policy decision which a court must make in determining the scope of bargaining concerns the goals to be served by civil service. If one views civil service merely in terms of its original function of eliminating the spoils system, then the role of collective bargaining

68 Employment relations boards, in their role as adjudicatory and policy-making agencies, may be better suited than courts to consider such issues. It has been argued that the difficulty and complexity of some types of policy determinations require that the legislative body provide specialized administrative tribunals to develop policy on a case-by-case basis. I K.C. Davis, ADMINISTRATIVE LAW TREATISE § 2.05, at 98-99 (1958). Perhaps these boards present the best possibility for resolving the collective bargaining-civil service conflict.

69 See text following note 47 supra.

70 See authorities cited note 17 supra.


72 See authorities cited note 8 supra. See also Mosher, supra note 9, at 65:

[Although some protagonists mentioned efficiency as an argument for a merit system, this was at best a secondary consideration—"and not a very close second at that," to quote Paul P. Van Riper's analysis of the movement. The civil service reform movement was essentially a negative movement designed to stamp out a system which was a "disgrace to republican institutions"—to eradicate evil. There was not very much original thought about the best kind of substitute for spoils beyond competitive entrance examinations and security of tenure.

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should be greatly expanded. The important function performed by the civil service system under this view is the elimination of unwarranted employer discretion and the enforcement of non-arbitrary standards, rather than the determination of the actual content of the standards. Collective bargaining could be given final authority to establish fixed rules governing hiring, promotion, transfer, discharge, and employment conditions without presaging a return to the spoils system. The necessary task of identifying clear and intelligible standards for controlling executive discretion can be accomplished as effectively by the collective bargaining process as by a civil service commission. Though a merit evaluation program devised unilaterally by civil service may produce more efficient employees than would a seniority system produced by negotiation, the latter method certainly prevents arbitrariness through application of objective and uniform criteria. Similarly, whatever one may think about the ability of private arbitrators, they do not seem more biased toward either union or employer than are civil service commissions. Although union security agreements place an extra condition on public employment—that is, the payment of dues—they do not subject employees to arbitrary discrimination.

The decision for a court becomes more difficult if purposes other than the elimination of the spoils system are attributed to civil service. Thus, if efficiency of governmental operations is seen as an important goal, much of the previous argument collapses. The content of objective

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73 "Apart from the employment of new applicants, the 'merit principle' probably should be pursued through collective bargaining and not through a civil service system." Wellington & Winter, Structuring Collective Bargaining in Public Employment, 79 YALE L.J. 805, 864 (1970).

74 Some commentators have observed and documented the arbitrariness of certain civil service commissions. U.S. COMM'N ON HUMAN RIGHTS, supra note 2, at 65-68. See also LEAGUE OF WOMEN VOTERS OF MASSACHUSETTS, supra note 8, at 34:

The procedure followed by many public personnel agencies in determining the relative weights to be assigned to experience and education, as well as other parts of the test battery, is simply the guess of the examiner as to the importance of each.

Unions could provide the "aggressive, militant approach" toward determining the validity and importance of civil service testing processes and improving the techniques of examinations which has been sorely lacking. Kaplan, supra note 11, at 221.

75 Nigro, The Implications for Public Administration, 28 PUB. AD. REV. 197, 144 (1968).


77 See text at note 5, supra. Commentators have suggested the introduction of arbitration into public employment to encourage reasonableness in the earlier stages of grievance resolution and to uplift employee morale. Killingsworth, Grievance Adjudication in Public Employment, 13 ARB. J. 3, 15 (1958). Killingsworth suggests that civil service commissions are inherently incapable of impartiality because of their dual functions of representing the public interest in protecting public servants and of performing managerial tasks. Id. at 11-12.

standards governing hiring, promotions, transfers, and grievances cannot be left to the employer and union because the public employer, unlike his counterpart in the private sector, lacks the profit incentive to engage in hard bargaining to maximize efficiency.

Similarly, the use of civil service to achieve social goals, such as transferring teachers into inner-city schools or advancing minority group employment, may be antithetical to expansion of collective bargaining. The sheer number of bargaining units negotiating independently of one another may make any uniform policy impractical to administer. Moreover, even disregarding these unit determination problems, the mutual interests of employers and employees may prove quite different from the social policies sought to be advanced. Expansion of collective bargaining, therefore, might increase the impediments to achieving those goals.

These difficulties are not insurmountable, however, and civil service is not the only means of solving them. For example, minority groups may be aided by public sector equivalents of the Philadelphia Plan, civil rights laws, and equal opportunity regulations. Conceivably, judicial review could be used to secure the fulfillment of vital government objectives. A New Jersey court recently invalidated a collective bargaining clause which impeded the promotion of black teachers in inner-city schools. Yet it is questionable how far a court should go, as a matter of policy, in requiring that social objectives presently achieved through civil service be pursued via alternate means.

The above problems should not be taken as a mandate either for judicial inaction or for adoption of one of the mechanical tests previ-

79 N.Y. GOVERNOR'S COMM. ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT 10-12 (1966).
80 Stanley has observed resistance on the part of public employee unions to the granting of preferred positions to less privileged workers for selection and training purposes. Stanley, supra note 3, at 110.
81 For a description of the plan, see Contractors Ass'n v. Shultz, 62 CCH LAB. GAS. ¶ 9421 (E.D. Pa. 1970). The court upheld the plan against charges that it violated the 1964 Civil Rights Act.
83 Courts may do much to increase bargainable topics without disturbing valid civil service regulations. For example, courts can allow bargaining to define the meaning of certain civil service regulations. In Zekas v. Baldwin, 310 F. Supp. 575 (E.D. Wis. 1970), a court granted a temporary restraining order against dismissal of a welfare worker because the regulations under which he was dismissed were overly broad. There should be no opposition to bargaining for the purpose of clarification when the alternative is unconstitutionality. Similarly, collective bargaining could provide for penalties for the violation of civil service laws when the laws themselves are silent. In Miami v. Gioia, 69 L.R.R.M. 2735 (Fla. Dist. Ct. App. 1968), the court held that an employer had violated civil service regulations by working firemen more than thirty days in a higher classification, but determined that no extra pay would be given the firemen because no regulation so
ously described. Although the legislature may have failed to provide any clear indication of its intent in enacting the public employee bargaining statute, the judicial function requires that the court, when the issues are properly presented, decide conflicts between the respective spheres of civil service and collective bargaining. Of course, it is preferable that the court's decision rest upon sound considerations of policy rather than upon the artificial characterization of a statute as "general" or "specific." But the policy questions which must be resolved are varied and complex, and the judicial forum may not be the most appropriate one in which to resolve the decision. Both the nature of the questions and the difficulty of answering them present a strong case for legislative intervention.

II. EXISTING AND ALTERNATIVE LEGISLATIVE RESOLUTIONS OF THE CONFLICT

A. Existing Legislative Resolutions

In a number of states, legislatures have attempted to reconcile the competing power claims of civil service and public employee collective bargaining. Five different approaches have been adopted. First, six states\(^\text{84}\) have resolved the collective bargaining-civil service conflict by excluding all civil service matters from collective agreements. Through statutory language subjecting collective bargaining settlements to civil service regulations,\(^\text{85}\) excluding civil service matters from negotiation,\(^\text{86}\) required. Bargaining should fill such gaps. Finally, courts should scrutinize the statutory grants of power to civil service and allow bargaining to govern categories outside these grants. Courts have limited the rule-making power of civil service commissions in the past, and can do so in the future to open new areas for bargaining. Essling v. St. Louis County Civil Serv. Comm'n, 283 Minn. 425, 168 N.W.2d 663 (1969) (civil service commission could not set mandatory retirement age when statute establishing commission did not include such authority); State ex rel. Baranowski v. Koszewski, 251 Wis. 383, 29 N.W.2d 764 (1947) (civil service commission could not both bring charges against employee and then adjudicate them, for legislature had not given commission such power).

\(^\text{84}\) See note \textsuperscript{19} supra.


\begin{quote}
Whenever the procedures under a merit system statute or rule are exclusive with respect to matters otherwise comprehended by this chapter, they shall apply and be followed.
\end{quote}

\(^\text{86}\) Hawaii Public Employee Collective Bargaining Act, § 9(d), No. 171, [1970] Hawaii Acts 316:
or forbidding any diminution of the power of civil service commissions,\(^7\) this legislation effectively preserves the authority of civil service. These laws assume that civil service regulations are generally preferable to negotiated agreements. As a result, such regulations are granted legislative protection without regard to their desirability. Moreover, employers in these states can eliminate bargainable issues simply by having the civil service commission expand the scope of its regulations.

In some situations, it might be to the union's advantage to bargain to increase the power of civil service.\(^8\) It is quite possible in these six states for agreements between unions and public employers to designate civil service and personnel boards as higher appeal agencies in localities where unions fear arbitrariness in discharge actions and have sufficient trust in civil service.

Second, in those states\(^9\) in which legislatures have not authorized public employers to bargain with their employees, the conflict seems

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Excluded from the subjects of negotiations are matters of classification and reclassification, retirement benefits and the salary ranges and the number of incremental and longevity steps now provided by law . . . . The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work . . . or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualifications, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions, and suspend, demote, discharge, or take other disciplinary actions against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.


Nothing herein shall be construed to deny to any individual employee his rights under Civil Service Laws or regulations.

The New Jersey Supreme Court has apparently interpreted this provision and the entire bargaining law to exclude any changes in civil service regulations. Lullo v. Firefighters Local 1066, 55 N.J. 409, 440, 262 A.2d 681, 697 (1970).

PA. STAT. tit. 43, § 1101.703 (Supp. 1971):

The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania or the provisions of municipal home rule charters.

\(^7\) MASS. GEN. LAWS ch. 149, § 178N (Supp. 1970):

Nothing in sections [178F-178M, which authorize municipal employees to bargain] shall diminish the authority and power of the civil service commission . . .

N.H. REV. STAT. ANN. ch. 98-C:7 (Supp. 1970) guarantees the exclusive right of the state to appoint, promote, discharge, transfer, or demote employees; to direct and supervise; to lay off unnecessary employees; and to maintain the efficiency of government operations. Ch. 98-C:4(b), however, allows negotiation to establish procedures and steps for conferring upon and considering recommendations for improvement in personnel policies and changes in classifications and allocations.


\(^9\) See note 18 supra.
to have been resolved as if there had been an explicit legislative pro-
nouncement forbidding collective bargaining from displacing civil
service regulations. The state courts have reached this result on the
grounds (1) that control over working conditions is a discretionary
power that cannot be delegated, or (2) that the proposed agreements are
incompatible with statutorily authorized civil service goals. The first
approach, which is premised on the belief that employment conditions
—qualifications, classification, tenure, working rules—should be deter-
nined solely by legislative fiat, has both broad and narrow applica-
tions. Under the broad reading, parties may not bargain on any matter
relating to employment, even in those areas where a civil service com-
mization has not passed any regulations. The narrow reading allows
parties to bargain over employment matters, but only if the civil
service commission has not yet adopted regulations to cover such
matters. Of course, if the civil service commission later enacts regula-
tions that conflict with previously bargained-for agreements, incon-
sistent clauses of the bargaining contract are invalidated. The second
approach evaluates the effect of contract terms upon the civil service

90 Fort Smith v. Council 38, AFSCME, 245 Ark. 409, 433 S.W.2d 153 (1968); City of
305 (1949) (superseded in California by passage of a public employee bargaining act); Fellows v. La Tronica, 151 Colo. 300, 377 P.2d 547 (1962); Wichita Pub. Schools Em-
ployees Local 513 v. Smith, 194 Kan. 2, 397 P.2d 357 (1964); Hagerman v. City of Dayton,
147 Ohio St. 313, 71 N.E.2d 246 (1947). See also Anderson, Labor Relations in the Public

91 "Labor unions have no function which they may discharge in connection with civil
service appointees." Hagerman v. City of Dayton, 147 Ohio St. 313, 328-29, 71 N.E.2d
246, 254 (1947). In Foltz v. City of Dayton, 75 L.R.R.M. 2321 (Ohio Ct. App. 1970), the
court upheld the invalidation of a union security clause in a bargaining contract, relying
on Hagerman. The two concurring judges expressed their hope that the Ohio Supreme
Court would overrule Hagerman, believing that collective bargaining was the most
satisfactory way of handling a government's relations with its employees. Hagerman
has been cited numerous times in other states which have denied bargaining rights to
public employees.

92 Local 611, IBEW v. Town of Farmington, 75 N.M. 393, 405 P.2d 233 (1965); Local
(1954).

93 This narrower theory is more plausible than the broader one which forbids any
debigation of power. It is easy to see under the narrow theory why parties should not be
allowed to circumvent by collective agreement civil service regulations already on the
books—allowing people to agree to ignore laws would hardly be consistent with orderly
government. But the broader theory forbidding parties to agree on matters not yet
covered by civil service regulations is questionable. The nondelegation rule has been
attacked on the grounds that it overstates the reasons for prohibiting delegations of
legislative authority (see State v. City of Laramie, 437 P.2d 295, 300 (Wyo. 1968)), and
that collective bargaining poses no compulsion to sign an agreement and does not deprive
the employer of final decision (see State Board of Regents v. Packinghouse, Food &
Allied Workers Local 1258, — Iowa —, 175 N.W.2d 110, 113 (1970)).

94 Local 611, IBEW v. Town of Farmington, 75 N.M. 393, 397, 405 P.2d 233, 236 (1965).
system. Although this analysis would seem to allow courts to uphold collective bargaining agreements having only minor adverse effects on civil service, the courts have consistently used this approach to uphold the power of the civil service commissions. For example, the courts have voided union security agreements on the ground that dismissal of employees for failure to pay union dues is incompatible with civil service’s retention of employees on merit. Similarly, arbitration by an outside party has been prohibited because an arbitrator would be unacquainted with the civil service laws he was supposed to enforce. Thus, in the absence of an express authorization of public employee bargaining, the courts tend to subordinate the policy considerations to a questionable legislative intent to have employment and tenure depend solely on merit as measured by civil service regulations.

A third type of legislative reconciliation, adopted in four states, imposes a duty to bargain collectively or to “meet and confer” upon public employers and unions, but exempts civil service matters from this duty. These statutes generally retain certain public employer prerogatives through a management rights section, but do not prohibit agreements affecting civil service regulations. A public employer is

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95 Petrucci v. Hogan, 5 Misc. 2d 480, 27 N.Y.S.2d 718 (Sup. Ct. 1941); Civil Serv. Comm’n v. Ballard, BNA Gov’t Empl. Rel. Rep. No. 344, Apr. 13, 1970, at B-1 (Ohio C.P. 1970). An alternative holding in Ballard was that the agency shop clause was invalid because it violated the equal protection clause—nonunion employees would be treated differently under the bargaining contract than without it because they would have to pay agency fees.

96 City of Cleveland v. Street, Elec. Ry. & Motor Coach Employees Div. 268 (Ohio C.P. 1945), reported in C. RHINE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW (1946).

97 See note 21 supra.

98 CAL. GOV’T CODE § 3500 (Supp. 1971):

Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed.

§ 3504 provides:

The scope of representation shall include all matters relating to employment conditions and employer-employee relations, . . . except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order. The failure of the prohibitory section to exclude civil service matters from the scope of representation can be interpreted as permitting negotiation over such matters, if the employer and union so wish. § 3500 can then be read as merely removing civil service matters from the scope of mandatory bargaining.

REV. STAT. § 288.150(2) (Supp. 1970):

Each local government employer is entitled, without negotiation or reference to any agreement resulting from negotiation:

a. To direct his employees;

b. To hire, promote, classify, transfer, assign, retain, suspend, demote, discharge or take disciplinary action against any employee;
apparently free to negotiate agreements contrary to civil service regulations. For example, in one case a union sought to enforce a strike settlement agreement by which a county employer consented to reinstate employees who had violated civil service regulations prohibiting unjustified absences from work. In holding that the union had stated a cause of action, the court said:

[T]he statute neither requires collective bargaining nor precisely defines the rights which flow to public employees and the nature and scope of the contract that can be entered into by the parties. The statute does, however, apparently envision that agreements reached as the result of such conferences and meetings are now compatible with civil service and merit systems.

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c. To relieve any employee from duty because of lack of work or for any other legitimate reason;
d. To maintain the efficiency of its governmental operations;
e. To determine the methods, means and personnel by which its operations are to be conducted; and
f. To take whatever actions may be necessary to carry out its responsibilities in situations of emergency.

Wis. Stat. § 111.91(2) (Supp. 1970):

Nothing herein shall require the employer to bargain in relation to statutory and home rule provided prerogatives of promotion, layoff, position classification, compensation and fringe benefits, examinations, discipline, merit salary determination policy and other actions provided for by law and rules governing civil service.

Wash. Rev. Code § 41.56.100 (Supp. 1971):

Nothing contained herein shall require any public employer to bargain collectively with any bargaining representative concerning any matter which by ordinance, resolution or charter of said public employer has been delegated to any civil service commission or personnel board similar in scope, structure and authority to the board created by chapter 41.06 RCW.

§ 41.56.130 of the Washington public employee bargaining statute incorporates § 41.06.150 of the personnel laws. The latter statute provides that the personnel board shall establish the basis and procedures for dismissal, suspension, demotion, appeals from disciplinary action, certification for filling vacancies, examinations, appointments, probationary periods, transfers, sick leave, hours, and layoffs. It stipulates further:

Provided, That in making such determination the board shall consider the duties, skills, and working conditions of the employees, the history of collective bargaining by the employees and their bargaining representatives, the extent of organization among the employees, and the desires of the employees; certification and decertification of exclusive bargaining representatives; agreements between agencies and certified exclusive bargaining representatives providing for grievance procedures and collective negotiations on all personnel matters over which the appointing authority of the appropriate bargaining unit of such agency may lawfully exercise discretion . . . .

It is conceivable that employer voluntary agreements to change civil service regulations may still run afoul of the problems discussed in the text at notes 38-41 supra.

East Bay Municipal Employees Local 390 v. County of Alameda, 3 Cal App. 3d 578, 83 Cal. Rptr. 503 (1970). Civil service regulations required that employees absent without excuse be terminated immediately with full loss of seniority benefits. In addition, terminated employees could be reinstated without prejudice only if they presented a reasonable excuse within three days after their absence.

Id. at 584, 83 Cal. Rptr. at 507 (emphasis in original). Other courts have refused to enforce strike settlement agreements granting nondiscriminatory reinstatement or increased remuneration to returning strikers. See, e.g., Almond v. County of Sacramento,
The court concluded that when a public employer engages in bargaining with public employees, any agreement that the public agency is authorized to make and does make should be valid and binding on all parties—union, employer, and civil service commission.

This case illustrates a major disadvantage of such "permissive" legislation. The union used an illegal strike to convince the employer to participate "voluntarily" in meaningful negotiations. Other unions may resort to similar displays of power if they perceive that the employer can be forced to negotiate civil service provisions, deemed important to their members. As a result, the negotiability of civil service regulations is determined by shows of force rather than by rational decisions as to the desirability of isolating these rules from negotiation.

A fourth legislative approach, adopted by Connecticut and Maine, allows collective bargaining agreements to supersede civil service regulations, but forbids negotiation relating to rules for the conduct and grading of examinations, candidate rating, and promotions from rating lists. These statutes recognize that civil service rules should not present a monolithic barrier to all bargaining and reflect a legislative judgment as to which aspects of civil service should be immune from bargaining.


101 CONN. GEN. STAT. ANN. § 7-474(f) (Supp. 1970):

Where there is a conflict between any agreement reached by a municipal employer and an employee organization and approved in accordance with the provisions [of this act] and any charter, special act, ordinance, rules or regulations adopted by the municipal employer or its agents such as a personnel board or civil service system, ... the terms of such agreement shall prevail.

§ 7-474(g) provides:

Nothing herein shall diminish the authority and power of any municipal civil service commission, personnel board, personnel agency or its agents established by statute, charter or special act to conduct and grade merit examinations and to rate candidates in the order of their relative excellence from which appointments or promotions may be made to positions in the competitive division of the classified service of the municipal employer served by such civil service commission or personnel board. The conduct and grading of merit examinations, the rating of candidates and the establishment of lists from such examinations and the appointments from such lists and any provision of any municipal charter concerning political activity of municipal employees shall not be subject to collective bargaining.


102 The report which provided the impetus for the Connecticut law noted:

We have also included in this section a provision to protect the authority of civil service or other similar commissions in the matter of merit system examinations from which appointment and promotion lists are drawn. These procedures are not to be subject to collective bargaining. However, in order to clarify any question that may arise if a provision of an agreement is in conflict with other rules or regulations in the municipality we are providing that the terms of the agreement shall prevail. We are not nullifying or repealing such rules and regulations, but, as a practical matter, it is not possible to have two separate rules in effect at the same time covering the same subject matter.

CONN. INTERIM COMM’N TO STUDY COLLECTIVE BARGAINING BY MUNICIPALITIES, REPORT 17 (1965).
Finally, in Delaware the legislature has adopted a blanket rule favoring collective bargaining. A 1967 law repealed the section of Delaware's collective bargaining statute stipulating that merit procedures and statutes were not to be affected by bargaining, and guaranteed public employees a role in the formulation of certain aspects of personnel policy.\(^{103}\)

B. Alternative Resolutions

The federal resolution of the conflict between public collective bargaining and civil service is found in Executive Order 11491, issued on January 1, 1970 by President Nixon.\(^{104}\) This order specifies that federal officials and employees are governed by the regulations of the *Federal Personnel Manual*,\(^{105}\) and that the government retains certain exclusive management rights, including the rights to hire, promote, demote, and discharge.\(^{106}\) The Civil Service Commission has indicated that certain fundamental principles, such as competitive selection of appointees, grading of positions according to legislative standards, promotion, and job protection, would not be subject to bargaining.\(^{107}\) The federal approach, then, restricts bargaining ability significantly.

Another possible resolution is the mandating of minimum civil service standards by a higher authority, as was proposed in the Intergovernmental Personnel Bill introduced in 1967.\(^{108}\) The bill would have required localities seeking government funds to meet certain minimum merit standards promulgated by a presidentially appointed commission. The standards would have covered recruitment, selection, and advancement on the basis of relative ability, knowledge, and skills; provided equitable and adequate compensation; trained employees to assure high-quality performance; and assured fair treatment of applicants and employees in all aspects of employment.\(^{109}\) The application

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\(^{103}\) The law recognizes that "the statute establishing the merit system of personnel administration for the employees of the state did not expressly define its relationship to the statute recognizing the right of public employees to organize" and provides that collective bargaining could establish rules for classification, uniform pay scales, competitive examinations, promotions, eligibility lists, rejections for unfitness, appointment of superior applicants, leaves, veterans preference, and residency preference. Ch. 876, § 5938, [1967] Del. Laws 1297.

\(^{104}\) The predecessor of this order was Exec. Order No. 10988, 3 C.F.R. 521 (1962), issued by President Kennedy. The provisions of the Nixon order relating to civil service are quite similar to those of the Kennedy order.


\(^{106}\) Id. at § 12(b), 3 C.F.R. 191, 199-200 (1969 Comp.).

\(^{107}\) U.S. CIVIL SERVICE COMM’N, FEDERAL PERSONNEL MANUAL ch. 711.


\(^{109}\) *Hearings, supra* note 12, at 21.
of these principles above the minimum standards set by the commission would be a proper subject for negotiation between unions and employers. The bill was not enacted into law, however, partially due to opposition from local officials who have insisted that federal control is unnecessary. A state mandating of standards may be more acceptable.

A final alternative is illustrated by the proposed National Public Employee Relations Act, written by the American Federation of State, County, and Municipal Employees. This Act would allow parties to agree on contract provisions superseding all merit regulations, but would require submission of the entire contract to the appropriate legislative body for ratification.

III. Conclusion

It is beyond the scope of this comment to evaluate each of the alternatives discussed above. However, one point continues to emerge from the commentary and cases in this area. The central problem has been the failure of legislatures to define the respective parameters of the civil service commission and the collective bargaining process. This abdication of responsibility has placed the courts in the position of having to decide issues which involve subtle policy judgments concerning the purpose and function of the civil service system. It is understandable, therefore, that courts have usually attempted to avoid the problem by applying the traditional, if formalistic, rules of judicial construction. Even those courts which have tried to grapple with the underlying policies have often succeeded only in adding to the confusion. If the situation is to be remedied, legislative direction is indispensable. The Maine and Connecticut approach is illustrative of the manner in which a statutory response can facilitate the purposeful

110 Hearings, supra note 12, at 193 (remark of Senator Muskie).
112 Opposition even to state control would arise from home rule advocates. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, supra note 6, at 83-84.
114 § 13 of the proposed Act states:

This Act shall supersede all previous statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, rules or regulations adopted by any State or any of its political subdivisions or agents such as a personnel board or civil service commission.

§ 13 defines the duty to bargain as the duty

. . . to negotiate about matters which are or may be the subject of regulation promulgated by any employer's agency or other organ of a state or subdivision thereof or of a statute, ordinance, or other public law enacted by any state or subdivision thereof, and to submit any agreement reached on these matters to the appropriate legislature.

115 See text and notes at notes 101-02 supra.
interaction between a civil service system and public employee unionism. Moreover, legislative action can carefully adjust the scope of allowable collective bargaining in accordance with the issue involved, and thereby avoid the mechanical tendency to treat all terms and conditions of employment alike. The important point, though, is that the legislatures should act to resolve the present conflict between civil service and collective bargaining; for in the absence of such legislative direction, employers, employees, civil service commissions, and the judiciary are set adrift on a sea of doubt, usually leaving the courts as the scene of the ensuing shipwreck.

On August 10, 1965, Dale Menard was taken into custody by the Los Angeles Police Department on a charge of burglary.\textsuperscript{1} He was held two days without a hearing and then released, the police being satisfied that "there [was] no ground for making a criminal complaint against the person arrested."\textsuperscript{2} Under a California statute the arrest was classified as "detention only." However, the record of his arrest, including fingerprints, had been forwarded to the Federal Bureau of Investigation, which incorporated it into criminal identification files.\textsuperscript{3} Menard filed a complaint in the District Court for the District of Columbia alleging that he was arrested without probable cause and seeking to compel the Attorney General of the United States and the Director of the FBI to remove his fingerprints and accompanying notation from the Bureau's files. The court granted summary judgment for the defendants. The Court of Appeals for the District of Columbia Circuit reversed in an opinion by Judge Bazelon stating that the FBI's authority to retain and disseminate Menard's record was not without limit. The court nevertheless remanded the case for trial, declaring that the issues presented required a more complete factual development before a final decision could be reached.\textsuperscript{4}

Full resolution of the legal issues presented by \textit{Menard v. Mitchell} could have a substantial impact on the present system of criminal justice in the United States. The practice of taking fingerprints, photographs, and other identification data of every person arrested by local, state, and federal law enforcement officers and disseminating that data at their discretion prior to final disposition of the case is well

\textsuperscript{1} Menard v. Mitchell, 430 F.2d 486, 488 n.1 (D.C. Cir. 1970).
\textsuperscript{2} Id. at 488.
\textsuperscript{3} Id. at 487.
\textsuperscript{4} Id. at 494. On remand, the District Court for the District of Columbia held that the FBI's authority to disseminate arrest records outside the federal government was limited to distribution to law enforcement agencies for law enforcement purposes. The action for expungement could not, however, be maintained until administrative remedies were exhausted, and then Menard's first resort would be in the state courts. 39 U.S.L.W. 2725 (D.D.C. June 15, 1971).
established.\(^5\) In fact, the collection\(^6\) and immediate transmission\(^7\) of data to state and federal law enforcement agencies are often required by statute. Even in the absence of statutory mandate, these procedures are usually held to be well within the authority of police.\(^8\) After a dis-

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\(^5\) The number of people affected by this practice is staggering. Although the total number of individuals arrested in the United States is unknown, the FBI reported, on the basis of returns representing 71% of the population, that in 1969 a total of 5,779,988 arrests were made. *Federal Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States: Uniform Crime Reports—1969*, at 107-08 (1969). One study has estimated that “about 40 percent of the male children living in the United States today will be arrested for a nontraffic offense sometime in their lives.” President’s Comm’n on Law Enforcement & Administration of Justice, Report: The Challenge of Crime in a Free Society 247 (1967). The statistics do not reveal how many people arrested are not convicted; however, the FBI reports may show a rough trend. Data covering a population exceeding 66 million showed that in 1969, of 2,402,979 persons charged, 15.9% or 382,074 were acquitted or had charges dismissed and 18.5% or 444,551 were referred to juvenile courts. *Federal Bureau of Investigation, U.S. Dep’t of Justice, supra*, at 102. Many more individuals would be included in the arrested but not convicted category if figures existed for those, like Menard, who were arrested but not formally charged.


Some courts have extended the scope of statutory authorization to collection of identification data on all arrested persons, holding that statutory authority to maintain records, at police discretion, of persons arrested for certain offenses implies the authority to maintain records of all arrests, unless the statute specifically prohibits record keeping in certain instances. See, e.g., United States v. Laub Baking Co., 283 F. Supp. 217 (N.D. Ohio 1968); Poyer v. Boustead, 3 Ill. App. 2d 562, 122 N.E.2d 838 (1954).


Furthermore, dissemination of data before disposition of the case is usually upheld. See *Poyer v. Boustead, 3 Ill. App. 2d 562, 122 N.E.2d 838 (1954); Volcker v. Tyndall, 226 Ind. 43, 75 N.E.2d 548 (1947); McGovern v. Van Riper, 140 N.J. Eq. 341, 54 A.2d 469 (Ch. 1947); Hansson v. Harris, 232 S.W.2d 600 (Tex. Civ. App. 1952).* Many states also authorize local police to establish, with the cooperation of the state identification bureau, their own identification files in which data may be maintained. See, e.g., *Del. Code Ann. tit. 11, § 8514(I) (1968); Ind. Ann. Stat. § 47-858 (1970).*

Some courts declare that the taking and dissemination of arrest data before disposition is justified because no stigma attaches to fingerprinting and photographing since the pro-
position of the case is reached the arrest data, often with notation of subsequent processing of the individual through the criminal justice system, are retained in local, state, and federal criminal identification files or computer data banks. If the arrest did not lead to a conviction, the information retained constitutes what is called the “arrest record.”

These procedures are also held to be necessary as a practical matter to facilitate the performance of law enforcement functions such as investigation and prosecution. See, e.g., United States v. Kelly, 55 F.2d 67 (2d Cir. 1932); United States v. Laub Baking Co., 283 F. Supp. 217 (N.D. Ohio 1968); Downs v. Swann, 111 Md. 53 (1909); Barletta v. McFeeley, 107 N.J. Eq. 141, 152 A. 17 (Ch. 1930), aff’d, 109 N.J. Eq. 241, 156 A. 658 (Ct. Err. & App. 1931), aff’d, 113 N.J. Eq. 67, 166 A. 144 (Ct. Err. & App. 1935).

For a survey of the law relating to the authority to take and retain fingerprints, see A. Moenssens, Fingerprints and the Law 59-72, 85-107 (1969).

The term “disposition” will be used to signify some terminal point in the prosecution of a case, such as acquittal, dismissal, charges dropped, no charges brought, or investigation discontinued.

For examples indicating the rapid move toward the computerization of arrest files, see New York State Identification & Intelligence System, System Development Plan (1967); California Crime Technological Research Foundation, Project Search: Standardized Data Elements for Criminal History Files (1970). Some of the computerization projects are making their first attempts to deal with the problems presented by these records. See, e.g., id.

Another part of criminal identification files is current investigative data, which are and should be restricted in order to protect current police investigations and informants. See note 63 infra. After an investigation has terminated without arrest, however, such data retained in files should be subject to the same considerations as are discussed below concerning arrest records.

Finally, where there is a conviction, the record becomes a true criminal record. Because use of such records does not involve harm to an innocent or potentially innocent person, they are beyond the scope of the present analysis. For an excellent discussion of the problems raised by conviction records, see Gough, The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status, 1966 Wash. U.L.Q. 147. See also National Council on Crime & Delinquency, Annulment of a Conviction of Crime: A Model Act, 8 Crime & Delinq. 97 (1962).
disseminated and used without restriction both within and without the criminal justice system. To anyone desiring to determine the extent of a person's past involvement with law enforcement authorities, the arrest record is extremely important: it is the only way to obtain this information efficiently and inexpensively through identification of the person by name alone.

Widespread use of the arrest record, however, can inflict definite and demonstrable harms on the arrested individual. Inside the criminal justice system, he may be subjected to unfair treatment by police, prosecutors, and courts; outside the system, he may suffer damage to his reputation and to his economic and psychological well-being. It is questionable whether any such consequences should be permitted to occur to a person who has not been judged guilty but who is presumed innocent. Until recently, most courts have neglected the problem; in the absence of legislative action they have left decisions concerning the retention, dissemination, and use of these records entirely to police discretion. But there is a current effort to reexamine the problem with a view toward eliminating some of the adverse consequences of arrest records. On one level, some state legislatures have enacted statutes providing for return or expungement of a record when certain criteria are met. Unfortunately, these statutes exist only in a few states. Furthermore, they are limited in effect, they have varying criteria for expungement, they usually do not apply to local identification bureaus, they seldom contain provisions for return of records disseminated beyond these bureaus, they rarely contain enforcement provisions, and they do not apply to the FBI, the largest collector of arrest records. In the absence of expungement statutes a few courts, as in Menard, have recognized the need to restrict the scope of the police

13 But see text at note 126 infra.
14 See text and notes at notes 24-31 infra.
15 See text and notes at notes 76-81 infra.
16 See text and notes 20 & 70 infra.
17 Expungement statutes as of 1966 are listed and analyzed in detail in Gough, supra note 11, at 162-68, 174-78. Since 1966 several states have added their own acts. See, e.g., Ill. Rev. Stat. Ann. ch. 38, § 206-5 (1970). See generally Baum, Wiping Out a Criminal or Juvenile Record, 40 Calif. St. B.J. 816 (1965); Booth, The Expungement Myth, 38 L.A. Bar Bull. 161 (1965); Comment, Criminal Records of Arrest and Conviction: Expungement from the General Public Access, 3 Cal. West. L. Rev. 121 (1967); Comment, Guilt by Record, 1 Cal. West L. Rev. 126 (1965). The term "expungement," it should be noted, is really a misnomer; most of the statutes cited provide for return or sealing of records rather than their destruction.
discretion in light of the debilitating effects on the individual resulting from the widespread use of his arrest record. This comment will analyze the judicial response to the problems raised by (1) retention and use of adult\textsuperscript{18} nonconviction arrest records within the criminal justice system, and (2) dissemination of these records at police discretion outside the system. In addition, it will offer suggestions, focusing primarily on the common law,\textsuperscript{19} for the further development of judicial responsibility in this area.

I. RETENTION AND USE OF ARREST RECORDS WITHIN THE CRIMINAL JUSTICE SYSTEM

A. Retention: the "Usefulness" Doctrine

Most courts have been extremely hesitant to interfere with police discretion. In the absence of legislative action, they declare that all arrest records can be retained and exchanged freely within the criminal justice system.\textsuperscript{20} However, specific reasons for this position are rarely articulated.\textsuperscript{21} The proposition generally adopted is that retention of arrest records is justified by their potential future usefulness in helping police prevent crimes and apprehend criminals.\textsuperscript{22}

\textsuperscript{18} The problems raised by juvenile records are equally significant. See, e.g., In re Smith, 310 N.Y.S.2d 617 (Family Ct. 1970). See generally President's Comm'n on Law Enforcement & Administration of Justice supra note 5, at 44, 74 (1967). However, because of the special status of juvenile records, they should be the subject of separate consideration and are not included specifically in this analysis. See Gough, supra note 11, at 168-73. See also S. Rubin, Crime and Juvenile Delinquency, 145-63 (1961).

\textsuperscript{19} Many of the issues presented may have a constitutional dimension. Thus far, however, there has been no specific judicial discussion of any of the possible constitutional issues. But see notes 46, 50, 110, & 129 infra.


\textsuperscript{21} One court did explain that retention was necessary in order to furnish superior police officials with definite and authoritative data concerning the activities of the department. Miller v. Gillespie, 196 Mich. 423, 163 N.W. 22 (1917). However, after disposition of the case, purely statistical data should be sufficient for this purpose.

\textsuperscript{22} See, e.g., Purdy v. Mulkey, 228 So. 2d 132 (Dist. Ct. App. Fla. 1969); Fernicola v. Keenan, 136 N.J. Eq. 9, 39 A.2d 851 (Ch. 1944).
Practical considerations support this broad rationale in most cases. Neutral identification information contained in the records, such as fingerprints and photographs, can be quite helpful to local police if the individual is ever under investigation again. Positive identification is often essential to link a suspect to a crime or to protect a person who is innocent. Also, imputational information such as the arrest notation can indicate a pattern of conduct that may be the basis for a future arrest or for a decision to press charges. If a rearrest is made, the arrest record may furnish facts concerning prior conduct which, although not sufficient to warrant conviction in the previous case, may still be useful to trained interpreters of records.

Presently, law enforcement officers utilize the record in subjecting the individual to rearrest on the basis of past arrests and in deciding whether to bring formal charges. Prosecutors consider past arrests in determining the category of offense to be charged and in deciding whether to plea bargain. Courts use the record in denying release prior to trial or appeal, in setting bail, in determining whether a defendant's testimony is impeached by prior convictions, and in sentencing. Parole boards evaluate the record in deciding whether to grant parole.

While each of these law enforcement uses may be questioned, police, prosecutors, and courts in every jurisdiction have an equal need for this data. Free interchange of arrest records facilitates these functions. Although injury to innocent persons may result from retention and use of the records, this risk is outweighed in most cases by society's interest in the performance of these activities to protect the general public.

B. Retention or Return: A Reexamination

1. Retention of an Arrest Record Without Probable Cause. The Menard court did not decide whether further retention and use of the

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23 It should be noted that usefulness of arrest records remains unproven since the closed system maintained by police impairs the ability to document usefulness. Therefore, only potential uses are considered here.


25 Id. at 141.

26 See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 116 (1966) (lack of a "criminal record" often a reason for charge reduction).

27 See, e.g., Russell v. United States, 402 F.2d 185, 186 (D.C. Cir. 1968); Rhodes v. United States, 275 F.2d 78, 81-82 (4th Cir. 1960).


31 See Duncan Report, supra note 12, at 16.
arrest record within the criminal justice system would be justified if Menard actually were arrested without probable cause.\textsuperscript{32} An examination of the nature of a record of arrest without probable cause in light of the common law rationale for retention of arrest records may suggest an answer.

The core of the arrest record is the notation of arrest. This notation either memorializes the arresting officer's perception connecting the arrested person with a particular crime or signifies a connection based upon a warrant. For the arrest to be legal, the connection with the crime must be reasonable or the warrant must be based on probable cause.\textsuperscript{33} The arrest notation thus becomes the basis for a continuing inference by law enforcement officials that there were reasonable grounds at the time of the arrest for associating the arrested person with the crime. When an arrest is made without probable cause, however, the arresting officer's perception is by definition unreasonable and the continuing inference based on his perception is invalid; the arrest notation thus will not be useful. Furthermore, retention may unjustifiably injure the individual by subjecting him to law enforcement decisions based on the misleading record.\textsuperscript{34} To require the notation to be completed or changed to "detention only" would not eliminate these possibilities since even a police user might overlook such a qualification or regard it as a mere formality.

Of course, such neutral identification data as fingerprints and photographs are still accurate and will be at least as useful as the same data of a person who has never been arrested. However, when they are stored and used in conjunction with the misleading arrest notation, these data lose their neutrality and the same unjustified consequences flow from their use. To prevent these results, the courts could either require that the arrest notation be removed and that the neutral identification information be kept in completely separate files, or order return of all records relating to the unjustified arrest. If the first alternative were administratively infeasible, return of the entire arrest record would be warranted.\textsuperscript{35}

2. Retention in Other Cases. The above analysis applies not only to an arrest made without probable cause, but also to several other

\textsuperscript{32} As Judge Bazelon pointed out, in Menard probable cause was not demonstrated. 430 F.2d at 492 n.28. There, the plaintiff had challenged the FBI's statutory authority to retain his record as a "criminal record." Id. at 489. Although the court dismissed this claim, the FBI's statutory authority should be interpreted on the basis of the common law purpose for retaining arrest records, as is discussed below.

\textsuperscript{33} LaFave; \textit{supra} note 24, at 17-32.

\textsuperscript{34} \textit{Contra}, Sterling v. Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962).

situations. If an arrest is made with probable cause and it is later discovered that the arrest was based on mistaken identity or that no crime had occurred, the validity of the inference based on the arrest notation is destroyed. For the same reason applicable to an arrest without probable cause, retention is unjustified and return is warranted.

On the other hand, this analysis does not apply directly to harassment arrest cases. In such cases the arrest is usually made with probable cause and nothing happens later to vitiate the continuing inference; the arrest record satisfies the usefulness criterion. Nevertheless, the motivation for a harassment arrest is unlawful and unrelated to the grounds for the arrest. The equitable notion of placing the individual who has been subject to abuse of police authority in status quo ante outweighs any usefulness that might result from retaining the records, and return is warranted. Indeed, in light of the willingness of the criminal justice system to let a potential criminal go unpunished as a means of deterring this type of police abuse, retention of arrest records in harassment cases would be anomalous.

Finally, it might be thought that a disposition of acquittal, dismissal, charges dropped, or no charges brought would itself be sufficient to justify return. If the law were consistent with the presumption of innocence, no disabilities would be permitted to occur without conviction and all records of arrests not resulting in conviction would be destroyed. With few exceptions, however, the only effect the courts have given the presumption of innocence is as a burden of proof. Moreover, these dispositions do not necessarily controvert the usefulness of the record. Acquittal means only that the defendant was not proven guilty beyond a reasonable doubt. Other dispositions can result from the death of an only witness, prosecutorial discretion, or the illegal seizure of evidence. Because of these considerations, the simple fact that a person has not been found guilty should not be sufficient to compel return of the record. If, however, an individual can show that the potential harm to him outweighs the usefulness of the record to the criminal justice system, he should be able to require return. Otherwise, this decision should be left to police discretion.

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36 This also may have been the case in Menard. 430 F.2d at 488.
41 If data were available, it might be possible to use the “future usefulness” analysis to decide whether arrest records for certain types of crimes, such as disorderly conduct,
Even when the record should be retained, Menard raises the subsidiary question of whether law enforcement officials are under a duty to complete the record. Because of the possibility of misinterpretation resulting in unjustifiable injury, retention of the record should be permitted only if the arrest notation and any subsequent notations of the processing of the individual through the criminal justice system—especially the final disposition—were both complete and accurate.

C. **Legal Foundation for Requiring Return**

Several legal theories may compel the return of arrest records that are not useful to police. In Menard, Judge Bazelon suggested that if an arrest is without probable cause, it is doubtful whether the Constitution can tolerate "any adverse use of that information." Indeed, one might argue that because the arrest was in violation of the fourth amendment, all "fruits" of that arrest should be eliminated. While this argument is compelling, the courts have hesitated to extend the application of the fourth amendment beyond the exclusion from trial of illegally seized evidence.

Although most courts have not yet accepted the principle that retention and use of arrest records constitutes a common law invasion of privacy, this right, when examined in the context of the previous should be returned after disposition. Statistics might prove that notation of certain crimes serves little or no usefulness in crime prevention. The probability of adverse consequences could be weighed against future usefulness of neutral identification data in deciding whether retention after disposition is justified. Without empirical data, however, discretion to maintain records must remain with the police.

For an excellent discussion of the problem of accuracy of records in general, see Karst, supra note 12, at 353-59.


In Menard, Judge Bazelon cited Davis v. Mississippi, 394 U.S. 721 (1969), for the proposition that the Constitution might not tolerate "any adverse use" of the arrest record. 430 F.2d at 491. The Supreme Court in Davis intimated that although fingerprints taken pursuant to an arrest without probable cause are inadmissible in a state court trial, detention for fingerprinting may under certain circumstances comply with the fourth amendment even without probable cause in the traditional sense. 394 U.S. at 727. Applying fourth amendment considerations to use of the entire record would present a different case because use of the misleading arrest notation would be involved. However, Davis appears to suggest that there may be limits to the Supreme Court's willingness to extend the fourth amendment.

In rejecting invasion of privacy contentions in these cases, the courts have concluded that any invasion of privacy involved in retaining and using records is outweighed by the interest of society in having the police perform these functions. See, e.g., Kolb v. O'Connor, 14 Ill. App. 2d 81, 824 (1957), in which the court held that Chicago police...
analysis, affords a basis for requiring return in all cases discussed above. An unreasonable intrusion into an individual’s private affairs is commonly considered to be an invasion of his right of privacy.\textsuperscript{48} When an arrest without probable cause occurs, the initial intrusion is unreasonable. Retention and use of the arrest record would seem to be a part of that initial unreasonable intrusion and therefore unjustified. In cases of mistaken identity, on the other hand, the initial intrusion is reasonable. Discovery of the fact of mistaken identity, however, indicates that retention can serve no valid purpose and would constitute a new intrusion into private affairs.

Several problems still remain regarding a return requirement based on the right of privacy. While the right is widely held to exist at common law, it is not recognized in several states.\textsuperscript{49} In some instances it has been found to be either an implied constitutional right or a natural law right incorporated into the Constitution. The actual application of the constitutional right of privacy, however, has been limited to special situations, such as intrusion into an individual’s intimate marital life.\textsuperscript{50} Finally, the types of actions that constitute an invasion of privacy are the subject of great debate.\textsuperscript{51} In many cases privacy ap-

\begin{thebibliography}{99}
\bibitem{48} The concept of privacy was early recognized in \textit{Warren \& Brandeis, The Right to Privacy}, 4 Harv. L. Rev. 193 (1890). Since its publication the right has grown far beyond the authors’ original conceptions. Prosser has organized the actions presently constituting invasion of privacy into four categories: (1) intrusion into the plaintiff’s private affairs, (2) public disclosure of embarrassing private facts about the plaintiff, (3) publicity which places the plaintiff in a false light in the public eye, and (4) appropriation for defendant’s advantage of plaintiff’s name or likeness. Prosser, \textit{Privacy}, 48 Calif. L. Rev. 583 (1960).

\bibitem{49} See Prosser, supra note 48, at 388.

\bibitem{50} In Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court held that a Connecticut statute forbidding use of contraceptives violates the marital right of privacy, which falls within the penumbra of the first, third, fourth, fifth, and ninth amendments. The case has given rise to much speculation about the scope of the constitutional right of privacy. See \textit{Comment, Privacy after Griswold—Constitutional or Natural Law Right?} 60 NW. U.L. Rev. 818 (1966); cf. Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966). In United States v. Laub Baking Co., 283 F. Supp. 217 (N.D. Ohio 1968), in which the defendants in a federal criminal antitrust prosecution moved for a protective order relieving them from being photographed and fingerprinted by a federal marshal, the court, limiting \textit{Griswold} to marital privacy, rejected the theory that a constitutional right is violated by the taking or retention of such records. Cf. \textit{Note, Discrimination on the Basis of Arrest Records}, 56 Cornell L. Rev. 470 (1971).

\bibitem{51} One commentator insists that privacy is not easily categorized and, indeed, that it is virtually impossible to describe the component parts of the tort. Kalven, \textit{Privacy in
pears to be no more than a label determined by a balancing process in which a variety of personal interests are weighed against the need of society or of other individuals to intrude on those interests. Nevertheless, the magnitude of the individual's interests would seem to justify application of this right here.

Even if the privacy rationale were not adopted, return might be obtained in the cases previously discussed on the grounds that retention is outside police authority and that the individual has substantial interests that need protection. The traditional equity powers of a civil court in a new proceeding, or of a criminal court upon disposition of the case before it, should be sufficient to protect the individual from the threat of unjustified injury which would result from use of a record and to place him in status quo ante. Several arrest records have actually been ordered returned on this basis.

D. Effects of Requiring Return in These Cases

Return of a record of an arrest made without probable cause or of a record in which the continuing inference is for some other reason invalid prohibits all further use of that record in law enforcement decisions. The return of only those records which are inherently misleading might be preferable to the return or sealing of all records, as provided in expungement statutes, since records of valid arrests may still be useful to police. Another advantage over expungement statutes is that return could be required from all criminal identification bureaus.

Some of the problems inherent in expungement statutes also plague a common law solution. First, placing the burden on the individual


52 See note 47 supra.

53 In a case like Menard, if the plaintiff can prove an immediate threat of irreparable injury due to retention of his arrest record, he may have standing to assert that his record should be returned simply because retention is action outside the scope of law enforcement agencies' statutory or common law authority. The Administrative Procedure Act, 5 U.S.C. § 702 (Supp. II, 1967), it has been argued, confers standing on individuals for judicial review of agency action, except as by law committed to agency discretion, which adversely affects them in fact. Davis, The Liberalized Law of Standing, 37 U. CHI. L. REV. 450 (1970). See also S. K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.01, at 210 (1965, Supp. 1970).


55 See cases cited notes 37 & 38 supra.

56 But see text at notes 60 & 125 infra.

57 For a discussion of the difficulties faced in expungement statutes, see articles cited note 17 supra.
to initiate action functionally hampers his ability to vindicate his rights. Second, return is dependent on judicial action; an administrative remedy would be more efficient and less expensive. Third, the ability of police accurately to dispose of a matter by a complete record is sacrificed when the record is returned. 58 Fourth, although the return of a record from local files provides a partial remedy by precluding continued reference to that record, future use is not eliminated unless duplicate records sent to other law enforcement bureaus are also returned. Since copies of the record are forwarded to individuals and agencies throughout the nation, it is often impossible to identify everyone who has a copy. Moreover, it is difficult for a court to obtain jurisdiction over an outside law enforcement agency known to have a copy. 60 A partial solution to this problem might be to include a provision in the injunctive order requiring the original disseminating party to be responsible for return of records sent outside the jurisdiction. Although proving continued retention in violation of the order would be difficult, the individual might be able to enforce compliance by initiating either a civil contempt proceeding or an action in tort for damages.

A final point that must be made is that minimization of unfairness to those whose records are retained is entirely dependent on limiting the scope of dissemination and the range of use outside the criminal justice system. If this proves administratively impractical, the balancing of usefulness against harm to the individual will have to be recalculated.

II. DISSEMINATION OF ARREST RECORDS OUTSIDE THE CRIMINAL JUSTICE SYSTEM

For the large majority of individuals whose arrest records are retained and for whom continuing inferences concerning the arrest are valid, difficult problems largely unresolved by the courts still exist. As dissemination of arrest records expands beyond the criminal justice system, the number of people who have access to records, the uses that are made of them, and their consequent adverse effects on individuals multiply dramatically. Before determining whether police discretion in this area should be limited, however, the present legal status of access to and dissemination of arrest records should be examined.

58 Return of records should be favored over their destruction because the individual will have the record if some matter arises later for which it is needed.


60 See text and notes at notes 117-121 infra, discussing similar enforcement remedies.
A. The Present Practice.

Public record statutes and information acts generally provide that records whose retention is required by law shall be open to reasonable public inspection.61 However, police investigative files compiled and preserved for law enforcement purposes are usually excluded.62 Even where statutes do not specifically exempt police records, courts have held such records confidential to protect current police investigations and persons submitting information to police.63 Arrest records are included under this public policy umbrella of confidentiality.64

Classification of arrest records as confidential means in practice that although arrest records are not subject to public inspection, police can disseminate the records to virtually anyone at their discretion.65 Dissemination of FBI records is allowed by statute to "authorized officials,"66 but a regulation of the Attorney General sets forth a rather broad list of authorized recipients, including governmental agencies in general, railroad police, insurance companies, and most banks.67

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65 See notes 12 supra & 79 infra.
67 28 C.F.R. § 0.85(b) (1970). Compare United States v. Kelly 55 F.2d 67 (2d Cir. 1932), the leading case authorizing federal agents to take fingerprints, in which the court declared, "It should be added that all United States attorneys and marshals are instructed by the Attorney General not to make public photographs, Bertillon measurements or fingerprints prior to trial, except when the prisoner becomes a fugitive from justice, and are required to destroy or to surrender to the defendant all such records after acquittal or when the prisoner is finally discharged without conviction. There is therefore as care-
Several state statutes explicitly authorize dissemination to all governmental agencies. Although some statutes attempt to limit dissemination by state agencies, most do not and none apply to local police or the FBI.

Courts usually refuse to interfere with the police practice of limiting public access to arrest records but circulating the records at their discretion. Yet the rationale for this practice—to protect police investigations—obviously should not apply to arrest records after the investigation has terminated. Although no other reason has been given for the present practice, it might be explained by two other considerations: (1) police should not be exposed to excessive demands for information, and (2) records include certain investigative data access to which should be restricted but separation of which would be administratively impractical. The first reason appears trivial because even where records are public the inquirer must show a specific interest in the records. Moreover, police are already under an obligation to furnish other similar information. The second reason may have some practical significance, but it should not be controlling as a matter of law, especially since some courts hold storage of secret information together with records to be no bar to public inspection. The present practice of uncontrolled police discretion should, therefore, be rejected; ful provision as may be made to prevent the misuse of the records and there is no charge of any threatened improper use in the present case" (Emphasis added.) In Menard, the District Court for the District of Columbia has on remand severely restricted the scope of this regulation. See note 4 supra.


69 See, e.g., Ill. Rev. Stat. Ann. ch. 38, § 206-3 (Supp. 1970) (information furnished to “peace officers”); cf. Wash. Rev. Code Ann. § 72.50.140 (Supp. 1970), which is unique in that it allows a cause of action to one whose record is released in violation of the statute, with recovery of damages—including injury to reputation—caused thereby. The major failure of other statutes which attempt to provide for confidentiality is their total lack of enforcement provisions.


73 See note 11 supra.

74 See, e.g., Holcombe v. State ex rel. Chandler, 240 Ala. 590, 200 So. 739 (1941).
either arrest records should be made public or both access and dissemination should be restricted.\textsuperscript{75}

B. Limiting Dissemination

1. The Competing Interests. In deciding whether arrest records should be made public, several factors become relevant. The individual with an arrest record, of course, has strong interests in limiting dissemination. First, unrestricted dissemination is likely to damage his reputation seriously. In some cases the record is either incomplete as to disposition or inaccurate,\textsuperscript{76} thereby increasing the probability that it will be misinterpreted as evidencing guilt. Even if the record is complete, the reader will often infer that the individual is in some way a "criminal." Second, the consequences of such dissemination can be economically disastrous. Licensing boards at all levels usually obtain copies of the record and consider them in deciding whether to deny or revoke a license.\textsuperscript{77} The arrested individual faces difficulties in obtaining insurance, credit, education, and even entry into the armed services.\textsuperscript{78} Most important, governmental agencies and private groups with access to records frequently use them to refuse the individual employment.\textsuperscript{79} Finally, and independent of these harms, unrestricted dis-

\textsuperscript{75} Presently an individual does not have access to his own arrest record. In view of the discussion above concerning limited public access, however, there seems to be no good reason for this practice. See, e.g., Scott v. County of Nassau, 23 Misc. 2d 648, 252 N.Y.S.2d 135 (Sup. Ct. 1964). Even if public access were limited, it would seem essential that the individual and his attorney have unrestricted access to his record for the purpose of checking accuracy, especially in light of recent federal legislation concerning an individual's access to his own credit files. But see text at note 93 infra.

\textsuperscript{76} See Miller, supra note 12, at 34, noting that court proceedings following an arrest are not furnished for about 35% of the "rap sheets" in FBI files. See also INTERNATIONAL ASS'N OF CHIEFS OF POLICE, A SURVEY OF THE POLICE DEPARTMENT, CHICAGO, ILLINOIS 824 (1970), noting that many case reports in the Chicago files were inaccurate or misclassified.

\textsuperscript{77} DUNCAN REPORT, supra note 12, at 14-15.

\textsuperscript{78} See, e.g., Gough, supra note 11, at 153-57.

\textsuperscript{79} For evidence of this practice and a discussion of the consequences for the individual, see DUNCAN REPORT, supra note 12, at 9-15; Hess & LePoole, Abuse of the Record of Arrest Not Leading to Conviction, 13 CRIME & DELINQ. 494, 498 (1967). One study indicates that approximately 75% of the New York City area employment agencies sampled do not refer an applicant with a record, regardless of whether the arrest was followed by a conviction. E. Sparer, Employability and the Juvenile "Arrest" Record (unpublished study by the New York University Center for the Study of Unemployed Youth, 1966). In another study, two-thirds of the employers surveyed would not consider employing a man acquitted of assault charges. Schwartz & Skolnick, Two Studies of Legal Stigma, 10 SOCIAL PROB. 133, 136 (1962). These economic consequences are likely to weigh heaviest on those who can least bear the burden—the poor and the black. DUNCAN REPORT, supra note 12, at 7. Moreover, a person may be arrested for a variety of reasons. In Menard, Judge Bazelon noted that many people are arrested for "investigation," or en masse, or for harassment purposes with no hope of ultimate conviction. 430 F.2d at 493-94. Police administrators have even admitted that three out of four arrests are probably illegal. Hess & LePoole, supra, at 495-96.
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semination of the arrest record disregards the individual’s psychological interest in preventing disclosure of “personal information” without his consent. The concepts of intimacy, identity, role-playing, and autonomy all involve the notion that the individual ought to have some control over what others know about him.

Militating against the individual’s interests are those of police and the public. First, both police and the public have an interest in dissemination to persons outside the criminal justice system who may help police prevent crime and apprehend criminals. Second, the public has an interest in unlimited access in order to minimize business risks by basing decisions on full disclosure of facts concerning an individual.

Since the common law rationale for use of arrest records is premised on law enforcement purposes, “business risk” interests should not be determinative unless they are relevant to law enforcement. Furthermore, it is doubtful whether the general public is capable of utilizing arrest records in an intelligent manner to minimize the incidence of crime. More probably, the presence of an arrest record becomes a convenient excuse for denying employment. Even if no inference of guilt is drawn, a businessman may still refuse employment on the basis of a high probability of rearrest, an event that would cost the employer time and money. This rationale may, however, become a self-fulfilling prophecy: denial of employment because of the

80 Since the person is no longer cast in the public eye, the arrest record might be considered “personal information” in relation to certain people. See text at notes 108-10 infra.


82 Karst, supra note 12, at 366, suggests that all arrest and criminal records be made public to end the “corroding, demoralizing occupation of information peddling within police departments,” and that emphasis be placed on legislative proposals restricting certain uses of this data. Indeed, this alternative may be more consistent with the “free flow of information.” However, any prohibition on use would have the same problems regarding proof and control as those regarding limitation of dissemination, and there is evidence that making arrest records public would invite disaster for those with records if no legislative guidelines were established. For example, in the District of Columbia in 1963 a new policy of almost total public dissemination resulted in a total of more than 3,500 records disseminated a week. Duncan Report, supra note 12, at 15. The overwhelming effects of this practice have already been noted. See note 79 infra. If these practices are to be curtailed, controls on both dissemination and use seem necessary. See also text at notes 127-29 infra.

83 As Judge Bazelon noted in Menard, “Even if we assume that the cryptic reference on appellant’s fingerprint card to release ‘in accordance with 849(b)(1)” would be understood by police, it is questionable whether it would be understood by potential employers or the general public.” 430 F.2d at 492-93.

84 See President’s Comm’n on Law Enforcement & Administration of Justice, supra note 5, at 75-76 (1967).

85 An FBI study showed that 92% of those arrested but acquitted or dismissed in 1963 had been rearrested by 1969. Federal Bureau of Investigation, U.S. Dep’t of Justice, supra note 5, at 38.
The possibility of rearrest can itself become a cause of rearrest. In this context the individual's interests, because they are more direct and substantial, should prevail over the interests of the business enterprise.

There are, of course, some instances in which dissemination outside the criminal justice system promotes crime prevention. For example, a school board may use an arrest record to deny a job as a school bus driver to a man repeatedly arrested for drunk driving and child molesting. Selective distribution to such agencies as railroad police or state licencing boards certainly has greater crime prevention possibilities than distribution to a credit bureau or private employer. Yet it should be noted that persons outside the criminal justice system have no particular responsibility to use records for law enforcement purposes. Their objectives may be unrelated to the police function, and they can use arrest records for a variety of purposes, a power that carries with it strong possibility of abuse. Additionally, private individuals or groups can freely distribute the record once it is given out. While theoretically the question whether to disseminate can be decided fairly by weighing the probability of crime prevention in each case against that of potential harm to the individual, the exercise of unfettered discretion by police has so far produced rather unsatisfactory results. The present widespread dissemination of arrest records seems to indicate that the interests of the individual are either discounted or disregarded entirely.

2. A Standard for Limiting Dissemination. Recently, in Morrow v. District of Columbia, the Court of Appeals for the District of Columbia Circuit in an opinion by Judge Wright evaluated some of these considerations. The case sustained the power of the District of Columbia Court of General Sessions to assume ancillary jurisdiction after dismissal of a criminal case and to issue an order prohibiting dissemination of the defendant's record. Reversing and remanding for a decision on the proper scope of restriction on dissemination, the court incorporated the Duncan Report in an appendix to its opinion. The Report, eventually enacted by the District of Columbia, recommended that dissemination of arrest records where there had been no conviction or

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86 There is reason to believe that the probability of rearrest is a function of unemployment and that existing rearrest probability figures are based on a high unemployment population sample. For example, one group noted that in a "special study made for the President's Commission on Crime in the District of Columbia, it appeared that over 50 percent of the offenders studied were unemployed at the time of the crime." National Capitol Area Civil Liberties Union, The Maintenance and Use of Arrest Records (unpublished report, 1967).
87 417 F.2d 728 (D.C. Cir. 1969).
88 Supra note 12.
89 417 F.2d at 745.
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forfeiture of collateral be limited to "law enforcement agents" for "law enforcement purposes." On remand, the District of Columbia Court of Appeals decided that the rules established by the Duncan Report were sufficient to protect the record in question.

This "insider-outsider" standard seems to be the most appropriate one for restricting access and dissemination in a manner consistent with the policy previously discussed—it protects the individual while serving the necessary law enforcement purposes. Since there is latitude in determining what are law enforcement agencies and purposes, the rule is sufficiently flexible. Such organizations as licensing boards might obtain records if they specified reasons and subjected themselves to rules insuring complete confidentiality. The Duncan Report standard is also important because it allows access to defense attorneys, who under present practice frequently obtain records only at the prosecutor's discretion. Furthermore, it would seem essential to allow the arrested individual access to his own record in order to insure its completeness and accuracy. However, because employers often require police clearance as a condition of employment, such a provision may allow the employer to circumvent normal prohibitions unless measures are taken to protect the individual from pressure to produce the record. Additionally, if the record is disseminated to anyone other than law enforcement agents, notification should be given to the individual affected; at least then he would be in a position to challenge the decision if he so desired.

C. Limiting Dissemination: Individual Rights and Remedies

1. Rights. Several legal theories are available to a person seeking to enjoin, or to obtain damages for, the dissemination of his arrest record to "outsiders." The first arises from the law of privacy and is

90 DUNCAN REPORT, supra note 12, at 23-27.
92 This practice might take care of examples such as that of the school bus driver since many jobs of public trust nature must be licensed. However, it might also invite abuse by licensing boards. Inequities would be decreased if the law stringently required, according to the equal protection clause, a reasonable connection with the arrest and the denial of the license. Compare cases cited note 129 infra with Pincourt v. Palmer, 190 F.2d 390 (3rd Cir. 1951); Camp v. Brock, 75 Cal. App. 2d 169, 170 P.2d 702 (1946); Hora v. City & County of San Francisco, 43 Cal. Rptr. 527 (Dist. Ct. App. 1965). But see Menard v. Mitchell, 39 U.S.L.W. 2725 (D.D.C. June 15, 1971) (dissemination to licensing agencies prohibited).

93 Additionally, records should be available to independent study groups if precautions are taken to insure confidentiality or anonymity. Greater flexibility in administering the standard might be insured if records were also available by court order.

94 Morrow also notes that in addition to the Duncan Report standard arrest records in unusual cases may be returned. 417 F.2d at 741. The above discussion of retention may provide a guide to these cases.
exemplified by a case in which a court restrained the display of an arrested person's photograph in a public "rogues' gallery" after charges had been dismissed. 95 The publication of an "innocent complainant's photograph in juxtaposition with hardened criminals" placed the plaintiff in a "false light" in the public eye. 96 Since the "false light" privacy theory is an outgrowth of the law of defamation, it is not surprising to find libel principles arising in cases of publication of arrest facts and records. For example, publication in a public "rogues' gallery" of a photograph of a person who had not been arrested has been held libel per se. 97 If the fact of arrest is true, of course, publication thereof is not libelous. 98 Nevertheless, in an analogous context, newspaper publication of a true fact of arrest with additional information which unambiguously conveys to the reader an imputation that the arrested individual is guilty of a crime has been held libelous as a matter of law. 99 Where the article is capable of two interpretations, only one of which is libelous, the defamation issue has been held to be a question for the jury. 100

These defamation or "false light" privacy cases suggest that at least two elements must be satisfied to constitute a cause of action: (1) the information released must have at least one libelous interpretation, and


Although a privilege is extended to the reporting of official judicial proceedings involving arrest facts, it is a qualified privilege which may be lost if additional facts are added. Smith v. New Yorker Staats Zeitung, 154 App. Div. 458, 139 N.Y.S. 325 (1913). Also, a report based on an arrest record is not based on a "public record" and should not be subject to the public record privilege. See text at notes 82-84 supra. Furthermore, if the publication imputes guilt it is not privileged even if based on a police report. Lancour v. Herald & Globe Ass'n, 111 Vt. 371, 17 A.2d 253 (1941).
(2) it must be published or made available to the general public. The former element is easily satisfied where the arrest record is comprised largely of cryptic notations, or phrased in terminology which would be of doubtful intelligibility to persons outside the criminal justice system.\(^{101}\) In this context, the reader would probably infer guilt rather than merely the true fact of arrest. Moreover, if the record is incomplete—for example, if the disposition is lacking—the likelihood that a reasonable man would infer guilt may be so great that dissemination could be restrained.\(^{102}\)

There may, however, be crippling limitations on use of defamation and privacy theory.\(^{103}\) Dissemination to a restricted audience may not be sufficient to qualify as the "publication" required by traditional privacy doctrine. Furthermore, the courts have declined to entertain plaintiff suits because of a reluctance to limit police discretion.\(^{104}\) Particularly striking are cases in which courts have refused to sustain invasion of privacy claims where records were made available to employers\(^{105}\) and where arrest photographs were displayed to a large public audience at a junior high school after charges had been dismissed.\(^{106}\)

However, a Maryland case, *Carr v. Watkins*,\(^{107}\) presents a privacy concept which may require limitation on dissemination of arrest records regardless of their defamatory character. While the plaintiff was working for a naval ordnance laboratory, non-criminal charges were made concerning the suitability of his continued employment, but he was exonerated after an administrative hearing. Six years later a laboratory security officer and two police officers transmitted this information, including particulars of the charges, to the plaintiff's new employer, realizing that the consequence would be his discharge from employment. The court sustained a cause of action for invasion of privacy, holding that the officers had unreasonably and seriously interfered with the plaintiff's interest in not having his affairs disclosed to others. Other cases similarly recognize this right, requiring only that the subject be a

\(^{101}\) See note 83 supra.

\(^{102}\) If a plaintiff knew his arrest record was inaccurate or incomplete, he might use these tort theories in conjunction with the analysis at note 43 supra at least to require completion.

\(^{103}\) For a discussion of possible constitutional limitations on these rights, see note 118 infra.

\(^{104}\) See cases cited note 70 supra. These cases may not be controlling, however, because usually there had been no allegation or showing that the arrest photographs or records would be disseminated to parties other than law enforcement agencies.

\(^{105}\) Norman v. City of Las Vegas, 64 Nev. 58, 177 P.2d 442 (1947).


\(^{107}\) 177 A.2d 841 (Md. Ct. App. 1962).
"private affair" and that the disclosure be "public" and offend a person of ordinary sensibilities.\textsuperscript{108}

In the context of dissemination of arrest records, a record might be considered a "private affair." Disclosure of the record to "outsiders" would constitute an unreasonable interference with a plaintiff's right not to have his affairs disclosed and would seem to offend a person of ordinary sensibilities. Although there may not be "public" disclosure, the breach of a confidential relationship might be sufficient to warrant redress.\textsuperscript{109} This type of tortious conduct has been recognized in similar situations.\textsuperscript{110}

Finally, even if the privacy rationale is not expanded to reach dissemination cases, a person with an arrest record might be able to invoke the equity powers of a court\textsuperscript{111} to limit dissemination because he may be harmed without any direct countervailing social gain.\textsuperscript{112} This is precisely what occurred in \textit{Morrow}.\textsuperscript{113}

2. Remedy. An arrested individual might be able to prevent improper dissemination to "outsiders" by injunctive relief on one of several grounds. He could request such relief under the "unauthorized

\textsuperscript{108} See Prosser, \textit{supra} note 48, at 392-98; Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940).

\textsuperscript{109} Redress is often provided against one who breaches a confidential relationship and divulges privileged communications. Lawyers, physicians, bankers, employers, spouses, and others have been held liable. J. \textsc{Sharp}, \textit{Credit Reporting and Privacy} 62 (1970). See, e.g., Munzer v. Blaisdell, 183 Misc. 778, 49 N.Y.S.2d 915 (Sup. Ct. 1944), aff'd, 269 App. Div. 970, 58 N.Y.S.2d 300 (1945); Brex v. Smith, 104 N.J. Eq. 386, 146 A.3d (Ch. 1929). The difference between the relationship in these cases and the "confidential relationship" between an arrested person and police is that arrest facts are public at the time of arrest. They do not become confidential until they become part of the arrest record. However, if the record is truly confidential, there should be a similar duty imposed on an "insider" not to divulge information to persons outside the confidential relationship. \textit{But see} Hawley v. Professional Credit Bureau, 345 Mich. 500, 76 N.W.2d 835 (1956). Moreover, this invasion of privacy theory is closely related to the "intrusion" line of privacy cases. Dissemination to or use by persons not justified in having access may be a new intrusion into what should be considered "private affairs." See Prosser, \textit{id.} at 396.

\textsuperscript{110} See Annot., 165 A.L.R. 1302, 1304-05 (1946).

\textsuperscript{111} See notes 53-55 \textit{supra}.

\textsuperscript{112} Recent developments indicate that a person with an arrest record might have a constitutional right to have dissemination limited. In a recent case, Wisconsin v. Constantineau, 91 S. Ct. 507 (1971), the Supreme Court held that a Wisconsin statute which allowed the posting of notices in liquor stores declaring plaintiff to be an "excessive drinker" and forbidding the sale of alcohol to her without prior notification or hearing was unconstitutional on its face as a denial of due process. For the majority, Justice Douglas wrote: "Yet certainly where the state attaches a 'badge of infamy' to the citizen, due process comes into play. . . . Where a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." \textit{Id.} at 510. Dissemination of arrest records beyond law enforcement agencies without notice to the individual does not seem much different.

\textsuperscript{113} See text at note 87 \textit{supra}.
disclosure" privacy rationale of Carr\textsuperscript{114} or invoke general equitable relief at the conclusion of his criminal trial, as in Morrow,\textsuperscript{115} or in a new civil proceeding. The injury resulting from the threat of dissemination would probably be sufficient to confer standing.\textsuperscript{116} Presumably a decree would be designed to prevent transmission of the record to non-law enforcement organizations outside the jurisdiction entertaining the suit. Injunctive relief would, of course, permit use of the contempt power to insure official cooperation.\textsuperscript{117}

Where improper dissemination has already occurred, a suit for damages based on a privacy or libel theory might succeed if the record were misleading. Even if the record were clear, the Carr rationale suggests a basis for compensation. The possibility of damage recovery against "insiders" is an important general deterrent to police misconduct in this area and would protect those who were too poor to sue, who could not prove violations, or who would fail to sue because of potentially insufficient damages.\textsuperscript{118}

Aside from these difficulties, however, a plaintiff might be prevented from suing for damages by the privilege doctrine, which often bars suits for misconduct by public officials.\textsuperscript{119} This doctrine is designed to insulate public officials from attack so that they may continue in the "unflinching discharge of their duties."\textsuperscript{120} The privilege is often held

\textsuperscript{114} See text at notes 107-110 supra.

\textsuperscript{115} But see Maxwell v. O'Connor, 1 Ill. App. 2d 124, 117 N.E.2d 326 (1953). Aside from Morrow, the controversy over a criminal court's power to limit dissemination or require return of an arrest record of the person before the court continues. See United States v. Penny, Civil No. 34-7270 (D.D.C., filed Nov. 25, 1970).

\textsuperscript{116} For a more detailed discussion of standing, see note 53 supra.

\textsuperscript{117} Hearings on compliance with the order are an alternative, but so far they have met with difficulties. In Morrow, the court held the burden to be on the defendant to show noncompliance before a hearing will be ordered. 417 F.2d at 744.

\textsuperscript{118} For a discussion of the general limitations of a damage suit as a means of controlling access and dissemination of files, see Karst, supra note 12, at 350-52. The author notes that the first amendment privilege may be a constant factor to contend with in any suit for injunction or damages based on the right to privacy. One requirement for the privilege is that the matter be of "public interest." Current arrest facts, of course, are of public interest. Arrest records, excluding present arrest facts, on the other hand, should be less a matter of public interest for the reasons discussed in the text at notes 82-86 supra. But arrest records of such persons as public officials, who are cast into the public eye, may warrant separate consideration. See Time v. Pape, 91 S. Ct. 633 (1971); New York Times v. Sullivan, 376 U.S. 254 (1964).

\textsuperscript{119} In Barr v. Matteo, 360 U.S. 564 (1959), the Supreme Court held that the acting director of the federal office of rent stabilization was absolutely privileged in a libel action and that the privilege extended to kindred torts.

\textsuperscript{120} Gregorie v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949). One reason for the privilege is related to the doctrine of sovereign immunity and the policy of holding individual officers not liable for actions taken pursuant to their perceived duties. Enactment of indemnity statutes or abolition of the doctrine, which would permit holding liable the government instead of its officers, might change the nature of the privilege. Recovery
to be absolute, even where officers have acted willfully and with malice. Nevertheless, some cases recognize a qualified privilege and hold certain public officers liable where they have acted outside the scope of their authority. Dissemination to "outsiders" by an officer in willful violation of a clear standard would likely be outside the scope of his authority and there, at least, the privilege doctrine would not bar a damage action.

It is therefore of primary importance that a standard governing dissemination be uniform and clearly defined. Otherwise, little protection can be offered the injured plaintiff in most cases. Moreover, compliance with injunctive orders would certainly be facilitated by a standard which could be applied by law enforcement agencies without unnecessary confusion.

The applicable standard could be formulated in a number of ways. A court could adopt its own principle or request a defendant law enforcement agency to submit a proposal for judicial approval. Alternatively, a class action would allow a court to adjudicate the rights of all persons with arrest records in a given jurisdiction. Of course, greater uniformity would be achieved by adoption of a comprehensive legislative solution or viable administrative rules.

Certainly, the ultimate goal is uniform compliance. In the age of instant photocopy and national computer data banks, the freedom of a single party to breach an established standard with impunity could render imposition of dissemination controls valueless. The creation of nationwide guidelines limiting dissemination and concomitant establishment of remedies to enforce those guidelines would go far to effectuate uniform compliance.

D. Limitations of This Approach

The benefit of limiting dissemination to "insiders" is that no decision could be made by "outsiders" on the basis of the arrest record without
first confronting the individual. Unfavorable credit ratings, difficulty in obtaining insurance, and employment rejections based on data bank information not supplied by the individual would decrease. However, even if a uniform standard were adopted and enforced, restricting dissemination would not completely eliminate "outsider" use. Employment questionnaires regularly ask whether a prospective employee has been arrested, and there is great pressure on the individual to reveal everything. On the other hand, since the employer would not have the official record for verification, the prospective employee could falsify with impunity. Some leakage would, of course, seem to be inevitable. If the harm resulting from retention of arrest records is great compared with their usefulness, expungement remedies may warrant reconsideration; return of arrest records may after all be necessary.

An emerging problem to be confronted is that present judicial response is aimed only at record keeping within the criminal justice system. Such organizations as newspapers, which have legitimate access to initial facts of arrest, can organize this information according to name, in effect duplicate arrest records, and open the door to circumvention of limits on dissemination. Expansion of the privacy theory of unreasonable intrusion into private affairs and the ability to sue "outsiders" might be sufficient to curtail such practices, but direct limitations on use of arrest records appear necessary to eliminate them completely.

One court has created a direct limitation on use by enjoining a company from denying a job to a black man on the basis of numerous arrests. The court held that since blacks are arrested more often than whites, such a practice results in racial discrimination under Title VII of the Civil Rights Act of 1964. A real problem in such situations is proving use, but this case suggests that the difficulty is not insurmountable. However, the ruling may be limited in effect since presumably the company could still deny employment to whites on this basis. The federal government as an employer has made some attempt to reduce

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125 There have been legislative attempts to prohibit employers from asking whether prospective employees have been arrested, but so far they have met with failure. See Hess & LePoole, supra note 79, at 499.

126 In fact, this practice may to some extent already exist. See the reference to "clipping agencies" in Note, supra note 50, at 477 (1971).

127 Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970). See generally Comment, Arrest Records as a Racially Discriminating Employment Criterion, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 165 (1971). The logic of this case, however, probably goes too far. Males are arrested more often than females; Title VII of the Civil Rights Act of 1964 also prohibits discrimination on the basis of sex; therefore, denying jobs to men on the basis of numerous arrests also results in prohibited sexual discrimination. Yet to deny employment to white females, the only group left, would probably be a denial of equal protection.
its use of arrest records by eliminating questions concerning non-conviction arrests from employment questionnaires.\textsuperscript{128} Beyond that, the government may be under a constitutional duty not to use the fact of an arrest to deny employment or a license unless there is a reasonable connection between the privilege denied and the cause of the arrest.\textsuperscript{129}

In order to regulate effectively the use of arrest records by both the government and private persons, more comprehensive legislation will probably be necessary.

III. CONCLUSION

As computerization augments police capacity to gather and store arrest records, an increasing number of people may obtain access to and use of such records. Adverse effects on arrested individuals will increase unless the law develops an effective means of regulating record keeping. Although comprehensive legislation would have certain advantages, there is both the need and sufficient common law authority for the development of judicial supervision in this area. Requiring return of arrest records proven not useful would help eliminate continued reliance on them. Limiting dissemination of unreturned records to "insiders" would not eliminate all use, but it would allow the individual with the arrest record to escape, in part, its stigma and place the legal system one step closer to a true presumption of innocence.

\textsuperscript{128} \textsc{President's Comm'n on Law Enforcement \& Administration of Justice}, \textit{supra} note 5, at 75.

\textsuperscript{129} \textit{See}, e.g., \textit{Mindel v. United States Civil Serv. Comm'n}, 512 F. Supp. 485 (N.D. Cal. 1970) (termination of job as postal clerk because employee living with a woman and not married unconstitutional because no rational nexus with job); Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) (alleged homosexual advance by civil service employee toward another insufficient to justify dismissal).
REVIEW


William M. Beaney†

The occasion of the 1969 Cooley lectures at the University of Michigan gave Professor Philip B. Kurland an opportunity to indict once again the Warren Court (1954-1968) for what he considers its many failures and its consistent misuse of judicial power.

There is nothing novel in sweeping indictments of the Court and its jurisprudential products by both non-academic and professorial critics. The pages of Charles Warren's The Supreme Court in United States History¹ chronicle a decade-by-decade series of attacks by those who found the Court unwise or biased in its handling of important social and political issues. Jeffersonians denounced the Marshall Court's centralizing judgments, conservative spokesmen pilloried the Taney Court for its decisions favoring police power, and anti-slavery forces condemned the Dred Scott decision² for thwarting an acceptable political compromise of the slavery issue.

The trauma produced by Dred Scott has never completely disappeared but has, like an albatross, remained hanging over the Supreme Court to give courage to its critics. The unusual and extreme character of that decision should be carefully noted so that overly facile comparisons of that judicial failure and other controversial decisions may be avoided. Not only did the Court through Taney reach out to destroy an existing agreement by the political representatives of the nation on the slavery issue, but, by giving due process protection to the ownership of slaves, it prevented any further legislative attempts to control the spread of slavery. The Court's insistence on a final solution acceptable to only one of the major antagonists clearly was a suicidal assumption of the power to govern that defies comparison with any Supreme Court decision before or after 1857.

In the post-Civil War era, as the Court diluted the freedoms from racial discrimination incorporated in the thirteenth, fourteenth, and fifteenth amendments, and then proceeded to erect safeguards for the free enterprise system against both state and federal social legislation,

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¹ C. Warren, The Supreme Court in United States History (1926).
controversy swirled around virtually every major decision. Liberals continued in this century to decry pro-business decisions of the pre-1937 Court. The gradual emergence of the Court's concern with civil rights and civil liberties issues in the pre-1937 period failed on the whole to satisfy liberals and hardly occasioned huzzas from among the general public, to whom protection of minority rights has rarely been an appealing issue.\textsuperscript{3} Finally, the decisions of the pre-1937 Court, invalidating New Deal and state social legislation, once again raised the hue and cry against the Court.

Academic critics of the Court have not been lacking in most periods of our history, but it was not until the growth and flowering of the Langdell model law schools around the turn of the last century that academic criticism became a sustained process, with an increasing number of law journals devoting probing comments and essays to developments in the law, including constitutional decisions by the Supreme Court.

The new criticism and analysis reflected more than its authors' agreement or disagreement with the outcome of cases. The commentators carefully examined the logic of decisions and their compatibility with precedents. In addition, a few attempted to define the role of the Supreme Court in the larger scheme of American law and government. Among these, an important place must be reserved for James Bradley Thayer, whose teaching and writings at Harvard before the turn of the century have had continuing influence on later generations of scholars, especially those who had contact with his thinking as students of Thayer or his intellectual successors at Harvard. Among the leading Thayerites was the late Professor Felix Frankfurter, with whom Professor Kurland enjoys intellectual kinship. To understand Kurland, we must grasp the essence of the Thayer-Frankfurter approach.

Thayer's well known article, "The Origin and Scope of the American Doctrine of Constitutional Law," published in 1893 in the \textit{Harvard Law Review},\textsuperscript{4} advocated a judicial policy of "hands-off" with respect to enactments by the legislature. Only a clear mistake by the legislature justified intervention.\textsuperscript{5} Of course, this rule merely restated

\textsuperscript{3} See S. KRIKIL, THE SUPREME COURT AND POLITICAL FREEDOM 7-53 (1968), for a discussion of the popular bias against freedom.

\textsuperscript{4} Thayer, \textit{The Origin and Scope of the American Doctrine of Constitutional Law}, 7 \textit{Harv. L. Rev.} 129 (1893).

\textsuperscript{5} Thayer always reserved the power of judicial review, that is, of "fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants." \textit{Id.} at 148.
the question of judicial review in a different form: What is a clear mistake? Thayer spoke in an era that witnessed an increasing willingness by the Supreme Court to invalidate state legislation by finding in due process of law a touchstone that in practice meant "whatever the Justices find reasonable." Their insistence on preventing even slight legislative intrusions into the comfortable economic and social order of post-Civil War America aligned the Justices against those whose slight share of power consisted principally in the privilege of voting with like-minded citizens to gain occasional legislative victories over the opposition of powerful interests. It was against these interferences with the power to govern that Thayer railed, as in his biography of Marshall, where he referred to judicial review of a legislative act in almost reverent terms: "To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act." This panegyric on legislatures sounds somewhat strange to modern ears, given our greater understanding of the workings of legislatures and our increasing knowledge of how the representative function is muted by archaic procedures and distorted by special interest forces. Yet Thayer certainly was correct in asserting that courts cannot govern—that only our elected officials can create policy, leaving courts with their own important role.

Felix Frankfurter tried to carry out Thayer’s philosophy as a member of the Court. In many ways, he went further. At times he seemed almost apologetic that an institution without an electoral basis had any significant role in American government. As an advisor and planner in Roosevelt’s administration he gained a special appreciation of the political branches and of their role when the Court obstructed social legislation approved by the other branches. As a member of the Court, Frankfurter followed his idol, Holmes, in believing that judges should and could divorce their personal views from those which they took as judges. Although opinion after opinion contains references to his personal views, Frankfurter did not allow them to color his decisions. In civil liberties cases, in which Holmes would occasionally breach his normal rule of self-restraint, Frankfurter found it difficult to abandon his role of judicial diffidence. One of the clearest explications of the importance of judicial self-restraint in Supreme Court history is the Justice’s effort to justify a school board’s rule compelling school children to join in a flag salute exercise that violated their religious beliefs.7 On

occasions, however, Frankfurter thought that a political organ had made a "mistake" sufficiently grave to justify invalidation. The "released time" cases\(^8\) come immediately to mind, as do the many criminal justice cases where police action had violated due process standards of fundamental fairness.\(^9\) To Frankfurter there was a legitimate role for the Court, but it was an extremely modest one. The Court's duty was to allow political representatives to govern. Quite often he wrote as though the United States enjoyed, or should accept, a parliamentary system in which the courts would play a meager part analogous to that of their British counterparts.

Justice Frankfurter, as well as his intellectual successor on the Court, Justice John M. Harlan, and a number of academic exponents of the Thayer-Frankfurter philosophy have found in the Warren Court the personification of all that can be wrong in a court. They have condemned both its active support of important individual and social values, and its insistence on providing judicial solutions to problems that might better be handled by political organs. The critics also charge that it uses sweeping announcements of broad principle rather than closely organized, logical analysis to justify its positions. The academic critics have been joined by spokesmen for groups angered by the substance of Warren Court decisions, among them school and other officials opposed to desegregation decisions, local politicians displeased by the outcome of the apportionment cases, law enforcement representatives who resent court intrusion into the pre-trial process, and members of patriotic groups who decry fair play for Communists, aliens, and war opponents. It is the criticism of these groups that largely explains why the Court has suffered in public opinion polls, which the academic critics cite to show the failure of the Warren Court. It is unreasonable to assume that better written opinions or greater respect for precedents by the Warren Court would have satisfied groups whose chief values and goals seemingly have been rejected by the Court. Moreover, although any Court must pay heed to public reactions to some extent, if only because Congress may be moved to act against the Court, is it not one of the virtues of a non-elected, life-tenured body that it can take the long view, largely impervious both to public opinion polls—to which Professor Kurland gloomily refers\(^10\)—and to the vote-seeking imperatives of the elected branches? Apart from their understandable concern as pedagogues with the Court's opinion-writing abilities and


\(^10\) P. xxiii.
their dismay that so many precedents were overruled (were the precedents "correct," or is it wrong to reject so many precedents simply as a matter of constitutional principle?), what exactly do the critics, exemplified by Professor Kurland, regard as the chief faults of the Warren Court? What are the "wrong" decisions of that Court, or, the easier question, did it succeed in doing anything right?

The general mode of attack comes down to this: If the Court did anything for which it might claim credit for courage or imagination, its decisions simply built on the past (desegregation, apportionment, Bible reading). Where there might be wide agreement among knowledgeable observers on the desirability of a decision (school desegregation), the results have not been as satisfactory as one might wish. Query: If the Court had been even more intrusive with respect to state school policies, would this not have been a mistake in the eyes of many critics since it would have helped bring about a higher degree of centralized control?

Almost as an afterthought dictated by the demands of academic fair play, Professor Kurland admits that "[o]ne must be careful, however, not to overplay the ineffectiveness of the Court's actions. If it has used old doctrines it has used them in new applications. And the Court must be given its due in helping to spark and sustain the Negro social revolution that engulfs us at the moment. And certainly, too, the Court has made major contributions to the egalitarian ethos that is becoming dominant in our society."12

This concession aside, Professor Kurland turns to his major critique, divided, like Gaul, into three parts.

First, he faults the Court for failing "to adhere to the step-by-step process that has long characterized the common-law and constitutional forms of adjudication. . . . It preferred to write codes of conduct rather than resolve particular controversies."13 The one-man, one-vote formula in reapportionment cases is cited as an example. Yet the Court followed a precisely opposite tactic in the desegregation decisions and has been charged with being derelict as the result.14 Case-by-case adjudication in the criminal justice arena, which began long before the Warren era with the strong support of Justice Frankfurter and other pre-Warren justices, left law enforcement officials and trial judges at sea as to the requisite constitutional standards. At least the Warren Court tried to

11 Pp. xvi-xviii.
12 P. xx.
13 Id.
14 This is not intended to applaud the Court's overly rigid approach to a complex problem, but it does show the difficulty of appeasing critics.
provide standards more explicit and more applicable than had been provided by the case-by-case "fair trial" rule of predecessor Courts.

His second charge is that the Court "has failed to recognize the incapacities that inhere in its structure."15 This criticism arises from the obvious facts that the Court has no independent staff to assist in shaping policy-oriented decisions, cannot administer its own decrees, and, hence, must rely on lower courts and other branches. The lesson seems to be that the Court should decide only those cases in which the litigants are good sports and the loser will take his medicine like a man. Apparently, the Court's duty, when it is presented with great issues that require more than a Supreme Court decree based on briefs of counsel, is to refer them to the political branches. What Professor Kurland seems to ignore is that the states and other branches have carried out court mandates, however reluctantly. It is they, not the Court, that bear responsibility for using staffs creatively.

The Warren Court's third weakness was its failure to persuade. "The Court's opinions have tended toward fiat rather than reason."16 One may wonder whether, law professors aside, the Court could have written any opinion that would convince most southerners (or northerners) that segregated schools are discriminatory. Can judicial appeal to reason, unaided by the other branches, succeed in inducing the belief in John Q. Public that those accused of crime have rights that must be protected, or that freedom of expression is a right that protects all of us, including spokesmen for unpopular views? Public opinion in these matters is the product of the results of judicial decision. What years of education and acres of public pronouncements have failed to achieve—belief in equality, justice, and individual rights—is unlikely to follow even the greatest of judicial opinions. Is the Court's proper stance, then, one of selecting and deciding only those cases in which popular approval will follow because of the result obtained? Is the Constitution, then, far from an auxiliary protection against the excesses of majoritarian rule, to serve only as a means of rationalizing whatever vox populi demands? This may sound extreme, but what are we to make of this plea by Professor Kurland about the Court's credibility gap? "The Supreme Court has been and must continue to be a strong force in the vital center that provides cohesion for a democratic society,"17 And then comes the clincher: "Above all it must emphasize individual interests against the stamp of governmental paternalism and confor-

15 P. xxi.
16 P. xxii.
17 Pp. xxiii-xxiv.
mity. At the same time, it must retain the confidence of the American people."

This conclusion is paradoxical in light of the sustained criticism of the Court by so many Americans (who don't read Court opinions) because the Warren Court asserted and defended the rights of minorities and individuals against a conformist, and hardly paternalistic, government. What individual interests can Professor Kurland have in mind? Do any decisions of the Warren Court fit his prescription? We are not given an answer. "It is not survival of the Court that is at stake, but the survival of the primacy of individual liberty that is in question," Professor Kurland tells us. If this means anything, it is that the Court must pull back, avoid unpopular decisions, and try to make itself popular in order some day to do something in support of individual liberty which, if it does, will embroil it in the kind of troubles experienced by the Warren Court. On the contrary, it is the role of the Court to act as guardian of the rights explicitly and implicitly set forth in the Constitution. So long as it does not thwart the power of coordinate branches to govern, as did the pre-1937 Court, its insistence that the ideals of the Constitution must become operative is in the best tradition of a constitutional court.

The comments thus far are responses to the introduction which, in this reviewer's opinion, has an abruptness of tone and judgment that is not sustained in the body of the discourse, which, on the whole, is relatively balanced and almost consistently interesting and informative. Only a few of the many themes and conclusions can be touched on here.

Some of Professor Kurland's political conclusions are debatable. Students of the modern presidency will be startled to learn that the "Congress . . . has tended to become the tool of the White House," a conclusion valid only for the first-term New Deal, during wartime, and in the conduct of foreign policy. His comment that "if the history of the origins of our Constitution teach us anything, it must be that one great fear of the Constitution's makers was the danger of a strong and arbitrary executive"—which he cites to justify his plea for a stronger Court role vis-à-vis the President—obscures the fact that the primary purpose of the framers in setting up a government of balanced and shared powers was to inhibit at the national level legislative dom-

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18 Id.
19 Id.
20 P. 17.
21 Id.
inance of the type revealed by post-independence state assemblies.\textsuperscript{22} As to his desire to increase control with respect to the President, we may ask whether Professor Kurland would have applauded the Warren Court if it had chosen to examine the legality of the Vietnam War? If not, what executive acts does he deem worthy of judicial rebuke? We are not enlightened on this very interesting point.

In a chapter examining the Warren Court's relationship with the Congress and the President, Professor Kurland concedes that although a substantial number of congressional enactments were held invalid, the Court's action did not cut into the power to govern—a point frequently overlooked by critics. He rightly notes that it was \textit{Brown v. Board of Education}\textsuperscript{23} that solidified the hard core of very influential opposition to the Court.\textsuperscript{24} It was a series of decisions limiting the search for and punishment of Communists that added to congressional ire. The \textit{Watkins} decision,\textsuperscript{25} more an exercise in judicial rhetoric than a real assault on the investigatory power, caused deep offense to those in Congress who craved the favorable publicity that "red-hunting" provided. The narrow defeat of the Jenner bill,\textsuperscript{26} which was designed to reverse many of these unpopular decisions, showed how much the Court had to fear from an aroused Congress. As a consequence, the Court appears to have receded from its more exposed positions,\textsuperscript{27} although Congress, as Professor Kurland observes, "continues to be frenzied by the Court's opinions in the desegregation areas" and shows "rancor at the decisions in the obscenity cases . . . ."\textsuperscript{28}

Having examined Warren Court cases that subordinated state power to national power, Professor Kurland concludes: "Federalism is dead and the Supreme Court has made its contribution to its demise."\textsuperscript{29} He treats this development as a blow to the protection of liberty, quoting such worthies as Lord Acton and K. C. Wheare. Whatever the theoretical merits of federalism, there is much evidence to suggest the failure of state and local governments in this country, handicapped as they are by insufficient financial resources and impotence in dealing with problems that cannot be solved effectively except on a national basis. In addition, large economic interests (business and labor) seem

\textsuperscript{22} R. BERGER, CONGRESS V. THE SUPREME COURT 8-15 (1969), presents a succinct statement of the fears of legislative "despotism."
\textsuperscript{23} 347 U.S. 483 (1954).
\textsuperscript{24} Pp. 26-7.
\textsuperscript{26} S. 2646, 85th Cong., 1st Sess. (1957).
\textsuperscript{28} P. 81.
\textsuperscript{29} P. 96.
to mold the states readily to suit their own purposes. But where is the empirical support for the pro-freedom fruits of federalism? The federal justice system, whatever its shortcomings, is a model providing a greater degree of justice than the systems of most states. Local welfare departments and other agencies with power over the poor have shown little sympathy, and at times an overt contempt, for legality in ministering to their charges. As to civil liberties, the threat has often been greater the closer government has been to the people. The "red-hunts" following World Wars I and II and the Japanese-American relocation scheme of World War II are the most serious blots on the federal record, while towns and cities throughout the United States have continually sought to suppress nonconformists and advocates of unpopular causes.

The reapportionment cases, undercutting state legislatures' long-time power to distort political representation, are criticized by Professor Kurland, perhaps justly, as dealing with some of the less pressing problems of the post-World War II era. Yet in insisting on fairer representation, the Court at least recognized that the subject was important enough to deserve something better than the grossly undemocratic rules used in the past. Professor Kurland criticizes *Lucas v. Colorado General Assembly*, in which the Court invalidated a referendum allowing one house to be selected by a system other than, one-man, one-vote, as an example of the manner in which "legal doctrine originated to assure majority rule was thus held to preclude a right of the majority to establish its role." This analysis overlooks the limited choice given the voters of Colorado in that referendum, since the more equal system offered as an alternative required multi-member districts of considerable size.

Both the chapter on "Egalitarianism and the Warren Court" and the concluding chapter on "Problems of a Political Court" apply familiar themes. Professor Kurland opposes the use of equal protection to limit the legislatures' power to classify on the ground that the new substantive equal protection gives the Court too much power. No less an authority than Geoffrey Gorer is summoned to testify to the dangers of an overemphasis on equality, testimony that may seem misplaced to those shouldered aside by legislative classifications.

The concluding chapter raises new issues and reiterates a number of themes mentioned earlier. "[T]he Court is not a democratic institution, either in make up or in function." Its chief task is "to protect

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31 P. 85.
33 P. 204.
the individual against the Leviathan of government and to protect minorities against oppression," but apparently it is not to do this in ways that pose risks for the Court, either at the hands of the people or of Congress. We need a Court in which the people can have confidence, and yet, Kurland concludes, it must "match the Warren Court attainments in the protection of individuals and minorities . . . ." So, at the very end we learn that something valuable did result from the labors of the Supreme Court in the years between 1954 and 1968. Whether the results will seem good, bad, or negligible to future generations requires a judgment on the nature of our future society. My guess is that the Warren Court will come through with relatively high marks. While Presidents faltered and Congress blundered on its largely conservative way, the Court alone held fast to ideals that hopefully are still a basic part of the American creed. It is no small achievement to have kept alive and expanded the concepts of fairness, equality, and freedom as part of the living law of our Constitution. Yet Professor Kurland is right to remind the Justices of the risks they run when they persist for long in taking an expansive view of their powers. They are part of a complex web of relationships in which each branch is continuously under pressure to define and redefine its role in a national system complicated by the demands and problems of a troubled federalism. While it may be wrong for the Court to assume that it should reach out to solve all problems ignored or mishandled by the other branches, it is, in this reviewer's judgment, equally erroneous to act as though it were an essentially illegitimate partner in our tripartite national scheme. The hardest fact to grasp—one taught by history rather than by purely rational analysis—is that the dynamics of our polity deny the luxury of a once-and-for-all definition of the role of each of the constituent members of our government. Presidents, Congresses, and Courts have each acted and interacted to provide examples of strong and weak institutional patterns. Each must gauge the limits of its reach, but there is no rigid and precise pattern of behavior commanded by anything in our Constitution or our political system. And in the long eye of history, results tend to count most heavily.

Professor Kurland's book deserves wide reading, for it deals with matters of the first importance. Its theses, as the foregoing testifies, are not those of the reviewer, but these are matters which reasonable men have argued and will continue to treat contentiously. Students

34 Id.
35 P. 206.
36 An excellent recent account of this dynamism is H. SEIDMAN, POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION (1970).
of the Court will welcome it as a fuller statement of the position Professor Kurland has sketched in numerous other writings. For these and many other contributions, among them the editorship of Justice Frankfurter's writings and, perhaps most of all, for his initiation and editing of the *Supreme Court Review*, of which eleven annual publications have appeared, we are deeply in his debt. His ideas and his conclusions deserve to be treated with the seriousness the subject deserves. Students, especially law students, should pay particularly close attention to what he and other academic critics of the Warren Court are saying. For it is largely the students who will determine, by their behavior as counsel, judges, legislators, and other officials, what the Constitution shall mean in the years ahead. They will have to decide whether the American people will accept a vigorous Court committed to the protection of important social ideals and values, or will demand a modest, compliant Court, mindful of the hazards of activism and devoted to the belief that other political institutions must bear the burden of governing.