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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

ELEHUE KAWIKA FREEMON and	)	
LUCILLE K. FREEMON,	)	CC Docket No. 94-89
	)	
Complainants,	)	
	)	
v.	)	File No. E-90-393
	)	
AT&T CORP.,	)	
	)	
Defendant.	)	

MOTION FOR SUMMARY DECISION

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November 22, 1994

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MOTION FOR SUMMARY DECISION

Pursuant to Section 1.251(a)(1) of the Commission's Rules, 47 C.F.R. § 1.251(a)(1), defendant AT&T Corp. ("AT&T") hereby moves for summary decision in this case.

As AT&T shows below, summary decision should be granted in its favor because the record is devoid of any admissible evidence that AT&T violated Section 705 of the Communications Act by intercepting or divulging complainants' interstate telephone conversation as alleged in the Complaint. Indeed, all of the record evidence confirms that no interception or divulgence of the alleged conversation occurred. It is likewise uncontested that any such surveillance, even if it had taken place, was contrary to AT&T's corporate policies and thus cannot be a basis for liability on AT&T's part. On this undisputed factual record, therefore, AT&T is entitled to dismissal of the Complaint.

Additionally, even if there were any evidence that the conduct alleged in the Complaint took place (and there is none), summary decision in AT&T's favor is nonetheless required because Section 705 is limited exclusively to radio communications, and provides no relief for interception and disclosure of a wireline telephone call. In all events, moreover, complainants' claim is absolutely barred by Section 415 of the Communications Act prescribing the statute of limitations, because the Complaint was not filed within two years after their cause of action arose. Accordingly, this action must be dismissed.<sup>1</sup>

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<sup>1</sup> While AT&T by this motion seeks dismissal of this action in its entirety, it also notes that although complainants were directed by the Prehearing Order (¶ 6) to proceed with their damages case, they have failed to adduce any such evidence in their Direct Case. See Complainants' Direct Case, Exhibits 1-4. Therefore, for this reason alone AT&T is entitled to immediate summary decision on the issue of damages. In all events, moreover, AT&T cannot be deemed liable for complainants' alleged damages such as an unwarranted and illegal assault by police and gross incompetence by emergency service personnel and physicians. See Elehue Freemon Deposition, p. 227, line 4 to p. 235, line 4; p. 248, line 18 and p. 250 line 24 to p. 251, line 22. Each of these alleged acts, even if true, constitutes an independent, superseding cause that cuts off the chain of causation and wholly relieves AT&T of liability. See Restatement of Torts 2d §§ 440, 442, 442B, 448 (1986); Heitsch v. Hampton, 167 Mich. App. 629, 423, N.W. 2d 297 (Mich. Ct. App. 1988) (burglars' intentional criminal act of beating customer of telephone company constituted superseding cause, relieving telephone company of any liability for

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I. There Is No Genuine Factual Issue Regarding The Alleged Violation of The Communications Act.

Complainants' only cognizable claim for relief is that an AT&T operator violated Section 705 of the Communications Act (codified as 47 U.S.C. § 705) by listening in on an interstate collect call placed by complainant Elehue Freemon at about 10:30 P.M. on May 30, 1988 to his mother, complainant Lucille Freemon, and suddenly interrupting the call to summon emergency assistance.<sup>2</sup> Section 705 prohibits the unauthorized interception and disclosure of certain interstate or foreign communications, and it is well-established that the statute is violated only if such a communication is both unlawfully intercepted and divulged.<sup>3</sup> The

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disconnecting service); Urbach v. United States, 869 F.2d 829 (5th Cir. 1989) (prisoner's unlawful and intentional beating of mental patient constituted superseding cause which cut off liability for negligent release of patient); Spears v. United States, 266 F. Supp. 22 (S.D. W. Va. 1967) (federal marshall responsible for custody of plaintiff could not be held liable for allowing duly licensed physician at reputable hospital to examine plaintiff, where treatment was later alleged to be improper or negligent).

<sup>2</sup> The Hearing Designation Order expressly found that neither the complainants' claims under the United States Constitution nor their claims under the federal wiretap statute are cognizable before the Commission. See Freemon v. AT&T, 9 FCC Rcd 4032 (1994) (n. 1) ("Hearing Designation Order").

<sup>3</sup> See Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254, 258-60, (9th Cir. 1977); Use of Recording Devices

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complainants have offered no admissible evidence that either of the requirements of Section 705 has been met here.

The Complaint alleges that at the time of the AT&T operator's alleged intervention in the call, Elehue Freemon was "blanked out" and could not hear who intervened or what, if anything, was said.<sup>4</sup>

Mr. Freemon's deposition testimony confirms that he did not speak with or hear the operator after he began his conversation with his mother:

"Q. So it's your testimony that you did not hear anything that the operator said to your mother?

"A. It was blanked out.

"Q: You did not hear anything that the operator said to your mother?

"A: I did not hear anything, no."<sup>5</sup>

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in Connection with Telephone Service, 2 FCC Rcd 502, 503, 506 (1987) (¶ 12 and n.18).

<sup>4</sup> See AT&T Direct Case, Exhibit 7 [Formal Complaint, with Attachments], at p. 2. Although the record shows that the operational characteristics of AT&T's operator system would not have permitted Mr. Freemon to be isolated from the call in the manner he alleges (see AT&T Direct Case, Tab B [Direct Testimony of Thomas C. Sharpe]), for purposes of this motion AT&T accepts, as it must, complainants' account of the events.

<sup>5</sup> See AT&T Direct Case, Tab D, [Defendants' Designations of Elehue Kawika Freemon Deposition], p. 210, line 10 to p. 210, line 15 (emphasis supplied).

Thus, by complainants' own admission, Mr. Freemon has no personal knowledge that any person, let alone a specific AT&T operator, intercepted or intervened in the disputed call. His sole source of knowledge for this claim is information conveyed to him by complainant Lucille Freemon.<sup>6</sup> This purported "evidence" is rank hearsay, and does not even remotely satisfy any of the limited exceptions to the rule excluding such testimony.<sup>7</sup>

Moreover, in the only admissible statements that may be attributed to her -- her deposition testimony -- Lucille Freemon expressly denied that any operator intervention occurred. Instead, she testified

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<sup>6</sup> See id., p. 211, line 25 to p. 212, line 6:

"Q. Okay. did your mother say anything to the operator? Did your mother tell you that she said anything to the operator?

"A. Okay. She stated during that time, not in an affidavit that she made later -- during that time I asked what happened. She goes, 'The operator came out and said that you needed help or something. I don't know.'" (emphasis supplied).

<sup>7</sup> See Fed R. Evid 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the hearing or trial, offering in evidence to prove the truth of the matter asserted"); Fed R. Evid. 802 (hearsay inadmissible except where otherwise prescribed). Section 1.315 of the Commission's Rules, 47 C.F.R. § 1.315, provides that formal hearings before this agency shall be governed by the Federal Rules of Evidence for non-jury trials.

that two separate, uninterrupted calls took place, one between herself and an operator, and another between her son and herself.

"Q. Right. . . . Do you remember getting a call from an operator who indicated that your son might be in trouble and then asked you for information about how to help him? Mrs. Freemon?

"A. Yes, I know that.

"Q. Did you get a call from an operator on that day, and the operator asked you for information to try to help your son?

"A. Yes."

\* \* \*

"Q. Okay. Did an AT&T operator call you and indicate to you that your son Elehue might be in trouble, and then ask you for help in order to get help for him? Is that what happened?

"A. Right.

"Q. Is that the way it happened?

"A. Uh-huh (indicating yes)."

\* \* \*

"Q. So did you tell the operator it was okay for her to try to help your son?

"A. I believe I did, yeah."

\* \* \*

"Q. "Did [Elehue Freemon] call you after that, after the operator -- I guess you went off the telephone line?

"A. Yes, I think he did.

"Q. When was that? How long after the call was that he when he called back?

"A. About three or four minutes after he called."

\* \* \*

"Q. But that's a different call than the operator call; is that correct?"

"A. Yes, different."

"Q. That's a different call that was after?"

"A. It was after the operator called."<sup>8</sup>

These admissions by the complainants fully confirm the correctness of AT&T's account of the events in issue, showing that Mr. Freemon's attempted collect call was not completed after his mother requested the AT&T operator to obtain help for her son.<sup>9</sup> Moreover, the record also contains no evidence that any communication between the Freemons was unlawfully intercepted, as required to establish liability under Section 705. Even assuming arguendo that it is authentic (which is doubtful),<sup>10</sup> Lucille Freemon's February 9, 1989 affidavit

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<sup>8</sup> See AT&T Direct Case, Tab C [Defendant's Designations of Lucille K. Freemon Deposition], p. 71, line 24 to p. 72, line 8; p. 72, lines 16 to 24; p. 73, line 22 to p. 73, line 24; p. 74, lines 6 to 12; p. 75, line 23 to p. 76, line 2.

<sup>9</sup> See AT&T Exhibit 8 [Answer, with Attachments], ¶¶ 27-32.

<sup>10</sup> Mrs. Freemon testified at her deposition that her purported notice of appearance in this proceeding (which Elehue Freemon has now conceded was executed by him) could not be her authentic signature because it omitted the final "e" in her first name. See Lucille Freemon Deposition, p. 37 line 4 to p. 41, line 4, and Exhibit 1 thereto. The signature on Mrs. Freemon's

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annexed to the Complaint is inadmissible hearsay. Additionally, Mrs. Freemon testified at her deposition that the account in that affidavit was false.<sup>11</sup> It would obviously be improper for the Presiding Officer to entertain inadmissible hearsay which the declarant under oath has admitted is untrue.

Similarly, the affidavit of Re Shea Plunkett, attached to complainants' Direct Case Exhibit 3, sets forth Ms. Plunkett's account of what Mrs. Freemon assertedly told her "the operator" had said to Mrs. Freemon. This writing is triple hearsay, and complainants have not demonstrated, nor can they, that even one (much less all) of these levels of out of court statement qualifies under any hearsay exception.<sup>12</sup>

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purported February 9, 1989 affidavit appears to be signed in the same hand as the concededly forged notice of appearance, and it likewise omits the final "e" from Mrs. Freemon's first name.

- <sup>11</sup> After being shown at the deposition the portion of page 2 of the Complaint that tracks the events described in her affidavit, Mrs. Freemon testified that "[w]hat's written on here is not the truth." After again inspecting the Complaint, she exclaimed "Oh, my God, what a mess" and acknowledged that the version of events given there was "not true." Lucille Freemon Deposition, p. 71, line 13; p. 72, lines 10-15; and p. 74, line 19 to p. 75, line 11.
- <sup>12</sup> In all events, moreover, Ms. Plunkett's claim that she observed Mrs. Freemon during the disputed telephone call is squarely contradicted by Mrs. Freemon's sworn deposition testimony that she was alone in her house

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Moreover, Ms. Plunkett does not even allege (much less show) that "the operator" referred to in her affidavit was an AT&T employee. Thus, even if exclusion of her hearsay statement were not otherwise required, it would still lack any probative value. In sum, therefore, complainants have adduced no evidence that their telephone conversation was intercepted by an AT&T employee.

There is similarly no evidence that any communication was unlawfully divulged, as also required to establish liability under Section 705. The only purported proof of divulgence is a pair of documents tendered by complainants that allegedly describe a call to Portland, Oregon emergency service personnel regarding Elehue Freemon.<sup>13</sup> These documents, however, are not admissible because, as a threshold matter, complainants have made no attempt to authenticate them (i.e., to offer competent proof that these items are in fact what they purport to be).<sup>14</sup> Even if properly authenticated,

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at the time of the disputed call. See Lucille Freemon Deposition, p. 69, lines 6 to 9.

<sup>13</sup> See Complainants' Direct Case, Exhibit 2.

<sup>14</sup> The need for such authentication was apparently clear to complainants, because at the outset of the prehearing discovery period Elehue Freemon noticed the deposition of "Sharon Lampl, Call taker, Bureau of Emergency Center" for the City of Portland. The

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moreover, these documents would in any event be inadmissible hearsay because complainants have not shown when, by whom or in what circumstances this material was prepared, or that these facts provide indicia of the reliability of the documents' contents. Additionally, the purported documents do not establish that AT&T's operator played any role in a claimed divulgence of complainants' conversation; these items do not identify who called the Bureau of Emergency Communications, and merely recite that "Mom told operator to get help for her son," without specifying any affiliation of the unidentified operator. This total failure of proof requires rejection of any contention that complainants' alleged conversation was unlawfully divulged.

Finally, the complainants have offered no evidence that AT&T may be held responsible for the violation of the Communications Act that they allege, even if it is assumed (contrary to fact) that conduct took place. Section 217 of the Communications Act, 47 U.S.C. § 217, provides that a carrier may be held liable

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Presiding Officer struck that deposition notice for several failures to comply with the Commission's Rules. See Orders released September 16, 1994 (42850) and September 21, 1994 (42897). Complainants never attempted to cure these remediable defects and proceed with the Lampl deposition.

for an employee's violation of the Communications Act only if the employee is shown to have acted within the scope of his employment.<sup>15</sup> There has been no such showing in this case. Indeed, the record affirmatively proves the contrary, because complainants themselves have acknowledged that the operator's alleged conduct violated applicable AT&T policy.<sup>16</sup> This fact has been confirmed by the undisputed testimony of AT&T witnesses Linda Wistermayer and Nancy Zolnikov, which makes clear that AT&T practice and policy absolutely prohibit the conduct alleged in the Complaint.<sup>17</sup> Accordingly, complainants cannot ascribe these alleged unauthorized acts to AT&T, and there is thus no basis for imposing liability on AT&T for the claim in this proceeding.

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<sup>15</sup> See Restatement of Agency 2d, § 229 (in assessing whether conduct is within the scope of employment, factors include whether the act complained of is commonly performed by the party's employees, or instead represents a significant departure from the normal method of operation).

<sup>16</sup> See Complainants' Direct Case, Exhibit 1, Attachment to Complaint, Letter from Elehue K. Freeman to Ms. Maeola Brown [sic], Common Carrier Bureau, Enforcement Division, dated May 21, 1989, p. 5 (conceding that the interception and divulgence complained of in this case were "direct violations of AT&T policy").

<sup>17</sup> See AT&T Direct Case, Tab A [Direct Testimony of Linda Wistermayer], pp. 5-7, and Tab E, [Defendant's Designations of the Nancy Zolnikov Deposition], p. 20, line 15 to p. 22, line 2.

II. Complainants Have Failed to State A Claim Under Section 705 of the Communications Act.

Summary decision must also be granted because the Complaint, even were there any evidence to support it, does not allege a violation of the statute on which AT&T's liability is purportedly based. Put simply, Section 705 of the Communications Act, which the Hearing Designation Order (¶ 14) makes clear is the sole basis for the Commission's subject matter jurisdiction in this proceeding, does not apply to wireline telephone calls.

Section 705 prohibits any person from "intercept[ing] any radio communication and divulg[ing] . . . such intercepted communication to any person" (emphasis supplied). The statute was amended by the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq., to eliminate all references to wire communications from the portion of Section 705 prohibiting interceptions. Congress made these changes in Section 705 because it intended "[t]he regulation of the interception of wire or oral communications . . . to be governed by proposed new chapter 119 of title 18, United States Code."<sup>18</sup>

Thus, since enactment of the 1968 amendments it has been settled law that the statute's prohibition

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<sup>18</sup> See S. Rep. No. 1097, 90th Cong., 2d Sess. 107, reprinted at 1968 U.S. Code Cong. & Admin. News 2112, 2196

against interception applies solely to radio communications, not to wire (i.e., telephone) communications such as those at issue here.<sup>19</sup> Moreover, both the Commission and federal courts have recognized that, as a result of those amendments, the prohibition on divulgence in the first sentence of Section 705(a) now applies only if there has also been an interception of a radio communication prohibited by the second sentence of that subsection.<sup>20</sup>

In this case, it is undisputed that complainants' alleged communication was conducted as a wireline telephone call. Even if interception and divulgence of such a communication took place as alleged in the Complaint, as shown above that conduct is not actionable under Section 705.<sup>21</sup>

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<sup>19</sup> See Korman v. United States, 486 F.2d 926, 931-932 (7th Cir. 1973) ("the clear intent of Congress would seem to be that the interception of wire communications would be governed solely by [18 U.S.C. § 2510 et seq.]"); see also United States v. New York Telephone Co., 434 U.S. 159, 168 n. 13 (1977); United States v. Clegg, 509 F.2d 605, 611 (5th Cir. 1975); United States v. Falcone, 505 F.2d 478, 482 (3d Cir. 1974).

<sup>20</sup> See Use of Recording Devices in Connection with Telephone Service, supra, 2 FCC Rcd at 503 (¶ 12) (noting that Congress "narrow[ed Section 705's] scope to unauthorized interception and divulgence of radio communication"); Hodge v. Mountain States Tel & Tel Co., supra, 555 F.2d at 258-260.

<sup>21</sup> Even if Section 705 were applicable to the Freemons' claims (which it is not), the Commission would still lack jurisdiction to hear them. Section 705(e) (3) (A)

III. Complainants' Action Is Time-Barred Under  
Section 415 of the Communications Act.

Summary decision should also be granted because the statute of limitations has lapsed. Section 415(b) of the Communications Act, 47 U.S.C. § 415(b), requires that any complaint against a carrier not based on overcharges must be brought within two years from the time the claim accrues. This limitations period, like the counterpart provision of the Interstate Commerce act on which it is based, is not merely a matter of affirmative defense, but is a substantive and jurisdictional bar to prosecution of the complaint.<sup>22</sup> The lapse of time beyond the limitation period therefore extinguishes both the complainant's remedy and the defendant carrier's underlying liability.<sup>23</sup>

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provides that civil actions for alleged violations of that statute shall be brought "in a United States district court or in any other court of competent jurisdiction" (emphasis added). The statute does not confer agency jurisdiction over Section 705 claims. The Commission's finding that it has jurisdiction under Sections 207 and 208 of the Communications Act, Hearing Designation Order, 9 FCC Rcd. at 4033 (¶ 8), was in error.

<sup>22</sup> See Tele-Valuation, Inc. v. AT&T, 73 F.C.C.2d 450, 453-54 (1979); Thornell-Barnes Co. v. Illinois Bell Tel. Co., 1 F.C.C.2d 1247, 1251 (1965); cf. 49 U.S.C. § 11706.

<sup>23</sup> See, e.g., Armstrong Utilities Inc. v. GTE of Pennsylvania, 25 F.C.C.2d 385, 389 (1970).

In the instant case, complainants allege that their telephone conversation was unlawfully intercepted and divulged on May 30, 1988. The Complaint, however, was not filed with the Commission until August 16, 1990, more than ten weeks after the statutory deadline. Moreover, although complainants had previously filed an informal complaint (IC-89-03060) based on the same claim, they cannot satisfy Section 1.718 of the Commission's Rules, 47 C.F.R. § 1.718, which in certain narrow circumstances permits formal complaints to "relate back" to the filing date of a prior informal complaint. Under that rule, the formal complaint can "relate back" only if it is filed within six months after the informal complaint is returned unsatisfied by the carrier. Complainants have not complied with that condition here.

Specifically, the informal complaint was filed with the Commission on or about February 9, 1989, and was forwarded to AT&T on March 15, 1989.<sup>24</sup> AT&T replied to the informal complaint in a letter dated April 28, 1989, in which AT&T emphatically refuted complainants' allegations of unauthorized interception or divulgence and unambiguously denied any liability under the informal complaint.<sup>25</sup> AT&T's letter declining to satisfy the

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<sup>24</sup> See AT&T Direct Case, Exhibit 11.

<sup>25</sup> See AT&T Direct Case, Exhibit 12. After describing the facts regarding its operator's handling of

informal complaint was transmitted to the Commission's Informal Complaints and Public Inquiries Branch, and a copy was sent to Mr. Freemon.

This event triggered the six month period within which complainants could have filed a formal complaint relating back to AT&T's report but, as the record shows, they failed to institute such a proceeding until more than fifteen months later -- by which time their action was already time-barred. The fact that Mr. Freemon continued to bombard AT&T with letters questioning AT&T's denial of liability (see AT&T Exhibits 13-20) does not permit a further extension of the limitations period. Any other construction of the Commission's rule would eviscerate Section 415, because informal complainants could successfully extend the statute of limitations ad infinitum simply by repeatedly disputing the defendant carrier's denial of liability for their informal claim.<sup>26</sup> Under the statutory limitations

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complainants telephone call, and correcting complainants' erroneous account, AT&T stated that "[b]ased on our investigation, the call was handled appropriately by the AT&T operator. We found no support for claims to the contrary in Mr. Freemon's [complaint] letter.

<sup>26</sup> For example, in the instant case complainants continued to correspond with the Commission staff and AT&T for almost a year after AT&T's April 28, 1989 report disclaiming any liability to these parties. AT&T's responses to those letters repeatedly affirmed

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- 17 -

period, the claim is therefore time-barred and must be dismissed.

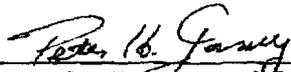
CONCLUSION

For the reasons stated above, the Commission should enter summary decision in favor of AT&T in this proceeding.

Respectfully submitted,

AT&T CORP.

By

  
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November 22, 1994

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its initial position that the complaint was without merit. See, e.g., AT&T Exhibit 14 (September 18, 1989 letter, stating that it "further demonstrates that the call placed by Mr. Freemon was handled by the AT&T operator in an appropriate manner"); AT&T Exhibit 17 (December 26, 1989 letter, showing that operator's conduct complied with applicable laws and AT&T practices). The Freemons nevertheless refrained from instituting a formal complaint after each of AT&T's filings, and continued writing letters contesting AT&T's position.

CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, hereby certify that a true copy of the foregoing "Moton for Summary Decision" of AT&T Corp. was this 22nd day of November, 1994, served by first class mail, postage prepaid, upon each of the following persons:

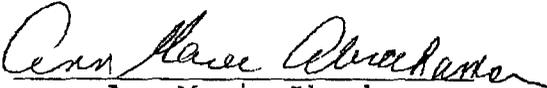
Elehue Kawika Freemon  
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Honorable Walter C. Miller\*  
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